

**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**

Having issued (i) an Opinion on July 15, 2015 relating to a number of matters including the production by plaintiffs of certain Hamilton Fisher documents and (ii) an Order on July 17, 2015 with respect to the production of plaintiffs' May 2014 documents, I have now been asked by the defendants to clarify the Opinion and modify the Order.

First, defendants want me to clarify the Opinion by insisting that the plaintiffs comply with the previously-agreed search protocol when the Hamilton Fisher documents are produced on July 27, 2015, instead of indulging in a proverbial "document dump". I see no need for clarification. Having been sanctioned twice by me already for document production failures, I dare say that the plaintiffs will not risk not only a further sanction but, possibly, a more profound one under Rule 37(b)(2)(A), if they do not comply with the agreed protocol. Indeed, in footnote 4 to the July 15, 2015 Opinion, I reluctantly noted that Rule 37(b)(2)(A) places a Sword of Damocles hanging over plaintiffs' heads. And, I interpret the plaintiffs' July 23, 2015 letter, by the use of the phrase "responsiveness review of those documents", as affirming the necessity of compliance with the search protocol.

Second, defendants seek a modification to the conditions I imposed for production of the

May 2014 forward documents. Specifically, the defendants ask me to require plaintiffs to not only bear the associated costs but to advance them in anticipation of a defense review of the 74,000 documents which were transferred to them electronically on July 20, 2015. Defendants claim that, without such cost shifting, they would be penalized unnecessarily under circumstances of “intense deposition-taking”. They also explain that, in any event, the chance of their being able to use any of the documents at the depositions taking place this week and next, as fact discovery closes, is virtually nil.

I decline to impose cost shifting in defendants’ favor for the May 2014 forward documents to any extent greater than I have already ordered. The July 17, 2015 Order provides a sufficiently broad approach to the presently-urgent discovery situation. According to the defendants’ submission on this issue, it will take them at least the same amount of time as it will take the plaintiffs. In a sense, they have a choice to make: either review the May 2014 documents now at their own expense, or wait until the plaintiffs undertake that effort, at plaintiffs’ expense (which effort plaintiffs have asserted they will be conducting), and then review the produced documents that have already been culled for privilege so that a privilege log is also produced<sup>1</sup>. To the extent that there remain discovery issues extant that I will be dealing with after August 3, 2015, defendants should have an opportunity at some later point to address those issues.

IT IS SO ORDERED.



Special Master

Dated: July 24, 2015

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<sup>1</sup> With much less chance, presumably, for the claw-back features of the parties’ Protective Order to be needed.