

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

OPENGATE CAPITAL GROUP LLC, <i>et al.</i>	:	
	:	
Plaintiffs,	:	
	:	
v.	:	C.A. No. 13-1475-GMS
	:	
THERMO FISHER SCIENTIFIC INC.,	:	
	:	
Defendant.	:	

SPECIAL MASTER OPINION AND ORDERS

This case arises out of the October 2012 sale of the defendant’s Lab Workstation business to the plaintiff. The central asset that was transferred was a fabrication facility in Reynosa, Mexico. The plaintiff alleges that, but for the defendant’s deliberate non-disclosure of extensive, disruptive drug cartel activity in and around the Reynosa facility known to Thermo Fisher prior to the sale closing, the plaintiff would not have purchased the business. The plaintiff’s primary theory of liability is based on fraud in the inducement.

No depositions have yet occurred, the earlier phases of discovery having been devoted to Rule 26(a) Initial Disclosures, informal negotiations, records searches of designated custodians and written discovery initiatives and responses. As of March 18, 2015, as a consequence of a teleconference with Judge Sleet a week earlier, the Fact Discovery cut-off was extended by the Court from June 1, 2015 to August 3, 2015. Substantial completion of document production, which was to have taken place as of March 1, 2015, was moved back to March 26, 2015.

Having been appointed by Judge Sleet to manage the on-going discovery disputes between the parties, I conducted a hearing on June 5, 2015 to consider their respective positions on the many pending issues. I have reviewed the Court’s July 8, 2014 Memorandum Opinion on the defendant’s motion to dismiss, the transcript of the telephonic discovery conference that

the litigants had with Judge Sleet on March 11, 2015, the parties' Joint Submission for that teleconference and their respective pre-hearing written submissions to me in which they further explained the issues and their positions. Finally, I received post-hearing a letter from the plaintiff setting forth its reliance on case law in connection with the specific issue of privilege waiver, as well as the plaintiff's privilege logs and the parties' various discovery responses.

Plaintiff's Issues

Opengate Capital Group raises two matters about which it had previously derived no satisfaction from Thermo Fisher: (i) its need to obtain records from a number of custodians, including Javier Salazar Gonzalez, Joseph Baiunco, Bob Simpson, John Listinsky, Roberto Enriquez and Amy Martin, all of whom to one extent or another were, in the important pre-closing time frame of January 2010 to October 2012, Thermo Fisher Human Resources personnel thought to have knowledge regarding the disruptive drug cartel activity in or adjacent to the Reynosa facility, and (ii) a more expansive search term protocol for the records of these additional custodians that had been requested in order to flesh out plaintiff's non-disclosure theory.

During the June 5 hearing, however, the parties' differences regarding these two matters were voluntarily reduced as follows:

- The defendant has already conducted a records search for three of the named individuals and found no records. Defense counsel represented that each of Baiunco, Simpson and Listinsky had left the employ of the defendant before the due diligence commencement date in 2012. Because it was Thermo Fisher's document retention policy regarding departing employees to immediately destroy

their email records, nothing could be found when the search occurred.

- The defendant had also conducted a records search respecting Roberto Enriquez, using an expanded search terms protocol, and indicated that applicable documents found would be produced.

It is around the remaining two HR representatives, Javier Salazar¹ and Amy Martin, that the current dispute now revolves. Javier Salazar was an on-site HR operative until the closing. He now works for Thermo Fisher at a facility in Tijuana, Mexico. The defendant is willing to search for Javier Salazar's records, but cautions that his laptop was lost or stolen so that the scope of its search will be compromised. Opengate Capital insists that, without an expanded search term protocol, likely significant information will remain undisclosed. It wants the defendant to use the specific terms "drug," "safety," "secur!" and "threat." Thermo Fisher has agreed to use these terms for the Javier Salazar search. However, it has not agreed to use the additional terms, "friends," "neighbors" and "situations," demanded by Opengate Capital based on its analysis of euphemistic phraseology in company emails describing cartel activities. The defendant resists any access to Ms. Martin's records, asserting that she was at such a removed HR position within Thermo Fisher that she had almost no involvement with the sale of the Reynosa facility; the plaintiff, on the other hand, has information implying that this individual, despite her high management level, was indeed involved in at least some aspects of the sale and thus a rational target for discovery purposes.

