

**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

SUPPLEMENTAL SPECIAL MASTER ORDER

At the July 13, 2015 hearing I conducted to consider the parties' respective applications for discovery relief, the first matter concerned plaintiffs' failure to produce documents. More specifically, I heard the litigants' positions regarding a recently discovered category of documents labelled Opengate Capital "May 2014 forward." At the hearing, plaintiffs' counsel represented to me that, having received the documents from his clients' in-house IT department on July 9, 2015, plaintiffs would produce those documents no later than today. Relying upon this representation, I ordered that plaintiffs do so, at their expense.

Last night I received a letter from plaintiffs' counsel dated July 16, 2015. In it, counsel explained that the representation made at the July 13, 2015 hearing had been mistaken; that there were many more "May 2014 forward" documents than previously understood, that those documents had been subjected to processing, uploading and the application of search terms; and that a round of searchable form conversion had been undertaken. According to plaintiffs' letter, the search terms had identified approximately 74,000 documents that would have to be reviewed by an outside vendor (presumably for privilege, if not other, purposes), who would devote at

least twenty legal professionals and/or paraprofessionals to the project, before plaintiffs could produce these documents. Given the unexpectedly greater magnitude of data to review, plaintiffs' counsel estimated that there would be a further delay of "3-4 weeks" before production could occur. The letter went on to explain the details of the related time and costs estimates.

Under the circumstances, including an acknowledgement that "the depositions must commence and be completed by August 3, 2015" and "the gravity of the situation," plaintiffs have offered to permit defendants to "call back any deposed witness to whom the 'May 2014 forward' documents apply." Plaintiffs characterize the steps they have taken and those they have offered as "a satisfactory remedy."¹

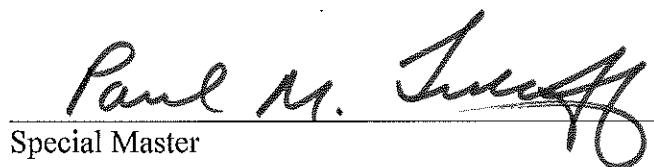
Unfortunately, the plaintiffs and I do not share the same view of what constitutes a "satisfactory remedy." What has now occurred is the latest of what seem to be a never-ending series of delays and excuses relating to the plaintiffs' failure to produce documents and privilege logs which should have been produced long ago in discovery.

Given the impending fact discovery cut-off on August 3, 2015², my remedy to this situation, consistent with Rule 37(d)(3) and Rule 37 (b)(2)(C) is as follows: (1) the plaintiffs shall produce the approximately 74,000 "May 2014 forward" documents to the defendants no later than 5:00 p.m. EDT on July 20, 2015 by requiring their outside document review vendor,

¹ The defendants' July 17, 2015 letter responding to and opposing plaintiff's July 16, 2015 letter has been reviewed. The defendants' request for additional Rule 37(b)(2)(A) sanctions is noted.

² I also received a letter from plaintiffs' counsel, dated July 15, 2015, in which plaintiffs describe the testimony of a defense witness, Javier Salazar Gonzales, at his deposition the previous day. Based on alleged discrepancies between that testimony and representations of defense counsel on earlier occasions, plaintiffs ask again (having unsuccessfully done so once before) that I "continue the discovery deadline to ensure that Plaintiffs have time to obtain relevant discovery in light of the new information." I decline to do so.

DTI, to forthwith upload and deliver those documents now in their possession to defendants through a File Transfer Protocol (“FTP”) site or similar electronic means; (2) the plaintiffs shall bear all expenses incurred to facilitate the document transfer; (3) the defendants shall have the option of calling back any witness whose deposition took place before the defendant reviewed the “May 2014 forward” documents which, had they been produced earlier, could have been used at that witness’ deposition; (4) to the extent that any such supplemental deposition is required, it will take place in Wilmington, Delaware or at such other location convenient to the defendants and the transactional expenses associated with that renewed deposition, including the witness’ travel expenses and court reporter fees, shall be borne by the plaintiffs; (5) to the extent that plaintiffs’ review of the documents produced pursuant to this Order identifies documents that plaintiffs believe are subject to the attorney-client privilege or attorney work product doctrine, plaintiffs may identify those documents as “inadvertently produced” under the Protective Order extant in this case, at which time defendants shall treat such documents as provided in the Protective Order; and (6) plaintiffs shall be solely responsible for those portions of the Special Master’s invoice covering the time invested in addressing this document production delay issue. IT IS SO ORDERED.



Paul M. Sweeny
Special Master

Dated: July 17, 2015