

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: VITAMINS ANTITRUST)
LITIGATION)

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

FILED

THIS DOCUMENT APPLIES TO:)
ALL ACTIONS)

AUG 07 2002

NANCY MAYER WHITTINGTON CLERK
U.S. DISTRICT COURT

ORDER

**RE: Plaintiffs' Motion to Compel DuPont to Produce
Communications to Governmental Authorities**

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that Plaintiffs' Motion to Compel DuPont to Produce Communications to
Governmental Authorities is **GRANTED**. It is further hereby

ORDERED that DuPont shall produce any and all documents in its possession, custody,
or control that are responsive to Document Request No. 1 of Plaintiffs' Joint Discovery Requests
to all Defendants' dated November 30, 2001. It is further hereby

ORDERED that DuPont's motion for costs is **DENIED**.

SO ORDERED.

August 6, 2002



Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION

RE: Plaintiffs' Motion to Compel DuPont to Produce
Communications to Governmental Authorities

Before the Court are E.I du Pont de Nemours and Company's ("DuPont") objections pursuant to Fed. R. Civ. P. Rule 53 to the July 12, 2002 Report and Recommendations of the Special Master Respecting Plaintiffs' Motion to Compel DuPont to Produce Communications to Governmental Authorities ("July 12 Report"). Upon careful consideration of the parties' briefs, the July 12 Report, and the entire record herein, the Court grants plaintiffs' motion for substantially the same reasons as set forth in the July 12 Report.

The dispute had its beginnings in September 1999 when plaintiffs served their First Consolidated Request for Production of Documents. After a series of negotiations and compromises through the meet and confer process, DuPont agreed to produce grand jury materials responsive to plaintiffs' request but withheld certain documents in three categories which DuPont deemed unresponsive and irrelevant. See July 12 Report at 1-5.

Specifically, the instant dispute concerns Document Request No. 1 in plaintiffs' joint discovery request served November 30, 2001, which in relevant part sought: "All documents...produced to the United States Department of Justice ("DOJ"), whether informally or

in response to a grand jury subpoena ... in connection with the DOJ's investigation of pricing and marketing practices in the vitamins industry." Pl.'s Joint Disc. Req., Nov. 30, 2001. On January 2, 2002, DuPont filed objections and responses to the discovery request stating that it "does not waive any objections it may have in these cases, and expressly reserves the right to amend or supplement these responses as further information may come to its attention." DuPont Opp. Mem., Exh. H at 1. In addition, DuPont generally objected to "these discovery requests to the extent that they are unreasonably cumulative, overbroad and unduly burdensome and to the extent that they seek documents or information that is irrelevant and immaterial to the subject matter involved in the pending actions" Id. at 1-2. Respecting Document Request No. 1, DuPont specifically objected by stating:

DuPont objects to this request on the grounds that it is unduly vague, unspecific, broad and burdensome and to the extent it seeks information protected by the attorney/client privilege, work product doctrine or any other applicable doctrine or privilege. DuPont further objects to this request to the extent it seeks information protected by Fed. R. Crim. P. 6.

Id. at 10.

On Friday April 5, 2002 following the Court's Order of April 4, 2002 affirming the Special Master's January 11, 2002 Report recommending that the foreign defendants be ordered to produce their written communications to the Department of Justice, plaintiffs served a letter to defense counsel, including counsel for DuPont (who represented defendants that were not respondents to the Court's April 4 Order), asking for representations that they would produce any documents being withheld that were responsive to Document Request No. 1. The letter stated that plaintiffs would file a motion to compel in absence of prompt receipt of such a representation and in light of the Court's April 8, 2002 deadline for the filing of motions

concerning disputed discovery. July 12 Report at 6.

DuPont responded by letter at 6:09 pm via Verilaw on Monday, April 8, 2002, stating that “the dispute with respect to production of governmental submissions by DuPont was resolved with DuPont agreeing to produce all documents that it produced to the grand jury responsive to plaintiffs’ individual substantive requests,” and referring plaintiffs to the letter of DuPont’s counsel dated April 7, 2000. Plaintiffs filed their motion to compel DuPont and other defendants to produce their communications to the U.S. Department of Justice and other governmental authorities at 3:36 pm via Verilaw on April 8, 2002. Plaintiffs noted the “extremely limited” period between the Court’s April 4, 2002 Order and the deadline to file discovery motions and stated they would immediately withdraw their motion as to any defendants that agreed to produce the discovery in question.

