

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MERRICK'S, INC.,

Plaintiff,

ORDER

v.

03-C-128-C

FULLMER CATTLE COMPANY, INC.,

Defendant.

Plaintiff Merrick's, Inc. has filed a motion to compel defendant Fullmer Cattle Company forthwith to disclose its computation of damages on the counterclaim. I am denying the motion because although there has been a technical rule violation, the motion to compel was ill-advised.

On March 19, 2003, Merrick's filed this diversity lawsuit seeking payment of amounts due on animal nutrition products it had shipped to Fullmer. Fullmer counterclaimed, alleging that one of Merrick's shipments was defective, causing "substantial damages, including but not limited to a significant increase in calf illness and deaths, and increased labor and medicine costs." *See Answer and Counterclaim, Dkt. 4 at 3-4.* (The amended answer and counterclaim have not changed this contention.)

On May 27, 2003, the parties filed their joint preliminary pretrial report and discovery plan with the court in which they commemorated their agreement to swap Rule

26(a)(1) disclosures by May 30, 2003. On May 29, 2003, this court provided the schedule in this case, setting the discovery cutoff on February 20, 2004 with trial to follow on March 22, 2004.

On May 30, 2003, Fullmer provided its initial disclosures. Fullmer stated that it had not yet completed its damages calculations on its counterclaim, but reserved its right to supplement its response. In a series of increasingly testy calls and letters between the parties, Fullmer stated that it would endeavor to provide an itemized computation of damages by June 20, 2003, but could not promise that it would be complete. This did not satisfy Merrick's, which responded that if it did not have the computations and materials by June 20, it would file a motion to compel. On June 11, 2003, Fullmer stated that it was gathering the materials necessary to compile its damages itemization and would supplement its initial disclosures in the near future, but likely would not be done by June 20, 2003.

So, on June 25, 2003, Merrick's filed its motion to compel. Fullmer responded by noting that Merrick's was not claiming any prejudice, and that Fullmer expected to provide full disclosure of damages by July 9, 2003. Merrick's replied that Fullmer essentially had confessed to violating Rule 26(a)(1) and it asked this court to strike the use of any damages evidence at trial, or to enter a proposed order requiring disclosures by July 9 and awarding costs of \$1,275.

Merrick's will not receive any relief for having glorified form over substance. Sometimes it's appropriate and necessary to be a hard-nosed stickler, sometimes it's not. This situation was a "not."

True, this court exalts speed and efficiency, holding parties and their attorneys firmly to the important deadlines such as summary judgment motions and trial dates, and admonishing the parties to flag discovery disputes promptly. That's the "speedy" aspect of F.R.Civ.P. 1, and this court does not lightly brook delay or gamesmanship. On the other hand, this court takes a *laissez-faire* approach to discovery, leaving the parties to their own devices so long no one gets sandbagged and everyone is ready for summary judgment motions and for trial. That's why the court's initial response to most discovery disputes is to direct the parties to back up a step, take a deep breath and then cut each other some slack. This falls under the "just" and "inexpensive" aspects of Rule 1. It may not be easy for a lawyer properly to balance "speedy," "just" and "inexpensive," but common sense, patience and flexibility help.

Merrick's response to Fullmer's delayed damages disclosures does not demonstrate these qualities. Beyond the technical violation of Rule 26(a)(1), what's the harm here? Merrick's claim that it has been prejudiced by having to file this motion to compel is shameless bootstrapping. By now Merrick's has all or most of Fullmer's information, and there are still eight months left until trial. No depositions had to be postponed, no

interrogatories had to be supplemented, and no substantive motions or briefs had to be amended. The only harm here flows from the motion itself, which distracted the parties and diverted their resources from important issues.

Therefore, Merrick's motion to compel is denied.

Pursuant to Rule 37(a)(4), Fullmer is entitled to reimbursement of its costs in defending against this motion. If Fullmer wishes to pursue this option, it should file and serve its itemized bill (hours \times rate) not later than July 21, 2003. Merrick's may respond to the justness of cost shifting not later than July 25, 2003. Or perhaps both sides could use this opportunity to step back, take a deep breath, forget about cost shifting this time, and recommit to the efficient, flexible, and cordial exchange of information.

Entered this 17th day of July, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge