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

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BETCO CORPORATION,

Plaintiff,

v.

MALCOLM D. PEACOCK, MARILYN PEACOCK, B. HOLDINGS, INC. and E. HOLDINGS, INC.,

Defendants.

OPINION & ORDER

14-cv-193-wmc

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In this civil action, defendants Malcolm D. and Marilyn Peacock ("the Peacocks") stand accused of making various misrepresentations and breaching various warranties and duties in the course of selling their two Wisconsin-based companies, now known as B. Holdings, Inc. ("BSC") and E. Holdings, Inc. ("EZI"), to plaintiff Betco Corporation. Although Betco's claims are relatively straightforward, the case itself has a tangled procedural history. Filed in the Northern District of Ohio in 2012, the case came within two months of trial before that district court transferred it to this court on March 10, 2014, with several motions yet to be resolved. Following a telephonic hearing, the court consolidated this case for all pretrial purposes with a related case, *Bio-Systems Corporation, Ltd. v. Bio-Systems of Ohio, LLC*, No. 12-cv-367-wmc. Currently, these are scheduled to be tried sequentially to the court beginning on June 15, 2015.

The Peacocks now move to amend the scheduling order and for other, related relief, including: (1) closing discovery in this case; (2) granting their motion for Rule 37(c) sanctions, which the Ohio court took under advisement but did not decide before transferring the case; (3) setting a briefing schedule on their motion for summary judgment,

which was filed in Ohio but was never fully briefed; and (4) rescheduling the bench trial in this matter for the earliest possible date. Given Betco's discovery violations, the court agrees that the Peacocks are entitled to some relief, though not to sanctions so harsh that they would result in dismissal of most of Betco's claims. Accordingly, the court will grant in part and deny in part the Peacocks' motion, as explained more fully below.

## BACKGROUND[1]

This saga begins in May of 2010, when the Peacocks engaged a broker, Steven Royko, to attempt to sell BSC, EZI and related assets. Royko contacted Betco in Ohio to inquire about its possible interest. Following an e-mail exchange between the principal parties, Betco contracted with defendants to purchase certain assets from BCS and EZI on September 29, 2010, including production equipment located in commercial buildings in Beloit, Wisconsin. At the same time, Betco, through its subsidiary Bio-Ohio, hired Malcolm Peacock to operate the Beloit plant and Marilyn Peacock to work there.

More than a year and a half later, on April 30, 2012, Betco filed this lawsuit in the Northern District of Ohio (the "Ohio suit"), alleging that the Peacocks defrauded Betco in the sale of BCS and EZI. When Betco made its initial Rule 26 disclosures, its damages computation disclosure read as follows:

> Betco is currently in the process of calculating its damages, and plaintiff will supplement this response once the damages calculation has been completed. Preliminary estimates regarding compensatory damages exceed $8 million.

[1] On July 29, 2014, pursuant to this court's order, Betco filed an amended complaint containing good faith allegations sufficient to establish complete diversity of citizenship under 28 U.S.C. § 1332. Having reviewed those allegations, the court finds that Betco's proffer satisfies the concerns raised in its previous order, such that it may exercise subject matter jurisdiction over this suit.

(Albert Bianchi, Jr. Decl. Ex. 01 (dkt. #87-1) 9.)[2] The Ohio district court originally set trial for July 9, 2013.

Meanwhile, the Peacocks also filed suit against Bio-Ohio on May 18, 2012 in this court (the "Wisconsin suit"), alleging that Bio-Ohio breached various ancillary agreements and violated the Fair Labor Standards Act. This court eventually stayed the Wisconsin suit in February of 2013, pending resolution of the Ohio suit.

In the Ohio suit, the Peacocks served interrogatories and requests for production on Betco on October 30, 2012. (*Id.* at Exs. 02, 03 (dkt. ##87-2, 87-3).) On December 3, 2012, Betco responded to the interrogatories and agreed to produce responsive documents but indicated that it had to sort through a large number of documents first. Following some delays, Betco began producing documents on February 27, 2013, while indicating it would be producing additional batches of documents intermittently as they were processed.

