IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JACK TYLER ENGINEERING COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 03-2060MaV**
	)	
ITT FLYGT CORPORATION and ITT INDUSTRIES,	)	
	)	
Defendants.	)	

ORDER DENYING DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S EXPERT REPORT AND TO PRECLUDE THE PLAINTIFF FROM USING ANY EXPERT TESTIMONY AT TRIAL AND FOR RULE 37(B)(2) SANCTIONS

On May 12, 2004, the defendants, ITT FLYGT Corporation and ITT Industries, filed a pleading entitled "Brief in Support of Defendants' Motion to Strike the Plaintiff's Expert Report and Preclude the Plaintiff from Offering Any Expert Testimony at Trial, for Summary judgment, and for Rule 37(b)(2) Sanctions and in Opposition to Plaintiff's Motion for a Voluntary Dismissal Without Prejudice." The defendants seek to strike the plaintiff's expert as a sanction for the plaintiff's alleged discovery abuses in connection with its expert designation and its production of documents. The portions of the motion relating to the motion to strike and the motion for sanctions were referred to the United States Magistrate Judge for determination. For the reasons that follow, those portions of the defendants' motion are denied.

Jack Tyler Engineering Company ("Tyler") filed suit against the defendants, ITT FLYGT Corporation and ITT Industries ("Flygt"), on December 23, 2002, alleging that Flygt unlawfully terminated contracts with the plaintiff for the purchase of certain industrial and construction supplies for resale. The court entered a Rule 16(b) scheduling order on June 17, 2003, establishing December 31, 2003, as the deadline for the plaintiff to make its expert disclosures. The deadline for completing discovery was fixed at April 30, 2004. This case is set for jury trial on Monday, July 19, 2004.

I. <u>Expert Designation</u>

On December 31, 2003, the plaintiff, via facsimile, identified Dr. Lonnie Talbert, an economist, as its damages expert and provided Flygt with a copy of Talbert's curriculum vitae. Because the plaintiff's expert disclosures failed to comply with Rule 26(a)(2), the defendants moved to strike Dr. Talbert as an expert. By order entered January 27, 2004, the court denied the motion to strike, extended to February 16, 2004 the deadline for the plaintiff to file an expert report in order for the expert to obtain Tyler's 2003 financial information for his report, and warned the plaintiff that failure to comply with the order and to comply fully with Rule 26(a)(2)(B) could result in Dr. Talbert being stricken as an expert. The order allowed Flygt until March

30, 2004, to file its expert disclosures.

On February 16, 2004, Tyler filed its Rule 26(a)(2)(B) expert report. After receiving the report, Flygt repeatedly requested dates when Dr. Talbert would be available for deposition. During the month of March 2004, an exchange of correspondence took place but no dates were provided. Because Tyler failed to provide dates for Dr. Talbert's deposition, Flygt's counsel issued a subpoena for Dr. Talbert, and Dr. Talbert was deposed on April 29, 2004. At his deposition, Dr. Talbert testified that the damage calculations in his report were inaccurate and that he would not rely on them at trial; that he didn't know when he would complete his revised calculations; and that he did not rely on Tyler's 2003 financial information for his report. Flygt argues that because Dr. Talbert's report was inaccurate, the plaintiff has therefore failed to comply with its expert witness obligations under Rule 26(a)(2)(B) to provide a complete written report of all his opinions within the time period allowed by the magistrate judge.

