

IN THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF OHIO
 WESTERN DIVISION

Glenn Graff, <i>et al.</i> ,	:	Case No. 1:09-cv-670
	:	
Plaintiffs,	:	Chief Judge Susan J. Dlott
	:	
v.	:	Magistrate Judge Karen L. Litkovitz
	:	
Haverhill North Coke Company, <i>et al.</i>	:	ORDER AFFIRMING MAGISTRATE
	:	JUDGE’S ORDERS ENTERED ON
Defendants.	:	DECEMBER 22, 2010 AND MARCH 24,
	:	2011 AND OVERRULING
	:	OBJECTIONS THERETO

This matter is before the Court on Plaintiffs’ Objections to Magistrate Judge’s Order Entered on December 22, 2010 (doc. 46) and Plaintiffs’ Objections to Portions of the Order Entered on March 24, 2011 (doc. 93). Chief Judge Susan J. Dlott and Magistrate Judge Karen L. Litkovitz, jointly, held a hearing on both sets of Objections on April 21, 2011. For the reasons that follow, the Court AFFIRMS the Magistrate Judge’s Orders (docs. 40 and 84) and OVERRULES the Objections. The Court also orders Defendants to supplement their discovery responses as set forth herein.

I. RULE 72(a) STANDARD

Plaintiffs state objections to the Magistrate Judge’s discovery Orders pursuant to Rule 72(a) of the Federal Rules of Civil Procedure. For nondispositive matters, a district judge must “modify or set aside any portion of the order that is clearly erroneous or contrary to law.” Fed. R. Civ. P. 72(a). The clearly erroneous standard applies to a magistrate judge’s findings of fact and the contrary to law standard to her conclusions of law. *See Gandee v. Glaser*, 785 F. Supp. 684, 686 (S.D. Ohio 1992). “A finding is clearly erroneous where it is against the clear weight

of the evidence or where the court is of the definite and firm conviction that a mistake has been made.” *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275, 281 (6th Cir. 1991), *overruled on other grounds*, *Kline v. Tenn. Valley Auth.*, 128 F.3d 337 (6th Cir. 1997); *see also Hood v. Midwest Sav. Bank*, No. C2-97-218, 2001 WL 327723, at *2 (S.D. Ohio Mar. 22, 2001). A decision is contrary to law “if the magistrate has misinterpreted or misapplied applicable law.” *Hood*, 2001 WL 327723, at *2 (internal quotation and citation omitted).

II. ANALYSIS

A. Verification/Certification Issue

In the Objections and at the hearing, Plaintiffs repeatedly argued that the Magistrate Judge erred by not requiring Defendants to expressly certify that their responses to Interrogatories were “complete.” Rule 26(g) requires that every discovery response be signed by at least one attorney of record as follows:

By signing, an attorney or party certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

Fed. R. Civ. P. 26(g).

Additionally, Rule 33 requires a person responding to interrogatories to answer each interrogatory “separately and fully in writing under oath” and to sign the responses. Fed. R. Civ. P. 33(b)(2) and (4). Finally, Rule 26(e) requires a party to supplement their response in a timely manner if “the party learns that in some material respect the disclosure or response 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.” Fed. R. Civ. P. 26(e)(1)(A). An incomplete answer must be treated by the Court as a failure to answer. Fed. R. Civ. P. 37(a)(4).

Plaintiffs’ objection is not well-taken. The Magistrate Judge did not grant leave to Defendants to evade their obligations under the Federal Rules of Civil Procedure. Plaintiffs have not established that Defendants failed to sign the Interrogatory responses. The Court will affirm the Magistrate Judge’s Order as to this issue.