Part of the defendant's resistance to both the Salazar and Martin initiatives derives from its perception that the plaintiff has abused the discovery process; that it had ample opportunity to

¹ Not to be confused with Ricardo Salazar, whose deposition has been noticed for June 16, 2015.

identify these additional records custodians and search terms but failed to cooperate on a timely basis last Fall and thereafter. In the face of the ever-shrinking discovery period, Thermo Fisher believes that Opengate Capital has wasted its opportunity to identify custodians and search terms. For its part, the plaintiff contends that it should be given every chance to explore and develop its central liability theory.

That Mr. Salazar's laptop has been lost or stolen and Ms. Martin's computer has been corrupted is not determinative of the scope of custodial records to be searched and produced. Nor is the fact that Ms. Martin is in management at a "global" level at Thermo Fisher an obstacle to inquiry. That both Ms. Martin and Mr. Salazar were designated as records custodians beyond the original ten identified by the defendant and the additional few added at the request of the plaintiff in February 2015 is also not problematic.² In fact, the plaintiff had previously identified Ms. Martin as being one of ten individuals who had "fully known" of the infiltration and threats by Gulf Cartel members prior to the sale. Second Amended Complaint, ¶97, p. 26.

With the recent Amended Scheduling Order stipulating to an extension of two deadlines including fact discovery, I am satisfied that an adequate frame of reference exists for not only a search of records for Javier Salazar but for Amy Martin as well. Moreover, the defendant must use the search terms "drug," "safety," "security" and "threat" for both individuals. I am sufficiently concerned, though, about the use of generic search terms such as "friends,"

² The Scheduling Order, at ¶3, specifies that, under circumstances where the litigants are unable to agree on electronic discovery, the Default Standard for Discovery, Including Discovery of Electronically Stored Information ("ESI") ["DSFD"] controls. As defense counsel acknowledged at the hearing, the DSFD represents, for the most part, aspirational guidelines to be conformed to as much as possible, with "proportionality" (an undefined, but fairly unambiguous concept), cooperation, good faith and "appropriate limits" being among the standards to apply. DSFD, ¶¶1.a. and 1.b.

“neighbors” and “situation,” that I am not prepared to require their use *per se*. Indeed, DSFD ¶5.b. provides that “Focused terms rather than over-broad terms.... shall be employed.” It makes more sense to use those three terms in searches that include other more descriptive terms such as “trouble,” “gun!,” “shoot!,” and “fight!”³ Too, the broader search should be self-limiting, by using a modifier of “w/in 10” after either “friends,” “neighbors” or “situations.” Consequently, examples of acceptable searches into the Salazar and Martin records would be “friends w/in 10 trouble,” or “neighbors w/in 10 gun!” Defendant must complete these searches and produce any documents found pursuant to them no later than June 18 2015. IT IS SO ORDERED.

Defendant’s Issues

Thermo Fisher has raised a number of issues: (i) its entitlement to an order compelling document production, including metadata, (ii) whether the plaintiff has waived the attorney-client privilege in certain respects, (iii) whether the defendant can have access to the laptop hard drives of former Reynosa facility employees, (iv) “special” spoliation-related discovery, as well as (v) attorneys’ fees and costs.

Taking these issues separately, the first has been ameliorated by virtue of the plaintiff’s commitment, no later than June 12, 2015, to produce the damages-related documents sought by the defendant together with all required metadata. This includes, *e.g.*, if not already produced, the Michael Kraus documents and post-closing financial information such as business reports and documentation of customers lost due to the situation in Reynosa. With respect to certain “new” documents, not already produced as a result of related Chancery Court litigation, the June

³ If the plaintiff has additional suggestions for such descriptive terms, its counsel should so advise me no later than June 12, 2015 and I will consider whether to add them to the search terms to be used by the defendant.

12, 2015 due date still requires them to be produced then, but there will be some metadata missing. The missing metadata shall be provided no later than June 19, 2015. IT IS SO ORDERED.

With regard to the two former employees' computers, the parties both agree that the content of the hard drives should be accessed. They disagree, however, as to which of the litigants should conduct the activity. Under the circumstances, an independent vendor shall be promptly selected by mutual agreement, the laptops⁴ must then be forthwith turned over to the vendor which will, as expeditiously as possible, conduct its downloading of their content and provide one copy of such to each party. Given that both parties owned the Reynosa facility at separate but sequential times, I am not presently concerned, as plaintiff is, about the revelation of proprietary, financial⁵ or other sensitive material that may exist in these two computers. If either of the litigants believes after the vendor's work is completed that there is information on the computers which should not have been shared, that issue should be dealt with consistent with the Stipulated Protective Order that has been in place for almost a year. The parties shall equally share the vendor's fee. IT IS SO ORDERED.

The "special" spoliation-related discovery that Thermo Fisher seeks, other than the Rule 30(b)(6) witness inquiry to which the plaintiff has apparently already agreed, includes the use of an independent vendor and receiving information on "a custodian-by-custodian basis." More specifically, the defendant appears to seek confirmation of its hypothesis that the plaintiff did not properly enact a litigation hold, presumably to establish an adverse inference or some similar

⁴ Which I understand are available for this purpose.

⁵ In fact, post-sale financial data could logically relate to the plaintiff's damages.

evidentiary device for trial. I am in receipt, however, of a written submission from defense counsel dated June 10, 2015 which purports to follow-up on the arguments made at the June 5 hearing on this particular subject. Because counsel's letter cites post-hearing developments, I will defer ruling on the "special" spoliation discovery issue pending a fuller exposition of the situation and will contact counsel shortly to set up a mechanism for dealing with that subject.

The issue of privilege waiver is, unsurprisingly, hotly contested. From the plaintiff's perspective, there is no constraint limiting the viability of its log. From Thermo Fisher's viewpoint, the plaintiff has completely forfeited the right to submit a privilege log because it ignored its discovery obligations.

The background for this issue is as follows. The Rule 16 Scheduling Order does not literally address privilege logs, but it refers to the potential creation of a Protective Order in addition to the utilization of the DSFD previously noted. The parties generated a Stipulated Protective Order last August. That document also does not literally mention privilege logs. The DSFD, though, does deal with privilege issues. Specifically, ¶1.d. requires counsel to confer regarding privilege logs, but it says nothing about timing. The critical and mandatory Rule 26(f) conference at the outset of the case, too, requires the litigants to address, as part of the Discovery Plan to be provided to the Court, "any issues about claims of privilege." FRCP 26(f)(3)(D). Their Discovery Plan was presented to the Court in the form of a Joint Status Report dated July 18, 2014. Although it mentions the inadvertent production of privileged documents, it does not deal with privilege claims or logs.

According to counsel, the litigants did discuss the production of privilege logs at some point. However, for one reason or another, they were unable to agree on the timing of their

production until a few months ago. The parties eventually agreed to exchange privilege logs on April 24, 2015. On that date, the defendant produced its log; the plaintiff did not. Over the next six weeks, the defendant unsuccessfully attempted to obtain a log from the plaintiff. Opengate Capital admits that its initial privilege log was not produced until June 4, 2015, on the eve of the Special Master hearing I conducted. In apparent response to defense counsel's pointed criticisms of the initial log at the hearing, the plaintiff generated a revised privilege log on June 8, 2015.

Thermo Fisher asks me to impose a "blanket" waiver in response to Opengate Capital's blatant disregard of its privilege log obligation. The frame of reference for the defendant's request, however, is a situation the origin of which is attributable to both parties. For whatever reason, the litigants chose, consciously or otherwise, to treat the generation of privilege logs almost as an afterthought. Yet, according to Rule 26(f)(3)(D), that topic did not deserve cavalier treatment.

Most of the cases the defendant cites in favor of blanket privilege waiver do not literally support use of that device.

There is only one Delaware federal court decision cited, *Int'l Paper Co. v. Fibreboard Corp.*, 63 F.R.D. 88 (D.Del. 1974), but it doesn't pertain to the timing of the generation of a privilege log.⁶ Of the other cases cited, *FG Hemisphere Associates, LLC v. Republique DuCongo*, 2005 WL 545218, *5 (S.D. N.Y. 2005) did deal with the defendant's disregard of a

⁶ Nor does the frequently-cited more recent Delaware federal court decision, *Willemijn Houdstermaatshaapij BV v. Appollo Computer, Inc.*, 707 F. Supp. 1429 (D. Del. 1989), a patent case where the Court was obligated to apply Federal Circuit law to privilege waiver issues. The timing of the delivery of a privilege log was not an operative question; only the adequacy of document descriptions and whether an inadequate log justified a "do-over."

court order to produce documents and a privilege log on a timely basis. But, the predicate for the privilege waiver which resulted was the existence of a Local Rule which required such a log being produced at the time of a discovery response.