Before the Special Master, plaintiffs argued that DuPont offered no rationale for withholding its governmental submissions that had not already been addressed by the April 4, 2002 Order affirming the Special Master’s January 11, 2002 Report and Recommendations (“January 11 Report”). Addressing DuPont’s specific objections to Document Request No. 1, plaintiffs cited the findings of the Special Master that Rule 6(e) does not prohibit private parties from disclosing documents they produced to a grand jury, see January 11 Report at 88; and that voluntary communications to adversaries waive otherwise applicable work product protections. Id. at 68. In summary, plaintiffs argued that to the extent that DuPont was withholding governmental communications on the basis of Rule 6(e) or the attorney work product protection, it should be compelled to produce them absent an affirmative showing it did not waive the work product protection.

DuPont opposed the motion on two grounds, arguing first that the motion and Document Request No. 1 are contrary to a “negotiated written agreement” of April 7, 2000, between DuPont and all direct action plaintiffs, and second, that plaintiffs should be procedurally barred from proceeding on their motion for failing to meet and confer by telephone or in person as required by Local Rule 7.1(m).

In reply, plaintiffs claimed that defendant’s argument that they had given up their right to pursue the discovery at issue was without merit and that contrary to defendant’s assertion in the April 7, 2000 letter, the withheld documents were relevant and responsive to Document Request No. 1. Plaintiffs asserted that they had at all times in the negotiations concerning the initial discovery, which resulted in the January 2000 requests, see July 12 Report at 1-3, made it clear that they were reserving their right to pursue further discovery. Further, plaintiffs stated that they never changed that position and that the April 7, 2000 letter did not reflect any such agreement by the plaintiffs. Plaintiffs argued that DuPont cannot continue to argue that the request at issue is overly broad or irrelevant as it is “virtually identical” to (1) a request addressed to foreign defendants approved by the Special Master’s Report of April 23, 2001 and (2) the request at issue the Court’s April 4, 2002 Order.

At the June 19, 2002 hearing plaintiffs argued that DuPont had waived its objections based on the April 7, 2000 letter by failing to raise them in its January 2002 response to the Document Request No. 1. Plaintiffs also said that they had made compromises with defendants respecting the first consolidated document requests in early 2000 in order to move the case along and that the compromises were made with the understanding that as the case developed plaintiffs had the right to come back and ask for additional discovery. DuPont responded to plaintiffs’ reliance on

reservation language saying that such language was not applicable to Document Request No. 1 because this request was essentially the same the subject of the April 7, 2000 agreement. DuPont acknowledged that the April 7 letter did not specify that plaintiffs were waiving any rights thereafter to seek production of the documents being withheld. DuPont further argued that the documents being withheld were not relevant and indicated that the omission of this argument from the January 2, 2002 response to Document Request No. 1 was an oversight. This failure, DuPont argued, should not be held to waive that ground because in the introduction to DuPont's response, DuPont reserved the right to amend and supplement the objections. See July 12 Report at 12-14.

In the July 12 Report, the Special Master found that DuPont's defenses to plaintiffs' motion to compel were without merit and recommended that DuPont be ordered to produce the withheld documents responsive to Document Request No.1, and, accordingly, that DuPont motion for costs be denied. First, as to relevance, he found that DuPont had waived its relevance defense by raising it for the first time at the June 19, 2002 hearing. See Blumenthal v. Drudge, 186 F.R.D. 236, 240 (D.D.C. 1999). Further he found that even if DuPont had not waived this defense that it provided no support for its contention that the documents it was withholding are irrelevant. He found that it was possible that withheld documents turned over to the grand jury in connection with the DOJ's investigation of the vitamins industry were indeed "relevant to the claim or defense of any party" in the litigation, thus meeting the threshold requirements of Fed. R. Civ. P. 26(b)(1). Id. at 16 (citing Fed. R. Civ. P. 26(b)(1)).

DuPont argues in its objections pursuant to Rule 53 that the Special Master erred in concluding that the DuPont failed to preserve its relevance argument because (1) DuPont had

indeed objected under relevance grounds in the “General Objections” portion of its January 12, 2002 response to Document Request No. 1; and (2) the April 7, 2000 letter, which DuPont asserts was controlling, also contained relevancy language.¹ See DuPont’s Obj. at 3.

The Court does not find these arguments persuasive. A general objection to a discovery request is not sufficient to preserve an objection on relevance grounds, nor is a general objection useful to a court in ruling on a discovery motion. And, of course, the party resisting discovery must explain and support its objections. See Chubb Integrated Sys. Ltd. v. Nat’l Bank of Washington, 103 F.R.D. 52, 58 (D.D.C. 1984) (“[Plaintiffs’] bare objection, that the requested information is ‘irrelevant’, does not meet the standard for a successful objection.”). DuPont never stated specifically that Document Request No. 1 was being objected to on relevancy ground, thus, the Court does not find that the argument was preserved. Importantly, however, the Special Master went on “[g]iving DuPont the benefit of the doubt,” see July 12 Report at 16, to address the relevancy argument finding that DuPont had not adequately explained why it would have produced documents to the grand jury in connection with DOJ’s investigation of the vitamins industry that would be irrelevant in this litigation which focuses on the very same subject. The Special Master was not convinced by DuPont’s bald assertion that the materials it produced to the grand jury “cast a broader net than just for materials that are at issue and

¹ The letter states:

However due to the fact that DuPont is not and has not ever been a vitamin manufacturer, DuPont assumes that its role in the grand jury investigation differed somewhat from the many other defendants in this litigation. Consequently, DuPont produced to the grand jury certain documents that have no relevance to the civil litigation, and which have, therefore not been included in the DuPont’s production to plaintiffs.