B. Plaintiffs’ Interrogatories 5 and 6

Plaintiffs seek discovery concerning the stack collapse in Interrogatory 5 and concerning the FGD failure in October 2009 in Interrogatory 6. (JX-2000 at 2, 3.)¹ In the December 22, 2010 Order, the Magistrate Judge ordered Defendants to “provide complete responses to subsections (c) and (f) by fully identifying responsive documents, photographs, and/or emissions data by specific reference to bates stamped page numbers and by identifying the specific search terms used to retrieve electronic documents responsive to Interrogatory No. 5 [and 6].” (Doc. 40 at 3.) The Magistrate Judge also ordered Defendants to “provide supplemental information not contained in the 2009 Fourth Quarter Deviation Report that is responsive to Interrogatory No. 6.” (*Id.*) The Order specifically addressed only subsections (c) and (f) of Interrogatories 5 and 6.

¹ Plaintiffs submitted to the Court a copy of exhibit JX-2000 at the hearing.

Plaintiffs were directed in the Order to “file formal discovery motions” if they “determine[d] that additional discovery issues need[ed] the Court’s attention.” (*Id.* at 12.) Accordingly, the Court’s review of Plaintiffs’ objections concerning Interrogatories 5 and 6 is limited to subsections (c) and (f) of each.

At the hearing and in their briefs, Plaintiffs sought additional discovery including a “root cause analysis study” (“RCA study”), dispersion modeling documents, and additional emission calculations and/or estimates.

Defendants have identified the RCA study on a privilege log provided to Plaintiffs. The privilege log issue now is pending before the Magistrate Judge as an initial matter and will not be adjudicated here.

Regarding the dispersion modeling documents, Defendants asserted that Plaintiffs already have dispersion modeling documents which were contained in the public records. However, Defendants stated that they would investigate whether new dispersion modeling documents were created in relation to the stack collapse and would produce those documents if they existed. Defendants’ agreement to produce those records if they exist resolves Plaintiffs’ objection on this issue.

Finally, regarding the emission calculations or estimates, Defendants represented to the Court that the calculation table provided to Plaintiffs, contained in Defendants’ Exhibit B (and identified at the hearing), is the only calculation or estimate of which they are aware. Defendants’ Exhibit B does not state the calculations used or identify the underlying data used to reach the results stated in the table. The Court orders Defendants to identify and produce the relevant underlying calculations and/or data no later than May 21, 2011. Additionally,

Defendants have a duty to timely supplement their response to subsections (c) and (f) of Interrogatories 5 and 6 to the extent required by Rule 26(e) of the Federal Rules of Civil Procedure.

The Court determines that the Magistrate Judge's Order was not clearly erroneous or contrary to law, but Defendants are ordered to supplement their responses as set forth above.

C. Interrogatory 7(f)

Plaintiffs seek FGD failure-related emission calculations and emission estimates in Interrogatory 7(f). (JX-2000 at 4.) In the March 24, 2011 Order, the Magistrate Judge denied a motion to compel a response to Interrogatory 7(f) because she determined that “the likely benefit to plaintiffs of obtaining all documents and emission calculations which ‘relate to’ every Other FGD malfunction or deviation under Interrogatories 7(c) and 7(f) is outweighed by the expense and burden on defendants of producing such information.” (Doc. 84 at 6.)

At the hearing, the parties continued to disagree as to whether Plaintiffs could determine the emission calculations and emission estimates responsive to 7(f) from the data and documents already provided. The Court resolved this dispute at the hearing by ordering Defendants to demonstrate to Plaintiffs how to determine the calculations and estimates from relevant data and documents already produced. Plaintiffs are ordered to identify five (5) incidents to serve as demonstrative examples no later than May 21, 2011. Within one month from the date of identification, the parties (or counsel for the parties) are to meet for the demonstration. Defendants are to demonstrate to Plaintiffs, step-by-step, how the emission calculation or estimate for each demonstrative example can be determined.