In March of 2013, the Peacocks filed a motion to transfer the Ohio suit to the Western District of Wisconsin. The Ohio court set a briefing schedule on that motion and extended the case deadlines. Under the revised schedule, the close of discovery was set for August 1, 2013; the dispositive motion deadline for September 3, 2013; and trial for April 14, 2014. (*See* dkt. #40.) In June of 2013, with the motion to transfer still pending, the Peacocks also filed a motion to dismiss for lack of personal jurisdiction. Ultimately, the parties agreed to extend the discovery deadline until August 16, 2013, for the limited purposes of completing depositions (*see* dkt. #58), with a corresponding extension of the dispositive motion deadline to September 18, 2013. Between July 23 and August 15, 2013,

[2] Unless otherwise noted, references to docket numbers correspond to the docket in the Ohio case, now Case No. 14-cv-193-wmc in this court.

the parties proceeded to take the depositions of some 22 witnesses, including eight Betco Rule 30(b)(6) designees.

On August 16, 2013, the agreed-upon discovery deadline, Betco informed the Peacocks it was supplementing its earlier document production. The actual supplemental production was served the same day and contained more than 2000 pages of documents, some of which, according to the Peacocks, were directly relevant to the deposition testimony of Betco's Rule 30(b)(6) designees.[3] The Peacocks filed a Rule 37(c) motion on September 3, 2013, to preclude Betco from relying on any information it had not timely disclosed.

Two weeks later, on September 17, 2013 -- the day before the dispositive motion deadline -- Betco filed "Plaintiff's Rule 26(e)(1) Supplemental Disclosures." Most important for purposes of the present motions, the document contained a purported "update to Betco's damages," including millions of dollars in new, previously undisclosed categories of damages but no new calculations or supporting documentation. Betco also filed a motion to strike defendants' Rule 37(c) motion, arguing that defendants failed to comply with local practice by seeking court intervention, rather than attempting to resolve the dispute informally. In a letter to the Peacocks' counsel dated the same day, counsel for Betco explained that the untimely production was due to a combination of factors, including the Peacocks' "very broad" discovery requests and the large number of documents in question. Betco's counsel also indicated the damages question was "complex" and included certain components that were "moving targets incapable of exact quantification,"

[3] As a specific example, Betco alleges that the Peacocks fraudulently represented that all product was manufactured to specifications and knowingly shipped product to customers that did not meet those specifications. (*See* Am. Compl. (dkt. #96) ¶¶ 41f, 45e.) The Peacocks sought discovery on the products that allegedly did not meet specifications, and deposed various customers trying to find out more information, but it was apparently not until August 16 that Betco produced the product labels themselves.

and offered to re-open discovery as a compromise. (*See* Albert Bianchi, Jr. Decl. Ex. 12 (dkt. #87-12).)

The next day, on September 18, 2013, the Peacocks filed a timely motion for summary judgment. One of the grounds for the motion was Betco's failure to timely produce damages evidence. On September 24, 2013, the Peacocks also filed a reply brief in support of their Rule 37(c) motion and a brief opposing the motion to strike. Betco then filed a reply in support of its motion to strike on September 30, 2013.

That same day, Betco's counsel sent another letter to the Peacocks's counsel, which stated in relevant part:

> [Y]our comments indicate that in the jurisdiction in which you practice, parties do not supplement discovery responses and production after the discovery cutoff. In this jurisdiction, however, this is commonplace, and no advance warning that supplemental production is forthcoming is normally provided. As a courtesy, please be advised that you can expect that we will continue to supplement our disclosures and responses over the next seven months before trial.

(Albert Bianchi, Jr. Decl. Ex. 14 (dkt. #87-14) 1.)

On October 2, 2013, the Ohio court conducted a status conference, at which it (1) took the motion for sanctions and the motion to strike under advisement, (2) stayed briefing on the motion for summary judgment, and (3) ordered the Peacocks to submit a written request to Betco on the scope of discovery that would be required given the new damages disclosures. On October 3, 2013, the Peacocks responded to the order by submitting a letter seeking all evidence on which Betco would rely at trial in support of any request for damages in the Ohio suit. (*Id.* at Ex. 15 (dkt. #87-15).) Five days later, Betco provided about 20 pages of financial statements and indicated that additional documents

were forthcoming. (*Id.* at Ex. 16 (dkt. #87-16).) Between October 11 and 23, 2013, Betco produced more than 2000 pages of documents that it characterized as responsive to the Peacocks' request. In addition, it produced an image of a computer server on a hard drive.

On October 23, 2013, the Peacocks sent a letter indicating they believed the damages calculations would turn on the admissibility of expert opinions under Federal Rule of Evidence 702 and seeking a formal expert report.

In addition, they noted that it was unclear what was on the hard drive and, if it was not information related to damages, it was untimely. Following an additional flurry of correspondence, the Ohio district court held a second status conference on October 29. Pursuant to that conference, it issued an order requiring that on or before November 5, 2013, Betco's counsel "categorize the nature of the production in response and rationale for the production at this time," with the Peacocks' counsel to e-mail a response by close of business on November 8, 2013. (Dkt. #68.) The parties did so, with Betco explaining that the delay was due to the breadth of the discovery requests and the complexity of the case, and the Peacocks maintaining that Betco's actions were unjustified.

During yet another status conference on November 13, 2013, the Ohio court raised possible solutions to the discovery deadlock. In follow-up e-mail, it also asked Betco's counsel what might be a "fair and corrective action" if the court were to reopen damages discovery, and asked Peacocks' counsel to estimate the costs of modifying its motion for summary judgment should discovery be so reopened. The parties submitted responses as directed.

At a status conference on November 27, 2013, the parties agreed to mediate the dispute, with Betco footing the bill for mediation. The Ohio court issued an order noting

the attempt at mediation, while indicating that the April 14, 2014, trial date remained on the calendar. The mediation took place on January 30th and 31st, in Madison, Wisconsin, but the parties ultimately reached an impasse.

On February 28, 2014, the Ohio court granted the Peacocks' motion to transfer the Ohio suit to the Western District of Wisconsin. This court then lifted its stay of the Wisconsin suit, Case No. 12-cv-367-wmc, and consolidated the two suits for all pretrial purposes, setting a deadline of September 29, 2014, for proponent's disclosure of liability experts; a deadline of December 12, 2014, for the filing of dispositive motions; a March 6, 2015 deadline for proponent disclosure of damages experts; and a May 1, 2015 discovery cutoff. Both cases are currently set to try sequentially to the court, beginning on June 15, 2015.

The Peacocks have since moved to amend the scheduling order and for other relief. They ask the court to close discovery in this matter immediately and to grant their unresolved Rule 37(c) motion for sanctions, thereby limiting Betco to the documents that were timely produced in the Ohio suit. They also ask the court to set a briefing schedule on the motion for summary judgment and reschedule this case for trial at the earliest available date. In response, Betco strenuously contests the Peacocks' right to *any* relief, arguing that the untimeliness in their disclosures was both harmless and substantially justified.

## OPINION

Federal Rule of Civil Procedure 16(b)(4) provides that a schedule "may be modified only for good cause and with the judge's consent." The Peacocks maintain that the modification they seek would merely hold Betco to the schedule established in the Ohio

suit, ensuring a "just, speedy, and inexpensive determination" of this case as required by Fed. R. Civ. P. 1. At its core, however, the Peacocks' present motion really turns on the merits of its motion for sanctions pursuant to Rule 37(c)(1).

Essentially, the Peacocks argue that the ramifications of Betco's discovery violations under the schedule set in the Ohio suit should extend to here, ultimately precluding Betco: (1) from relying on any untimely disclosed documents for purpose of proving liability; and (2) from presenting *any* evidence with respect to their claimed damages. Granting that relief would necessarily mean closing discovery in this case and, by that same logic, ordering the parties to finish briefing the Peacocks' motion for summary judgment (which appears to presume success on their Rule 37 motion, although it offers various alternative grounds for summary judgment as well). (*See* Br. Supp. Mot. Summ. J. (dkt. #63-1).) Accordingly, the court will begin by addressing the Peacocks' motion for sanctions.

The Peacocks' Rule 37 motion identifies two main failings on Betco's part: (1) the untimely document production that Betco announced and began on August 16, 2013, the last day for any discovery in the Ohio case, which was to be completed sometime thereafter; and (2) Betco's inadequate Rule 26 damages disclosures. Taking the August 16 production first, there can be no real dispute that it was an untimely supplemental production under the schedule the Ohio court imposed. General discovery closed on August 1, 2013; on July 22, 2013, the parties agreed to a limited extension of that deadline "until the end of the day on August 16, 2013 for the sole purpose of completing depositions proposed by Defendants." (*See* Joint Mot. Extend Discovery (dkt. #58) 1.) The product labels and data sheets that Betco produced on August 16 were not even arguably within the narrow scope of the parties' agreement to extend the discovery deadline and were, therefore, untimely

disclosed on their face, as of course were any additional documents disclosed after that date. *See* Fed. R. Civ. P. 26(e)(1) (requiring parties to supplement incomplete disclosures or responses "in a timely manner" or "as ordered by the court").

Furthermore, Betco's attempt to make mandatory disclosures on the last day of discovery, effectively preventing the Peacocks from *any* follow-up discovery regarding those documents, violates both the letter and the spirit of Rule 26(a)(1) as well. Specifically, Rule 26(a)(1)(A)(ii) requires that a party furnish "a copy – or a description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses[.]" The Peacocks represent that the documents Betco produced on August 16 are *directly* relevant to Betco's fraud claims, meaning they should have been produced or described in Betco's Rule 26 initial disclosures.[4] Under the Ohio court's case management conference order, the documents in question should have been either produced or described by September 7, 2012 -- nearly a full year earlier. (*See* Case Management Conference Order (dkt. #18) 1.) The Peacocks do not explicitly make this argument, although Betco's Rule 26(a)(1)(A)(ii) disclosure is certainly sparse. (*See* Initial Disclosures (dkt. #22) 7.) Regardless, at a minimum, Betco violated the Ohio court's scheduling order and Rule 26(e) by failing to supplement its disclosures "in a timely manner if . . . the [original] disclosure or response is incomplete or incorrect." Fed. R. Civ. P. 26(e).

"The exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1) unless non-disclosure was justified or harmless." *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 758 (7th Cir. 2004). Although Betco never responded to the merits of the

[4] The fraud claims have been part of this suit since Betco filed it. (*See* Compl. (dkt. #1) ¶¶ 25-35.)

Peacocks' Rule 37(c) motion in Ohio, it now argues that its failure to make timely disclosures was both harmless and substantially justified, although its arguments are somewhat broad and generic. Taking its arguments of substantial justification first, even if the Peacocks' discovery requests were overly burdensome, the record does not suggest Betco ever sought relief from those requests -- or even advised the Peacocks, much less the court, that it would be unable to complete its production before the court-imposed deadline for discovery. Nor does Betco's apparent assumption that the Peacocks would excuse its late production based on purported local practice appear to be a substantial justification for the untimeliness of that production, especially given that the parties had negotiated a formal, joint motion explicitly *limiting* any extension of the discovery deadline for the taking of depositions only.[5]

Betco does not convincingly argue that its late production was harmless either, particularly in light of the Peacocks' representation that the documents produced were crucial to their understanding of the factual basis for Betco's fraud claims. Betco principally points to the fact that months remained until trial in the Ohio case -- and that now, the Peacocks have the opportunity to take *additional* discovery given the reset of the schedule in this case -- but "[l]ate disclosure is not harmless within the meaning of Rule 37 simply because there is time to reopen discovery." *Finwall v. City of Chi.*, 239 F.R.D. 494, 501 (N.D. Ill. 2006); *see also Musser*, 356 F.3d at 759-60 (although the district court could have rescheduled trial date and allowed additional discovery and new dispositive motions, it did not abuse its discretion in finding that the added costs and further delay were not

[5] Of course, to the extent this last minute production involved information that should have been disclosed pursuant to the straightforward and independent obligation in Rule 26(a)(1), the fact that the Peacocks' discovery requests may have been overbroad is no excuse at all.