The plaintiff explains that the damage calculations in this case are difficult because the plaintiff has continued to operate the business with replacement lines of product. In addition, the plaintiff concedes that in his initial report Dr. Talbert failed to take into consideration the mitigating income from the replacement lines, a fact he realized after reviewing the defendant's expert

report. Moreover, just five days before he was deposed, Dr. Talbert learned that the sales figures provided to him were incorrect in that they were based on Tyler's purchase price rather than sale price. Upon learning this information, Dr. Talbert immediately tried to recalculate his figures prior to his deposition but was unable to do so. Given Dr. Talbert's inability to recalculate his numbers prior to his deposition, the plaintiff's counsel promptly advised Flygt's counsel of the problem, but according to Tyler, Flygt's counsel insisted on proceeding with Dr. Talbert's deposition as scheduled with full knowledge that Dr. Talbert intended to supplement his report with correct numbers in the near future. Dr. Talbert has now completed and filed a signed supplemental report setting forth his new calculations. The plaintiff is willing to allow a supplemental deposition of Dr. Talbert if the defendants wish to take one, and the plaintiff is willing to bear the cost of flying Dr. Talbert to Memphis for a supplemental deposition.

In essence, Flygt seeks to strike Dr. Talbert as an expert because he has changed his opinion from that stated in his original report. The court considered a very similar situation in *Porter v. Hamilton Beach/Proctor-Silex, Inc.*, No. 01-2970MaV, 2003 WL 21946595 (W.D. Tenn., July 28, 2003) and concluded that the expert report should not be stricken because supplementation of an expert

report was governed by Rule 26(a)(2)(c) and Rule 26(a)(3) in the absence of a court-imposed supplementation deadline, and the supplementation was timely. The same is true here.

Rule 26(a)(2)(C) directs the timing of expert disclosures:

> **These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).**

FED. R. CIV. P. 26(a)(2)(C).

Rule 26(e) states:

> **(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:**
>
> > **(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B), the duty extends both to information contained in the report and to information provided through a deposition of**

> **the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.**

FED. R. CIV. P. 26(e). Rule 26(e) requires supplementation of disclosures when a "party learns that in some material respect, the information disclosed [under subdivision (a)] is incomplete or incorrect." *Id.* It requires disclosure if ordered by the court or in certain enumerated circumstances. With respect to an expert, the duty to supplement extends both to information contained in the report and to information provided through a deposition of the expert. The supplementation of expert testimony must be made by the time disclosures are due under Rule 26(a)(3).

Here, trial is scheduled for July 19, 2004. Rule 26(a)(3) disclosures are due thirty days before trial, that is, by June 19, 2004. Dr. Talbert's supplemental report was submitted on May 21, 2004, well in advance of the Rule 26(a)(3) deadline. As such, the supplemental report of Dr. Talbert is timely.

Additionally, as the court noted in *Porter*, the absence of an expert supplementary disclosure deadline does not preclude supplementation by an expert. As the advisory notes to Rule 26 observes, it may "be useful for the scheduling order to specify the time or times when the supplementation should be made." FED. R. CIV. P. 26 advisory committee's note to 1993 amendments. If a

court fails to designate an expert supplementation deadline, then Rule 26(e) controls and the supplemental reports must be made by the Rule 26(c) deadline.

Based on the foregoing, Flygt's motion to strike Dr. Talbert as an expert is denied. Because Dr. Talbert's supplementary report substantially changes his prior opinion, the court will allow Flygt to depose Dr. Talbert a second time, within fifteen days from the date of service of this order. Tyler is directed to make Dr. Talbert available for deposition in Memphis at its expense and to pay all reasonable expenses of Flygt, including attorney fees, associated with the second deposition of Dr. Talbert.

II. Document Production

In addition to the matters associated with expert designation, Flygt also seeks dismissal of this case as a Rule 37 sanction for repeated discovery abuses in connection with document production Flygt served its first set of written discovery requests on Tyler in September of 2003. Having received no written response by the time responses were due, Flygt filed a motion to compel. By order dated January 27, 2004, this court granted Flygt's motion to compel and ordered Tyler to produce responsive documents within fifteen days. In compliance with the order, Tyler provided 15,000 pages of documents to Flygt. Flygt claims, however, that only a portion of the documents were responsive and that the remainder of the

documents were useless. In addition, Flygt claims that Tyler failed to produce two critical responsive documents: (1) Tyler's 2000 tax return, and (2) Tyler's 2003 financial statement. After three letter demands from Flygt for these two documents, Tyler produced them on April 28, 2004, the day before Dr. Talbert's deposition.