D. Interrogatories 8-10

Plaintiffs seek discovery concerning bypass vent openings in Interrogatories 8-10. (JX-2000 at 5-6.) In the December 22, 2010 Order, the Magistrate Judge determined that Defendants had provided a complete response to Interrogatory 8, subject to the duty to supplement pursuant to Rule 26(e) of the Federal Rules of Civil Procedure. (Doc. 40 at 4.) As to Interrogatories 9 and 10, the Magistrate Judge ordered Defendants to provide responsive data to the requests for the fourth quarter of 2010 and to “attest that the information contained in the deviation reports provides complete and comprehensive responses to these requests.” Subsequently, Defendants supplemented their responses to the Interrogatories on January 10, 2010. (JX-2000.) Plaintiffs then stated in their Reply brief as to Interrogatories 8-10 that “Plaintiffs, at this time, ask only that the Defendants be required to promptly verify that their February 8, 2011 correction (of their January 10 final answer), is a true and complete response to the question posed.”

Despite the limited scope of Plaintiffs’ written objection (as narrowed in the Reply brief), Plaintiffs argued at the hearing that they believed Defendants have additional responsive documents. Defendants denied knowledge that additional responsive documents existed. The Court has no basis on which to conclude that Defendants are withholding responsive documents or information. The Magistrate Judge’s Order was not clearly erroneous or contrary to law. Plaintiffs’ objections on Interrogatories 8-10 are not well-taken. However, the Court reminds Defendants of the duty to timely supplement their responses as appropriate pursuant to Rule 26(e) of the Federal Rules of Civil Procedure.

E. Interrogatory 13

Plaintiffs seek discovery regarding air pollution controls considered or evaluated by Defendants in Interrogatory 13. (DX-2000 at 8.) In the December 22, 2010 Order, the

Magistrate Judge determined that Defendants had provided a complete response to Interrogatory 13. Despite Plaintiffs' arguments to the contrary, the Court has no objective basis upon which to conclude that Defendants are withholding responsive documents or information.² Plaintiffs' objection to the Magistrate Judge's Order on Interrogatory 13 is not well-taken. Defendants retain the duty to timely supplement their responses as appropriate pursuant to Rule 26(e) of the Federal Rules of Civil Procedure.

F. Interrogatories 14, 15, and 22

Plaintiffs seek discovery concerning sources and potential sources of air pollution emissions in Interrogatories 14, 15, and 22. (JX-2000 at 8, 9, and 13.) The Magistrate Judge concluded that Defendants had adequately responded to these Interrogatories. (Doc. 40 at 6, 7, and 10.) Despite Plaintiffs' arguments that Defendants have additional relevant information to disclose or documents to produce, the Court has no objective basis upon which to conclude that Defendants are withholding responsive documents or information. Plaintiffs' objections about these Interrogatories are not well-taken. However, the Court again reminds Defendants of the duty to timely supplement their responses as appropriate pursuant to Rule 26(e) of the Federal Rules of Civil Procedure.

G. Plaintiffs' Requests for Production of Documents

In the December 22, 2010 Order, the Magistrate Judge ordered Defendants to determine if alleged deficiencies identified by Plaintiffs could be cured and to produce any additional

² Specifically, Plaintiffs' counsel stated that he was relying on information he learned via the attorney-client privilege to support his assertion that Defendants had additional information concerning air pollution controls. Plaintiffs' counsel was unable to reveal the information protected by the privilege, leaving the Court with no objective basis to conclude that the discovery is incomplete.

responsive documents by January 10, 2011. She furthered ordered the parties to brief any additional disputed items if they could not resolve those disputes extra-judicially. (Doc. 40 at 11.) For the reasons stated at the oral argument, Plaintiffs' objections as to the Requests for the Production of Documents are not well-taken.

III. CONCLUSION

For the foregoing reasons, the Magistrate Judge's Orders Entered on December 22, 2010 and March 24, 2011, respectively, are **AFFIRMED** and Plaintiffs' Objections thereto are **OVERRULED**. Defendants have a duty to supplement their discovery responses as set forth herein.

IT IS SO ORDERED.

s/Susan J. Dlott
Chief Judge Susan J. Dlott
United States District Court