harmless). With respect to the untimely production of August 16, then, the Peacocks would appear to have the better of the argument with respect to both the lack of justification and harm.[6]

The Peacocks also fault Betco for failing to comply with Rule 26(a) in making its initial disclosures with respect to damages. Under that rule, each party must provide "a computation of each category of damages claimed by the disclosing party – who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based[.]" Fed. R. Civ. P. 26(a)(1)(A)(iii). Under the Rules, a party "must make its initial disclosures based on the information then reasonably available to it," but it is "not excused from making its disclosures because it has not fully investigated the case." *Id.* at 26(a)(1)(E).

Under this standard, Betco's initial disclosure was plainly deficient. Betco disclosed neither computations nor any particular categories of damages, beyond the broad and wholly unsupported statement that it expected its "compensatory" damages to "exceed $8 million." (*See* Initial Disclosures (dkt. #22) 8.) The fact that the calculations were "complex," as Betco represents, is no excuse -- both because Rule 26 states as much and because Betco, as the plaintiff, controlled when to file its suit and should have been prepared to prosecute its case, including by complying with the Federal Rules of Civil

[6] Betco also asserts that the Ohio court informed its counsel that Betco would have "an opportunity to 'fix' any discovery issues raised by the pending motion," apparently suggesting that this included the untimely production on and after August 16. (Pl.'s Br. Opp'n (dkt. #90) 7.) The court cannot credit that assertion in light of the Ohio court's actual order, which granted Betco leave only to supplement its discovery with respect to the damages calculation. (See Oct. 3, 2013 Order (dkt. #66).) The Ohio court's follow-up order of October 29, directing Betco to explain the rationale behind its supplementation, further contradicts Betco's assertion that the Ohio court granted it leave to "fix" *any* of its discovery problems.

Procedure. Perhaps more egregious, whatever justification there may have been for Betco's initial failure to disclose the amount, categories and substance of its damage claims, Betco failed to supplement its disclosures month after month despite promising to do so.

At the same time, the Peacocks could not have been unaware of the inadequacy of Betco's damages disclosure, which was made on September 7, 2012. Nor could there have been any doubt that Betco would need to prove damages with respect to their claims for fraud, negligent misrepresentation, breach of contract and breach of the duty of good faith and fair dealing.[7] Nevertheless, the Peacocks apparently did not ask Betco to cure this obvious defect in its disclosure, nor did they bring this deficiency to the court's attention. Instead, they waited until discovery had closed before filing a motion for drastic Rule 37 sanctions, seeking dismissal of four of Betco's five claims in their entirety as a sanction for the (admittedly deficient) Rule 26(a)(1)(A)(iii) disclosure.[8]

Finally, the court cannot ignore the record in the Ohio suit. Made aware of the parties' dispute, the Ohio court did not, as the Peacocks requested, grant the Rule 37 motion and dismiss the majority of Betco's claims. Rather, it took the motion under advisement and attempted to facilitate resolution of the dispute by: (1) directing the Peacocks to submit a request on the discovery needed for damages purposes; and (2) ordering Betco to respond to the request by producing the damages information sought. Later, that court also asked the Peacocks to estimate the potential costs of reopening discovery on damages, while asking Betco what would constitute a "fair and corrective" action in light of their pending motion for sanctions. Thus, while the Peacocks are correct

[7] Perhaps Betco could still seek specific performance on some of its claims, but even this should have been timely disclosed.

[8] The remaining claim is one for equitable rescission of contract.

that the Ohio court never *denied* their motion for Rule 37 sanctions, the record suggests that the Ohio court was more disposed to mediate the dispute and allow Betco to cure the defect -- at least insofar as damages were concerned -- rather than taking the drastic step of dismissing most of Betco's case for discovery violations.

