

**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

**SPECIAL MASTER ORDER REGARDING ATTORNEYS' FEES**

In connection with the parties' on-going discovery disputes relating to document production<sup>1</sup>, on June 11, 2015 I asked the defendants, as the prevailing party on a motion to compel, to submit an accounting for their reasonable expenses under Rule 37(a)(4) [or Rule 37(b)(2)(A)] as a result of plaintiffs' inexcusable failure to produce their long-overdue privilege log until the evening before the June 5, 2015 Special Master hearing. That accounting has been presented as has the plaintiffs' response. This is my ruling on the reasonable expenses application.

The defendants listed time spent by billing professionals, including four attorneys and two legal assistants, with a total time investment of 54.6 hours connected to the privilege log matter. The reported value of that time investment aggregated \$35,052.00, which was the amount billed to their client. The required activities included, among others, preparing for and participating in an earlier discovery dispute teleconference with Judge Sleet, researching and drafting submissions and attendance at the June 5 hearing. Where more than one discovery task

was the subject of professional time, such as at a hearing where a number of issues, in addition to the production of the privilege log, were addressed, a proportional allocation occurred.

Opengate Capital opposes the scope of defense counsel's application on basically two grounds: (i) defense counsel's hourly rates compared unfavorably with rates prevailing in this jurisdiction for law firms engaged in commercial litigation, and (ii) the time invested by lawyers and paraprofessionals other than Mr. Lockwood was excessive. Plaintiffs support their opposition to the hourly rate submission by providing me with case law as well as a telephonic survey of Delaware law firms conducted by a local forensic accountant commissioned for that purpose. The surveyed firms' current average and median billing rates for attorneys at different experience levels are listed.

In deciding the question of attorneys' fees in the context of a Rule 37 application, I agree with plaintiffs that the amount actually billed to the client is not the deciding factor. Rather, I must apply the "lodestar" methodology adopted by our District Court consistent with Third Circuit and U.S. Supreme Court precedent. *Asahi Glass Co., Ltd. v. Guardian Industries Corp.*, 2013 WL 936451, \*1 (D. Del. 2013)[a patent infringement case]{citing *Brytus v. Spang & Co.*, 203 F.3d 242 (3d Cir. 2000) and *Blum v. Stenson*, 465 U.S. 886, 895 (1984)}; *Chalumeau Power Systems LLC v. Alcatel-Lucent USA Inc.*, 2104 WL 5814062, \*1 (D. Del. 2014) [a patent case]; *Knight v. International Longshoremen's Ass'n*, 2102 WL 1132761, \*5 (D. Del. 2012) [an opinion based on a federal labor statute]; *ACLF of Delaware v. Department of Correction*, 2014 WL 4755520, \*2 (D. Del. 2014)[a civil rights act case].

The lodestar methodology initially multiplies time spent, in hours, by reasonable hourly

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<sup>1</sup> As to which I issued a Supplemental Order on July 17, 2015, including a number of features pertaining to further document production-related conduct.

rates. *Asahi Glass Co., Ltd.*, 2013 WL 936451, *supra* at \*1. The hours component is reduced by unnecessary or inadequately documented time. The rate component is determined by looking at prevailing market rates in the community. *Id.* The movant bears the burden of establishing the reasonableness of both components. *Id.*

With respect to the time element of the lodestar, plaintiffs attack the 54.6 hours submitted by the defendants as excessive; they claim that individual attorneys spent too much time on the privilege log issue considering the nature of and time required for the work involved. My own analysis of defense counsel's time spent from late April through the June 5 Special Master hearing suggests that the parties started with twelve separate discovery issues meant to be addressed by the Court. By the time of the Special Master hearing, the issues were reduced to about half that number. Of these latter issues, the timing of production of the privilege log was only one but, in the latter context, defendants more intently asked me to grant a profound remedy in the form of a blanket privilege waiver. Defendants submitted a cumulative breakdown of attorney time rather than extracts from actual invoices; i.e., the eventual presentation was in a "block billing" format so that I have less to consider in terms of judging the scope of the fees than might otherwise have occurred<sup>2</sup>. Without a more specific breakdown of time devoted to the privilege log issues, defendants' assignment, in almost all instances, of one-third (1/3) of an attorney's time to the privilege log matter seems too generous. Consequently, I agree with plaintiffs that a reduction in hours expended as an element of the lodestar calculation must occur such that I will include in their lodestars the following hours for each attorney: Mr. Lockwood<sup>3</sup> –

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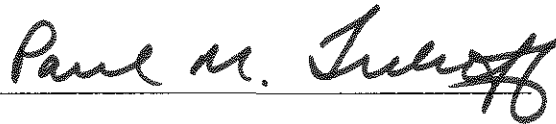
<sup>2</sup> I am referring to the supplemental 2-page description later provided at plaintiffs' request.

<sup>3</sup> Plaintiffs do not challenge this attorney's time but, given an analysis of just the time spent at the June 5 Special Master hearing, it would be inconsistent to ascribe a higher percentage of his time overall to the privilege log issue than his colleagues devoted.

3.05; Ms. Huffman – 3.85; Ms. Kunz – 10.15; Ms. Bartolacci – 7.40. I will not reduce the paraprofessionals' time.

Plaintiffs next contest the hourly rates of each attorney. They contend that those rates are out of touch with rates described in the cases cited in their submission. The forensic accountant's survey is focused on Delaware lawyers in commercial litigation matters whereas some of the non-patent cases cited by plaintiffs relate, e.g., to employment and civil rights litigation. The survey congregates lawyers into law practice experience ranges, i.e., 2-5 years, 7-10 years and 20-25 years (presumably based on the respective experience levels of defense counsel here) and divides the firms surveyed into two categories: those with fewer than 25 attorneys and those with more than 25 attorneys. I note that the Delaware Legal Directory for 2015 lists more than five dozen lawyers at defense counsel's Wilmington office, so the relevant category seems obvious. I accept the survey as a part of the frame of reference for my opinion on reasonable attorneys' fees.

The lodestar calculations for each attorney results in the following reasonable attorneys' fees: Mr. Lockwood – 3.05 hours x \$700/hour = \$2,135.00; Ms. Huffman – 3.85 hours x \$425/hour = \$1,636.25; Ms. Kunz – 10.15 hours x \$300/hour = \$3,045.00; Ms. Bartolacci – 7.40 hours x \$295/hour = \$2,183.00. The total is **\$8,999.25**. The required reductions mentioned earlier are built into that total. Plaintiffs shall pay the amount of \$8,999.25 to defendants no later than July 31, 2015. IT IS SO ORDERED.



Special Master

Dated: July 20, 2015