

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: VITAMINS ANTITRUST)
LITIGATION)

Misc. No. 99-197 (TFH)
MDL No. 1285

THIS DOCUMENT APPLIES TO:)
ALL ACTIONS)

FILED

JAN 08 2002

MEMORANDUM OPINION

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

Re: Defendant Tanabe Seiyaku Co. Ltd.'s Rule 53 Objection

Pending before the Court is the Rule 53 Objection of Defendant Tanabe Seiyaku Company, Ltd. ("Tanabe") to the Special Master's November 9, 2001 Report and Recommendation (November 9 Report) concerning the Plaintiffs' motion under Rule 37(a) of the Federal Rules of Civil Procedure to compel Tanabe to produce jurisdictional discovery and for sanctions. Upon careful consideration of the parties' briefs, the Special Master's Reports, and the entire record herein, the Court affirms and adopts the Special Master's November 9, 2001 Report.

The Special Master's Report recommends that plaintiffs' motion to compel be granted in part and denied in part. While the Report detailed specific recommendations, it essentially recommended that Takeda be required to produce jurisdictional discovery and to pay plaintiffs' reasonable costs and attorney fees incident to the Rule 37(a) motion at issue and that plaintiffs' counsel produce competent proof of such costs and fees in a timely fashion pay attorney fees associated. Since the issuance of the November 9 Report, Takeda has belatedly responded to the jurisdictional discovery requests at issue in the Rule 37(a) motion.¹ Seemingly, these belated

¹ Defendant Tanabe has provided: (1) Responses to Plaintiffs' Jurisdictional Interrogatories (submitted Nov. 9, 2001); (2) Responses to Request for Production of Jurisdictional Documents (submitted Nov. 9, 2001); (3) Privilege Log (submitted Nov. 23,

responses obviate the need to address the specifics of the motion to compel and leaves only the propriety of the Special Master's recommendations with respect to sanctions at issue before this Court. Defendant Takeda, however, persists, as is its right, in arguing that the November 9 Report should be rejected. Takeda presents three arguments in its Rule 53 Objection all of which were addressed by the Special Master in great detail. Takeda argues that the November 9 Report compels Tanabe to respond to discovery served on others, imposes on Tanabe the outcome of a dispute other parties litigates, and recommends a sanction unrelated to any issue raised in the plaintiffs' motion. The Court finds these arguments without merit and adopts the reasoning of the Special Master as to each of the arguments.

Takeda's first argument fails because on July 30, 2001 plaintiffs sent a letter to Tanabe counsel requesting jurisdictional discovery which satisfied the service requirement. Specifically, Tanabe received the jurisdictional discovery requests recommended for approval by the Special Master and approved by this Court's Sept. 18, 2000 Memorandum Opinion. Tanabe has treated this July 30, 2001 transmittal as effective service and will not be heard to claim otherwise given its actions subsequent to receiving the letter and given the fact that Tanabe has not filed a motion for a protective order seeking to be relieved of any or all of the court-approved jurisdictional discovery requests. Effective service on Tanabe was made at least as early as July 30, 2001. *See* November 9 Report at 16-18.

Tanabe's second argument also fails. The court-approved jurisdictional discovery requests were indeed the product of negotiated compromises and litigated objections to discovery

2001); and, (4) Supplemental Response to Plaintiffs's Second Request for Production of Jurisdictional Documents (listing the "Identity of the Entities and Persons Whose Files Were Reviewed for Responsive Documents ")(submitted Dec. 3, 2001).

on other parties. As the Special Master details, see Report at 2-3, Tanabe was not a part of the underlying discovery dispute resulting in the discovery requests. Tanabe, however, has not convinced the Court that it is in a materially different position from the eight foreign defendants who were parties to the Court's September 18, 2000 ruling and that it should not be bound by that jurisdictional discovery. The Court again notes that Tanabe could have filed a motion for a protective order asserting such a material difference and seeking relief but it did not.² *See Id.* at 17.

Tanabe's last objection- that the report recommends a sanction unrelated to any issue raised in the plaintiffs' motion - fails, not because it is without merit but because it is true and is precisely what the Special Master found in his report. The Special Master *did not* recommend as a sanction that Tanabe be required to produce its 30(b)(6) witness in Hawaii as requested by the plaintiffs. To the contrary, the Special Master found that this was not warranted under Rule 37(a). *See* November 9 Report at 22. To clarify, the Special Master did recommend as follows:

As to the 30(b)(6) deposition of Tanabe, I recommend that the parties be ordered to meet and confer within seven days of the Report to agree on dates, so the deposition may be promptly noticed within 30 days thereafter. Finally, I recommend that such deposition take place in Hawaii or Osaka, depending on the results of the Court's ruling on other defendants' pending Rule 53 Objections to the Special Master's September 10, 2001 Report [respecting the location of foreign defendants' 30(b)(6) witnesses].