Under all of these circumstances, this court is similarly inclined, particularly in light of: (1) the signals from its sister court in front of whom all of these violations occurred; and (2) the fact that the Peacocks *knew* of the inadequacy of Betco's Rule 26(a)(1) disclosure from the outset of the case and did nothing to address it until the close of discovery. This is consistent with the Seventh Circuit's warning that "[d]epriving the parties of a merits disposition is serious business." *Salgado ex rel. Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 740 (7th Cir. 1998). "In the normal course of events, justice is dispensed by the hearing of cases on their merits; only when the interests of justice are best served by dismissal can this harsh sanction be consonant with the role of courts." *Id.* at 740 (quoting *Schilling v. Walworth Cnty. Park & Planning Comm'n*, 805 F.2d 272, 275 (7th Cir. 1986)). In service of those principles, the Seventh Circuit has "urge[d] district courts to carefully consider Rule 37(c), including the alternate sanctions available, when imposing exclusionary sanctions that are outcome determinative." *Musser*, 356 F.3d at 760. Here, under the circumstances, the court cannot say that the interests of justice are best served by wholesale dismissal of four of Betco's five claims.[9]

[9] Betco has already supplemented its damages disclosures, and it appears from the record that Betco has also produced the documents underlying those computations at this point. If this is not the case and the Peacocks are still missing documents underlying Betco's computation of damages, Betco may be excluded from offering them into evidence absent good cause shown, although the Peacocks may.

Nevertheless, the Peacocks are entitled to some relief, particularly with respect to the untimely liability disclosures on and after August 16. Accordingly, the court will order Betco to respond to the Peacocks' previously-filed motion for summary judgment (dkt. #63) within 30 days, with the Peacocks to file their reply within 14 days. Both parties are to follow this court's procedures to be filed on summary judgment, a task made easier by the fact that the Peacocks have already filed proposed findings of fact. (*See* Preliminary Pretrial Conference Order (dkt. #85) 12-16 (relating procedures to be followed on summary judgment).)

In opposing that motion, Betco may rely *only* on liability evidence that was timely produced in the Ohio suit. (This is to explicitly except the late-disclosed damages information, which would otherwise be outcome-determinative on all but one of Betco's claims.) Alternatively, if Betco seeks to rely on untimely-produced evidence, it must explain with specificity with respect to each individual piece of evidence why its untimely production was either harmless or substantially justified. Once briefing is complete, the court will resolve the motion for summary judgment on an expedited basis.[10]

This solution strikes a balance between the strong preference for resolving cases on their merits, *see Salgado*, 150 F.3d at 740, and the need for "parties and their attorneys to be diligent in prosecuting their causes of action," *Spears v. City of Indianapolis*, 74 F.3d 153, 157 (7th Cir. 1996) (quoting *Geiger v. Allen*, 850 F.2d 330, 331 (7th Cir. 1988)). To the extent that Betco failed to present evidence to support the merits of its claims timely, it must now

[10] Given Betco's discovery violations, this remedy will not preclude the Peacocks from bringing another motion for summary judgment, should any claims remain after their current motion is resolved. Accordingly, the court will lift the dispositive motion deadline in this case for the Peacocks only.

justify that failure with particularity or face dismissal on the merits. The parties may then proceed to litigate any remaining claims, which will, presumably, be only those unaffected by Betco's untimely production of liability evidence.

The Peacocks' motion is, therefore, granted in part and denied in part. Betco is to respond to the motion for summary judgment as set forth above on or before November 21, 2014. Until that motion is resolved, the court will reserve on the Peacocks' other requests to close discovery, impose further Rule 37(c) sanctions, and reschedule the bench trial in this matter.[11]

ORDER

IT IS ORDERED that:

1. Defendants Malcolm D. Peacock, Marilyn Peacock, B. Holdings, Inc. and E. Holdings, Inc.'s motion to amend the scheduling order and for other relief (dkt. #86) is GRANTED IN PART AND DENIED IN PART, consistent with the opinion above.

2. Plaintiff Betco Corporation is ordered to respond to the motion for summary judgment (dkt. #63) on or before November 21, 2014, with defendants to file a reply, if any, not later than 14 days thereafter.

Entered this 20th day of October, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge

[11] In light of the possibility that this case will proceed to trial on an expedited basis, the parties are strongly encouraged to complete any remaining discovery sooner rather than later.