The plaintiff points out that it provided what it believed to be a complete 2000 tax return in its initial production, and upon being advised that the return was incomplete, it located and produced a completed 2000 tax return.

Flygt served a second set of written discovery requests on Tyler on February 23, 2004, consisting of two additional interrogatories and six additional document requests, Requests 14 - 19. Tyler failed to timely respond on Thursday, March 25, 2004, the day the responses were due. The next day, Flygt's counsel notified Tyler's counsel that responses were now due to the second set of written discovery and requested that the responses be provided no later than Friday, April 2, 2004. On Tuesday, April 6, 2004, which was eleven days late, Tyler's counsel served written answers to Flygt's second set of discovery but did not provide any documents. Instead, he indicated that responsive documents had previously been provided and new ones would be provided under separate cover. Some of the documents were produced on April 28,

2004, during depositions of some of the plaintiff's witnesses. Flygt complains, however, that no documents responsive to Requests Nos. 15 through 18 concerning Tyler's sales by product lines have ever been produced.[1] The plaintiff insists that Flygt has in its possession the plaintiff's records indicating the amount of the plaintiff's sales by year and by product.

Rule 37(d) of the Federal Rules of Civil Procedure provides that if a party fails to serve answers to interrogatories or respond to requests for production of documents, the court may, upon motion, impose sanctions. The authorized sanctions include dismissal of the action and reasonable expenses, including attorney fees, caused by the failure of a party to act. Fed. R. Civ. P. 37(b)(2)(C) & (d).

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[1] **These four requests seek the following documents:**

> **Request No. 15. Documents sufficient to show, separately by year, the plaintiff's total sales of Flygt products from 2000 through 2003.**
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> **Request No. 16. Documents sufficient to show, separately by year, the total commissions from 2000 through 2003 by the plaintiff from Flygt.**
>
> **Request No. 17. Documents sufficient to show, separately by year, the sales by plaintiff of KSB products from 2000 through 2003.**
>
> **Request No. 18. Documents sufficient to show, separately by year, the sale by plaintiff of Interon products from 2000 through 2003.**

The Sixth Circuit regards the sanction of dismissal under Rule 37 for failure to cooperate in discovery to be "the sanction of last resort." *Beil v. Lakewood Eng'g and Mfg. Co.*, 15 F.3d 546, 552 (6th Cir. 1994). Dismissal may be imposed "only if the court concludes that a party's failure to cooperate is due to willfulness, bad faith or fault." *Regional Refuse Sys. v. Inland Reclamation Co.*, 842 F.2d 150, 154 (6th Cir. 1988). In determining whether to dismiss an action for failure to cooperate in discovery, the court should consider (1) whether the party acted with willfulness, bad faith, or fault; (2) whether prejudice resulted from the discovery violation; (3) whether the party had been warned that her conduct could lead to extreme sanctions; and (4) whether less drastic sanctions were previously imposed or should be considered. *Freeland v. Amigo*, 103 F.3d 1271, 1277 (6th Cir. 1997); *Bass v. Jostens, Inc.*, 71 F.3d 237, 241 (6th Cir. 1995); *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990).

Here, the court does not find any evidence of wilfulness or bad faith on the part of the plaintiff. The plaintiff timely complied with the court's order of January 27, 2004, with the exception of two documents, one of which had previously been produced but in an incomplete fashion and the other of which was later produced albeit untimely. The plaintiff claims that sales documents are in the possession of Flygt. Flygt has not

demonstrated any prejudice as a result of these alleged dilatory production of documents but merely frustration.

Accordingly, the defendants' motion for Rule 37 sanctions is denied.

IT IS SO ORDERED this 8th day of June, 2004.

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DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE