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 OPINION

On July 15, 2015, following a July 13, 2015 hearing, I issued a Special Master Opinion pertaining to many disputes between the litigants during this last phase of fact discovery. Resolution of one issue raised at the hearing, however, relating to the plaintiffs' privilege log, had to abide receipt of post-hearing submissions, as well as the challenged documents for a review *in camera*. Now that I have reviewed the documents, I am prepared to rule.

Belatedly, on June 5, 2015, then by revision on June 8, 2015, the plaintiffs produced their privilege log. It contains a Bates range of close to 20,000 pages, although there are numerical gaps at various points. Among the log's column headings for each page is one labelled "Privilege Type." Only two types of privilege are cited, either "Work Product" or "Attorney Client." In many instances, only one privilege type is mentioned; in some instances, both types are claimed. The last column, entitled "Privilege Comment," is used to elaborate on the nature of the communication or other type document whose disclosure is sought to be prevented. Two columns added on the revised log are "Date Sent" and "Date Created."

The dispute as initially formulated was one of scope and presented two questions: (1) does work product protection extend to a period of time pre-dating the acquisition of the

defendants' assets, and (2) when after closing did the work product privilege attach? By letter dated July 15, 2015, the plaintiffs dropped their privilege claims for item (1) documents. By also suggesting that they would have to go back to review pre-closing documents to "redetermine" both whether they were responsive to defendants' discovery and whether they were not covered by work product privilege, though, their letter was sufficiently equivocal that I wrote to plaintiffs' counsel on July 16, 2015, indicating that there was now only one issue for me to resolve – i.e., the temporal scope of the post-closing work product privilege. Since there was no basis to claim work product protection for non-anticipation-of-litigation documents dated before October 23, 2012, I gave plaintiffs until July 20, 2015, within which to produce to defendants copies of all pre-October 23, 2012 documents which had previously been designated as protected by work product. I assumed that, to the extent that plaintiffs had not to that point determined whether the designated pre-closing documents were even responsive to defendants' discovery[1], they would still have a little over four days within which to accomplish that exercise. To hereby confirm my written direction described above, IT IS SO ORDERED.

Thermo Fisher does not currently challenge the plaintiffs' attorney client privilege claims[2]. They appear to contest plaintiffs' work product claims only insofar as the latter extend beyond the boundaries established by FRCP 26(b)(3)(A) and applicable Third Circuit case law.

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[1] An implausible situation: plaintiffs have had those documents for more than 2½ years within which to decide the connection between them and the substance of the allegations in the Complaint (which they contend in the context of this particular dispute to have been a basis for legal action immediately after 10/22/12); they've had the documents for at least 9 months since defendants sought production.

[2] Nor do the defendants contest any specific work product or attorney-client privilege entries by virtue of any focus on the information in any columns other than "Privilege Type," "Date Sent" or "Date Created." They take the position, however, that they are not waiving the right to subsequently challenge the "grossly inadequate" log, even as revised (which they claim was not presented in "a usable version" until June 30, 2015).

The defendants originally posited April 17, 2013 as the earliest possible time for the attachment of work product privilege. They referred to a formal threat of litigation that they believed tends to confirm that date as the time when plaintiffs reasonably contemplated litigation. Indeed, Thermo Fisher went even further and asserted that the more appropriate privilege-driven date is May 23, 2013, based on the Allana Chaffin litigation hold e-mail of that date addressed to six Opengate Capital-related individuals (there was no litigation hold notification to Hamilton Fisher document custodians).[3] In a subsequent communication, defendants appeared to focus only on April 17, 2013 as the fulcrum date.

Opengate Capital's submission concentrates on what it characterizes as Thermo Fisher's intent to establish an unacceptable bright line rule *vis-à-vis* anticipation of litigation. The defendants suggest that their bright line is nothing more than the "reasonable anticipation test," a concept with which the plaintiffs already agree. That test is actually the first prong of a two-part inquiry fashioned by the Third Circuit, the second prong of which is: was the anticipation of litigation the exclusive basis for withholding a document? If not, work product privilege does not apply. *See e.g.*, *In re Gabapentin Patent Litigation*, 214 F.R.D. 178, 183, 184 (D. N.J. 2003).

Prior to my *in camera* review, the plaintiffs did not submit any documents which unequivocally, or even equivocally, established a date certain by which they reasonably anticipated litigation. Yet, their letter memorandum submission offered a willingness to once again "examine...post-closing, pre-demand...documents" ostensibly covered by the work product doctrine. By the same token, plaintiffs assumed that the defendants' position would not challenge the privilege log entries on "an item by item" basis. This implicitly recognizes the

[3] The choice of that date is unclear to me since plaintiffs filed suit in California on May 10, 2013.

conundrum with which I was confronted: how can I decide when the plaintiffs reasonably anticipated litigation if I don't have their documents from the applicable time period in front of me? So, on July 18, 2015, I directed plaintiffs to deliver the challenged post-closing (i.e., October 23, 2012 to April 17, 2013) documents for my *in camera* inspection. That such an undertaking was required is clear from a review of appellate decisions such as *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1258-1260 (3rd Cir. 1993) and *U.S. v. Rockwell International*, 897 F.2d 1255, 1264-1266 (3rd Cir. 1990).

With the parties' dispute now reduced to a single issue, it is incumbent on me to determine the effective date when the plaintiffs reasonably anticipated litigation such that the work product privilege attaches. I have completed the *in camera* review and have determined that the date by which the plaintiffs reasonably anticipated litigation was **October 31, 2012.**

The analysis which went into this determination reflects the use of certain precedent-driven criteria. For example, '"the prospect of litigation must be identifiable" to trigger work product protection'. *Martin*, 983 F.2d 1252, *supra* at 1260. Can the subject document, in light of its nature and the factual situation in the case, be fairly said to have been prepared because of the prospect of litigation? *Martin*, 983 F.2d 1252, *supra* at 1258. The party seeking protection must show more than a remote prospect, inchoate possibility or likely chance of litigation. *In re Garapentin Patent Litigation*, 214 F.R.D. 178, supra at 183. Instead, there must be "an identifiable specific claim of impending litigation" when the document was created. *Id.* Simply consulting with lawyers and/or commissioning an investigation by counsel is not evidence of anticipation of litigation. *Id.* Litigation need not be imminent as long as the primary motivating factor for the document's existence was to aid in possible future litigation. *Maertin v. Armstrong World Industries*, 172 F.R.D. 143, 148 (D.N.J. 1997)[citing *U.S. v. Rockwell*

International, 897 F.2d. 1255, supra at 1266].

Because of the second prong applicable in this Circuit, I must also confirm, for a document to justify work product protection, that it was not routinely prepared in the ordinary course of business and that it essentially had no other useful purpose. *In re Garapentin Patent Litigation*, 214 F.R.D., *supra* at 184.

In this case, it is abundantly clear from a review of the plaintiffs' submitted post-closing documents that the plaintiffs reasonably anticipated litigation as of October 31, 2012. On that date, a Glaser Weil attorney, Rachael Wexler, who had functioned pre-closing as plaintiffs' deal counsel, reflected in an email document of that date to other Glaser Weil lawyers an acute awareness by her clients of security issues relating to the recently-acquired Reynosa facility that were likely to lead to litigation. Specific probable causes of action were mentioned. The email was not created for any extraneous purposes. Less than two weeks later, Glaser Weil litigation attorneys were reviewing an internal legal memo, written in the interim, which analyzed such potential causes of action.

Based on this determination of the reasonably-anticipated-litigation date, plaintiffs must produce to defendants no later than July 22, 2015 copies of all post-closing documents dated prior to October 31, 2012[4] which they had previously withheld due to their work product claims.

IT IS SO ORDERED.

Paul M. Tuttoff

Special Master

Dated: July 21, 2015

[4] Specifically, those created on/dated from October 23, 2012 through October 30, 2012.