Id. at 24-25. The Court's November 30, 2001 Memorandum Opinion Re: Deposition Locations

² As the Special Master found: That Tanabe has not pleaded guilty to criminal antitrust violations or participated in a corporate leniency program does not make it materially different, given that UCB S.A., one of the eight foreign defendant's that did participate in the briefing leading to the Court's September 18, 2001 Memorandum opinion, was in the same position. *See* November 9 Report at fn 18.

has rendered this point moot.³ The Court recognizes that Tanabe was not a party to the briefings surrounding the issue of the location of foreign defendants' 30(b)(6) depositions. Tanabe may file a motion for a protective order which would afford relief were it to be noticed for deposition in the United States if Tanabe can establish good cause. It would be difficult to imagine, however, what viable objections it could establish given the extensive arguments already made by similarly situated foreign defendants.

The Court is unclear as to what argument Tanabe makes in support of its objection to the Special Master's recommendation that as a sanction Tanabe be ordered to pay plaintiffs' reasonable costs and attorney's fees incident to this motion as a sanction related to plaintiffs' Rule 37(a) motion. Regardless, the Court finds that the Special Master's analysis with respect to his recommendation is sound. Rule 37(a) was designed to protect courts and opposing parties from delaying or harassing tactics during discovery.⁴ Plaintiffs did establish that Tanabe failed to answer their interrogatories or produce the requested documents. Tanabe has not established that its nondisclosure was substantially justified. The Special Master's detailed description of the events leading up to the plaintiffs' Rule 37(a) motion, see November 9 Report at 3-12, demonstrates that Tanabe *did not* timely respond to the plaintiffs' requests under Rules 33 and 34.

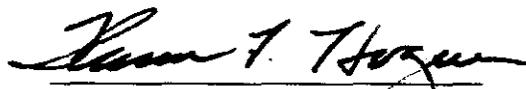
³ The Special Master did recommend that parties meet and confer within seven days of the Report to agree on dates so that the 30(b)(6) deposition of Tanabe be promptly noticed for a date within 30 days thereafter. Tanabe has not argued that this should not occur.

⁴ It provides that where a party fails to answer an interrogatory under Rule 33, or fails to produce for inspection in response to a request submitted under Rule 34, the discovering party may move (1) "for an order compelling an answer *** or an order compelling inspection in accordance with the request," see Rule 37(a)(2)(B); and, (2) to "require the party ***whose conduct necessitated the motion of the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making themotion, in cluding attorney's fees," see Rule 37(a).

Further, it did not meet a series of self-imposed deadlines for production thereafter. As the Special Master points out, there could be no time-based reason for this as Tanabe interpreted the requests as seeking information or documents regarding its knowledge of defendant Roche's jurisdictional facts, a task which could not require much work. Perhaps most egregious was the quality of Tanabe's responses - Tanabe denominated its initial responses to the plaintiffs' requests as "Informal" and did not provide sworn interrogatory answers with either production, despite the plain language of Rule 33(b). Tanabe finally served corrected responses to the plaintiffs jurisdictional discovery requests only after the Special Master's October 29, 2001 hearing. If such tactics do not warrant sanctions, the Court is at a loss to fathom what actions would. Given this utter failure to properly respond, the imposition of a sanction requiring Tanabe to pay plaintiffs' reasonable costs and attorney's fees is warranted.

In summary, the Court affirms and adopts the Special Master's November 9, 2001 Report and Recommendation respecting the plaintiffs' October 9, 2001 motion under Rule 37(a) to compel Tanabe Seiyaku Company Ltd. to produce jurisdictional discovery and for sanctions. Tanabe is ordered to comply with the plaintiffs' jurisdictional discovery requests to the extent that it had not yet met that requirement. The Court also orders that Tanabe pay reasonable costs and attorney's fees incident to the plaintiffs' motion. Further, parties are ordered to meet and confer within seven days of the this opinion and order to agree on dates so that the deposition may be promptly noticed within 30 days of this Memorandum Opinion and Order.

January 7th, 2001


Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ORDER

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

Re: Defendant Tanabe Seiyaku Co. Ltd.'s Rule 53 Objection

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED the Special Master's Report and Recommendation of November 9,
2001 is affirmed and adopted by the Court. It is further hereby

ORDERED that plaintiffs' Rule 37(a) motion is granted in part and denied in part
as follows:

1. Tanabe is ordered to produce full and sworn interrogatory answers, and
complete its document production, in response to all the court-approved jurisdictional discovery
and provide a privilege log.

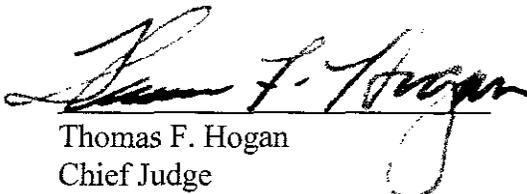
2. Tanabe is ordered to identify in an appropriate pleading by its counsel by the
names of persons and entities whose files have been searched in responding to the discovery, and
the location of those files.

3. Tanabe is ordered to pay plaintiffs' reasonable costs and attorney fees incident to the Rule 37(a) motion at issue and that plaintiffs' counsel produce competent proof of such costs and fees in a timely fashion.

4. Parties are ordered to meet and confer within seven days of the this opinion and order to agree on dates so that the deposition may be promptly noticed within 30 days of this order.

It is so ORDERED.

January 7th, 2001


Thomas F. Hogan
Chief Judge