DuPont’s Opp. to Pls.’s Mot. to Compel, Exh. G (April 7, 2000 Letter from DuPont to Pls.).

responsive to discovery requests in this case.” Id. at 16 (quoting June 19 Hrg. Tr. at 25-26, argument of DuPont Counsel). He determined that plaintiffs’ Document Request No. 1 meets the threshold requirements for relevance under Fed. R. Civ. P. 26(b)(1). Indeed, even in its Rule 53 motion, DuPont has pointed to nothing which requires a contrary finding.

Respecting DuPont’s argument that the relevancy language in the April 7, 2000 letter is controlling, the Court is not persuaded. As discussed below, the Court agrees with the Special Master’s finding that the April 7, 2000 letter was not controlling.

Second, in the July 12 Report, the Special Master found unpersuasive DuPont’s argument that plaintiffs’ motion was barred the April 7, 2000 letter in which DuPont claims the plaintiffs agreed not to pursue the documents that DuPont submitted to the Department of Justice but which DuPont considers not responsive to plaintiffs’ individual substantive document requests. He found that this had not been raised in the January 2002 response and, therefore, should be considered a waiver which, unless excused, bars its consideration at this time. He found this despite DuPont’s argument that it had reserved the right to amend its January 2002 response. See Drudge, 186 F.R.D. at 240 (“any ground not stated in a timely objection [to an interrogatory] is waived unless the party’s failure to object is excused by the court for good cause shown’, Rule 33(b)(4), Fed. R. Civ. P.,The same principle applies to written document requests under Rule 34(b).” Id. at 240 (quoting Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1473 (9th Cir. 1992)).

Further, he found that the April 7, 2000 letter should not be given the meaning for which DuPont argues - that plaintiffs had relinquished their rights to pursue the withheld grand jury documents - as the letter does not expressly state this. He found that the letter “memorialized an

agreement of counsel respecting production of documents at an early stage in the discovery process” and that there was no basis for the Court to presume that plaintiffs would agree to “half a loaf” to obtain a view of a portion of the submission. July 12 Report at 19.

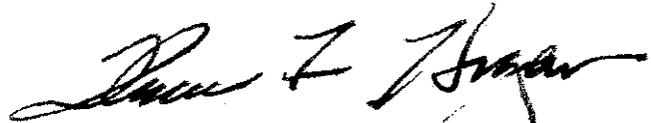
In its Rule 53 objections DuPont claims that the Special Master erred in relying on a February 10, 2000 letter from plaintiffs to defense counsel in which plaintiffs reserved a right to subsequently seek full compliance with their governmental submissions request, and in ignoring the subsequent meet and confer process which DuPont claims resulted in the April 7, 2000 letter. Even if the Court was persuaded by this argument and even without reliance on the February 10 Memorandum, there is ample support in the July 12 Report for the conclusion that the April 7 2000 letter was not a bar to the plaintiffs’ motion to compel. July 12 Report at 19-20.

Lastly in the July 12 Report, the Special Master considered DuPont’s argument that plaintiffs should be procedurally barred from pursuing the motion because plaintiffs did not meet and confer in person or by telephone in accordance with Local Rule 7.1(m). He found that plaintiffs efforts within the narrow window in which to meet and confer in this instance - April 5-8, 2002 - fulfilled the purpose if not the letter of this important rule. DuPont did not specifically object to this finding and the Court has no trouble in affirming his reasoning in such a complex case involving many parties under a short deadline.

Conclusion

For the foregoing reasons, the Court affirms and adopts the Special Master's July 12, 2002 Report and Recommendations Respecting Plaintiffs' Motion to Compel DuPont to Produce Communications to Governmental Authorities. As such, the Court grants the plaintiffs' motion to compel; denies DuPont's motion for costs; and orders DuPont to produce any and all documents in its possession, custody, or control that are responsive to Document Request No. 1 of Plaintiffs' Joint Discovery Requests to all Defendants' dated November 30, 2001. An order will accompany this opinion.

August 6, 2002



Thomas F. Hogan
Chief Judge