The two Delaware state court cases the defendant refers to, *Klig v. Deloitte, LLP*, 2010 WL 3489735 (Del. Ch. 2010) and *Mechel Bluestone, Inc. v. James C. Justice Co.*, 2014 WL 7011195 (Del. Ch. 2014), both of which involved extensive privilege waivers, reflect the obvious impatience of the Vice-Chancellor with counsel who treat privilege log issues cavalierly. On the other hand, neither of those decisions involved the timing of log production. Putting aside the last case, *Heath v. F/V Zolotoi*, 221 F.R.D. 545, 552 (W.D. Wash. 2004) [obligation to create privilege log is “absolute” duty of party withholding discovery], to which I will refer later, no Delaware federal court or Third Circuit cases have been cited which reflect an unequivocal determination to construe FRCP 26(b)(5) as requiring the timely creation and delivery of a privilege log in order to avoid a blanket privilege waiver.

The plaintiff describes its six-week delay in producing the privilege log as only being “discourteous” to Thermo Fisher, nothing more. I find that characterization to be quite disingenuous under the circumstances. Having recently stipulated to an amended Scheduling Order, which itself was so obviously a product of various failures of the parties to resolve their discovery differences on their own without judicial intervention, and having represented to the Court on March 11 that it had been performing its discovery obligations in good faith, how can the plaintiff without embarrassment suggest that discourtesy was the only result of its failure to produce a promised privilege log? Indeed, the plaintiff contends (i) that it has not violated the Federal Rules, the Local Rules, or any applicable court order; that the only issue is whether

disregarding an “informal deadline” deserves the imposition of a total privilege waiver, and (ii) the defendant has suffered no prejudice.

In fact, the plaintiff has violated FRCP 26(b)(5),⁷ *see, Heath*, 221 F.R.D., *supra* at 552, and one court order, as described below. The defendant’s application for sanctions is under Rule 37. It does not literally specify, however, either Rule 37(a)(3)(B), 37(a)(4) or 37(b)(2)(A). For present purposes the non-specificity is not disabling.

Knowing that there could be a contest with respect to entries on its privilege log,⁸ knowing that deposition discovery was going to have to occur within the 99-day period from April 24, 2015 to August 3, 2015 and knowing that it would be critical to the parties to have any privilege claims resolved before depositions were taken, the plaintiff must have been acutely aware that withholding its privilege log for forty-one of the days remaining for discovery would severely impact the defendant’s ability to engage in meaningful discovery.

Consequently, I find the plaintiff’s non-prejudice contention to be totally lacking in candor. While the plaintiff had the defendant’s privilege log from April 24 to June 4, Thermo Fisher had nothing. It is significantly prejudiced by virtue of the “crunch time” environment that currently exists in the sprint to the August 3, 2015 fact discovery completion date with

⁷ “Rule 26 (b)(5). Claiming Privilege or Protecting Trial-Preparation Materials. (A) Information withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications...not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”

⁸ Although I have received copies of both the initial and revised versions of the plaintiff’s privilege log, they have not been reviewed for substantive merit and I have not been asked to resolve any dispute about the privilege claims reflected in the logs. If any such contest subsequently occurs, specific privilege waiver determinations will be made then.

multiple thousands of documents to consider in terms of whether to challenge the propriety of the claims of privilege.

Under these circumstances all of the elements are in place to justify the imposition of a sanction. Thermo Fisher requests a blanket privilege waiver. I decline to take that drastic step, for a number of reasons including that the attorney-client and work-product privileges are designed to protect both confidential communications between a party and its lawyer as well as an attorney's thought processes and, at some level, are relatively inviolate. Broad waivers are disfavored. *See, e.g., Robert Bosch LLC v. Pylon Mfg. Corp.*, 283 F.R.D. 142, 145 (D. Del. 2009) ("The extent of any waiver is only that is "necessary to ensure that all parties are treated fairly.") But, I do have the prerequisites for the use of FRCP 37(a) or 37(b).

On January 28, 2015, the parties stipulated to an extension of time to March 1, 2015, for their mutual substantial completion of document production. On March 9, 2015, for the March 11, 2015 discovery dispute teleconference, Judge Sleet received a Joint Submission from the parties listing the items about which they could not agree, including a failure of the plaintiff to substantially complete discovery by March 1, 2015. At the March 11, 2015 discovery dispute teleconference, the Court, based on representations of the parties that they would work out their differences themselves, deferred ruling on a number of their disputes. In response to the parties' second Joint Submission, no conference was set; rather Judge Sleet determined that the appointment of a Special Master was appropriate.

Despite the extra time for fact discovery provided by the March 18, 2015 Amended Scheduling Order, in that same Order there was only a twenty-five day extension of time, to March 26, 2015, for the substantial completion of document production. As of March 26, 2015,

the plaintiff had still not produced its privilege log. Had it accomplished that task by that date, the defendant at least would have been aware that the plaintiff had intentionally chosen to not produce thousands of pages of documents and could have forthwith taken steps to review the log to determine if any of the privilege designations should be challenged. That the parties subsequently agreed that a log exchange should occur by April 24 does not undermine their transcendent obligation to substantially complete document production by March 26. That the defendant, by virtue of not producing its own log before April 24, was similarly disposed to disregard the substantial completion obligation does not relieve the plaintiff from its separate responsibility.⁹

Despite the Court's expectations of informal dispute resolution, the litigants sent in another Joint Submission, dated May 8, 2015; in addition to listing some of the items that had been listed previously on March 9, the defendant placed both "Plaintiff's failure to produce a privilege or redacted log, which the parties agreed to exchange on April 24, 2015," and "Defendant's request for sanctions against Plaintiff pursuant to Federal Rule of Civil Procedure 37 for failure to cooperate in discovery."

The Joint Submission of May 8, 2015 was consistent with Judge Sleet's protocol for resolving discovery disputes; motions to compel are not anticipated. There is no provision for compliance with Local Rule 7.1.1.¹⁰ The defendant's citing the plaintiff's failure to produce a

⁹ As far as I know the plaintiff has not contested the defendant's privilege designations on the latter's log despite having now had seven weeks within which to do so.

¹⁰ Nevertheless, at the June 5, 2015 hearing I conducted, defense counsel made representations, as an officer of the Court, regarding his communications with plaintiff's counsel in order to encourage production of the plaintiff's privilege log. Plaintiff's counsel did not contest these representations.

privilege log and its request for sanctions for “a failure to cooperate”¹¹ in the May 8, 2015 Joint Submission is the equivalent, as I understand Judge Sleet’s practice, of a Motion to Compel.

A Special Master has the authority to impose sanctions under FRCP 37.¹² Rule 37(a)(4) serves as a basis to award attorneys’ fees to the prevailing party in a motion to compel. Rule 37(a)(4) describes an evasive or incomplete disclosure as equivalent to a failure to disclose. Rule 37(a)(5) mandates the party and/or its counsel whose conduct necessitated the motion to compel to pay the movant’s reasonable expenses, including attorneys’ fees, incurred in making the motion. Likewise, Rule 37(b)(2)(A) is available to deal with disobedience to a discovery order and Rule 37(b)(2)(c) is its enforcement provision.

In *Community Ass’n Underwriters of America, Inc. v. Queensboro Flooring Corp.*, 2014 WL 3055358, *7 (W.D. Pa. 2014), the court assessed an award of attorneys’ fees against a party which had failed to timely produce an adequate privilege log. In another log timing case, *Banks v. Office of the Senate Sergeant-at-Arms*, 226 F.R.D. 113, (D. D.C. 2005), having found that a privilege log had not been timely produced and that Rule 37(a)(4) could be used to assess a sanction of attorneys’ fees for a 5-month delay in production of the log, the court analyzed federal case law relating to the timing of privilege log production and found pervasive support for the proposition that timely production is important; that an untimely production, under the appropriate circumstances, could justify privilege waiver. *See, also*, 8 *Fed. Prac. & Proc. Civ.* §2016.1 (3d Ed.), FN 12, for a list of cases decided before 1993 (when Rule 26(b)(5) was amended) from other Circuits that placed the burden on the party asserting privilege to timely

¹¹ The quoted language comes from the subject line for Rule 37.

¹² Pursuant to FRCP 53(c)(2).

establish it. I find these cases persuasive in terms of how to assess the plaintiff's conduct.

The plaintiff's failure to produce its privilege log prior to June 4, 2015 demonstrates a failure to cooperate as contemplated by the Amended Scheduling Order, not expected by Judge Sleet after the March 11 discovery dispute teleconference and inconsistent with Rule 26(b)(5). Consequently, the plaintiff will be sanctioned for that failure consistent with the provisions of both Rule 37(a)(5) and 37(b)(2)(C). As such, it must pay the defendant's reasonable expenses including attorneys' fees incurred to compel the production of the plaintiff's privilege log. The defendant must submit to me by June 30, 2015 an accounting of such reasonable expenses. IT IS SO ORDERED.



Special Master

Dated: June 11, 2015