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

On November 30, 2015, I issued a Special Master Opinion in which I decided the parties' cross-motions for sanctions with respect to certain matters arising out of alleged discovery misconduct. On December 14, 2015, plaintiffs asked me to reconsider one aspect of that Opinion. Specifically, plaintiffs requested that I reconsider and modify an order that prevented them from affirmatively using any of the "May 2014 forward" documents that they had finally produced (following a responsiveness review, but well after fact discovery had closed), to support their damages proof at trial. Plaintiffs contend (i) that there was no time set for their completion of the responsiveness review, (ii) that they had already been sanctioned once in connection with the May 2014 forward documents such that an additional sanction was unnecessary and inappropriate, (iii) that plaintiffs had never objected to producing the documents (presumably in the face of at least an available work-product or other privilege such that Thermo Fisher is taking advantage of that largesse), and (iv) that, with the defendants use of many of the documents during discovery and in connection with their dispositive motion, has opened the door for plaintiffs' subsequent use of them at trial.

Initially, defendants raise a threshold procedural point, arguing that I have no authority to indulge in a reconsideration and/or modification of my November 30 Opinion and that plaintiffs' only recourse is to file an Objection with the Court. Plaintiffs, however, claim that, while a Magistrate Judge is precluded from reconsidering a decision by Local Rule 7.1.5[1] as well as FRCP 53(f)[2], no analogous constraint applies to a Special Master's ruling. Defendants counter that the order appointing me had included built-in limitations preventing my reconsideration of an order[3].

I do not read either LR 7.1.5(b) or Rule 53(f)(2) or ¶6 of the Court's order appointing me Special Master as literally preventing my reconsideration[4] of one of the many orders issued within my November 30, 2015 Opinion. At the same time, any such subsequent decision will not, in my view, operate to further extend the plaintiffs' 21-day opportunity to object to the November 30 Opinion, in the event it chooses to do so, which action would have to occur by December 21, 2015. Allowing otherwise would open the door to losing parties invariably moving for reconsideration in order to add additional time to that within which they can object.

Having jumped over this initial procedural hurdle, though, plaintiffs are confronted with another, more significant barrier. Specifically, the standard I must apply to any application for a

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[1] LR 7.1.5(b): "A party seeking review of an order, decision or recommendation disposition issued by a Magistrate Judge…shall be limited to the filing of objections…and shall not be permitted to file a motion for reargument…"

[2] Rule 53(f)(2): "A party may file objections to – or a motion to adopt or modify – the master's order, report, or recommendations no later than 21 days after a copy is served…"

[3] Order dated May 22, 2015, ¶6: "**Appeals**. Mr. Lukoff's rulings shall be subject to review by the Court, consistent with Rule 53(f)."

[4] Plaintiffs' assert that Thermo Fisher is trying to implement a double standard because the defendants actually went through the same reconsideration process earlier this year in the context of discovery. But, defendants' motion was one for "adjustment" and "clarification", not reconsideration, since their requested relief would not have fundamentally changed my order'ss substantive result or effect.

reconsideration, which defendants correctly characterize as essentially a request for reargument, is a tough one. In this district, consistent with LR 7.1.5[5], motions for reargument must be granted sparingly. *See*: *Tristrata Tech., Inc. v. ICN Pharms, Inc.*, 313 F.Supp 2d 405, 407 (D. Del. 2004); *U.S. v. Lopez*, 2014 WL 7149187, *2 (D. Del. 2014). More importantly, such motions cannot be granted unless the court has misunderstood a party, made a decision outside the adversarial parameters presented or made an error of apprehension rather than reasoning. *U.S. v. Lopez*, 2014 WL 7149187, *supra*, at *2; *Flash Seats, LLC v. Paciolan, Inc.*, 2011 WL 4501320, *1 (D. Del. 2011).

In this case, I have not misunderstood the argument plaintiffs made, nor have I decided a non-argued issue, nor have I misapprehended plaintiffs' position. Under those circumstances, I have no choice but to deny plaintiffs' request for reconsideration. IT IS SO ORDERED.

In the event its request for reconsideration is not granted, Opengate Capital seeks a "clarification" regarding whether its interpretation of a part of the November 30, 2015 Opinion is correct. Specifically, plaintiffs believe that they will be able to use certain of the May 2014 forward set of documents at trial in the context of their proof of damages. Their reading of my order in connection with their proof of damages evidence at trial is not correct, as I will explain.

Plaintiffs focus on one phrase of the applicable order as being determinative. They cite the following language: that they "can subsequently use any such document if defendants refer to it/them for any purpose."[6] In doing so, plaintiffs unjustifiably expand the scope of the order,

[5] "**Motions for Reargument Shall be Sparingly Granted.**"

[6] Special Master Opinion, dated November 30, 2015, p. 9, note 16.

which was intended under Rule 37(b)(2)(A)(ii)[7] to preclude certain damages-related evidence[8] from introduction at trial. That the defendants used any such damages-related documents in the context of discovery, or to support a dispositive motion, does not implicate the cited "if defendants refer to it/them for any purpose" language at all. The sanction language referred to trial, not a pre-trial event. Consequently, it is the Court, not me, to whom plaintiffs must look for any relief from the evidence-at-trial constraints that my November 30, 2015 Opinion imposed. I decline to clarify the spotlighted order from that Opinion since it speaks clearly for itself. IT IS SO ORDERED.

Special Master

Dated: December 18, 2015

[7] "(ii) prohibiting the disobedient party from supporting…designated claims…, or from introducing designated matters in evidence."

[8] Plaintiffs attempt to deconstruct an obviously confusing situation regarding the documents which are the subject of my order, by citing the Hamilton Scientific post-closing records (many of which are damages-related). Yet, plaintiffs cited the May 2014 forward set of documents as the fulcrum around which I should base a change to my earlier opinion and they attached 33 specific documents to their submission, of which less than 10 appear to come from the latter set. The clarification Opengate Capital wants is for me to confirm its "ability to use the May 2014 documents", so asking me to look at documents from outside that database is quite misleading.