

**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 ORDER

One of the issues raised at the first discovery dispute hearing I conducted pertained to spoliation. Because of post-hearing developments, I deferred this issue to a subsequent hearing which occurred on June 19, 2015. The parties' provided additional written submissions beforehand.

Thermo Fisher suspects that the plaintiff did not perform an adequate litigation hold at the point when it was determined to initiate a law suit to divest itself of the Lab Workstation business assets purchased from the defendant in October 2012. Moreover, due to its not having received anticipated documents from Opengate Capital or an adequate response to certain interrogatories (Nos. 15, 16 and 17), the defendant is seeking relief in the form of (i) more complete responses to those interrogatories, and (ii) an independent vendor's search of plaintiff's records custodians' computers.

For its part, the plaintiff agrees that its initial responses to those interrogatories were insufficient and that it will provide more complete responses to the specified interrogatories. This confirms my verbal order during the hearing that the complete responses must be submitted to the defendant no later than June 24, 2015. IT IS SO ORDERED.

I am not convinced at this stage, however, that there is a need for an independent vendor performing computer searches<sup>1</sup> to verify completeness of discovery responses. Given that Opengate Capital has identified two individuals as Rule 30(b)(6) witnesses for the purpose of responding to Thermo Fisher's citing certain topics as subjects for Rule 30(b)(6) inquiry, and that their depositions are scheduled to occur this week or next and in the first week of July, sufficient opportunity exists for the defendant to make a record<sup>2</sup> relating to possible spoliation that should negate the need for a computer search by an independent vendor.

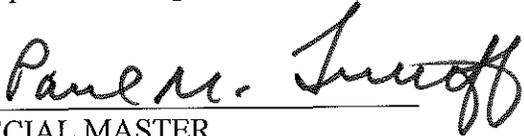
The plaintiff has recently requested its own Rule 30(b)(6) deposition, of one or more individuals designated by the defense, delving into the defendant's record retention policy and other spoliation-related topics. There are enough reasons to justify such an inquiry, especially the unavailability of computer records of at least three former HR employees of the defendant's Reynosa Mexico facility and the corrupted status of the computer of one global HR individual, coincidental or, as plaintiff believes, otherwise. Consequently, the defendant, after receiving the prompt identification by Opengate Capital of topics for the inquiry, must forthwith designate one or more Rule 30(b)(6) witnesses to field the plaintiff's questions on those topics and the parties must make an effort to schedule the deposition(s) as soon as possible. IT IS SO ORDERED.

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<sup>1</sup> I did order an independent vendor to access two computer hard drives in my earlier Opinion of June 5, 2015, but the circumstances there were different.

<sup>2</sup> Such a record potentially deriving, as well, from depositions of the various plaintiff's witnesses currently set to take place over the next month or so, and from written discovery responses.

I explained to the parties at the hearing that I would not hesitate, especially in light of the little time remaining before the fact discovery cut-off, to appropriately deal with, if necessary, any deviation from a party's Rule 30(b)(6) deposition preparation obligations.

  
SPECIAL MASTER

Dated: June 22, 2015