UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MEDPACE, INC.,	:	Case No. 1:12-cv-179
	:	
Plaintiff,	:	Judge Timothy S. Black
	:	
vs.	:	
	:	
BIOTHERA, INC., *et al*.,	:	
	:	
Defendants.	:	

ORDER DENYING DEFENDANT'S MOTION FOR INVOLUNTARY DISMISSAL AND CIVIL CONTEMPT AND GRANTING DEFENDANT'S MOTION FOR SANCTIONS (Doc. 82)

This civil action is before the Court on Defendant's motion for involuntary dismissal, civil contempt, and sanctions (Doc. 82), and the parties' responsive memoranda (Docs. 90, 93). On December 13, 2013, the Court heard oral argument.

I. BACKGROUND

This Court's Preliminary Injunction of November 6, 2012 required Medpace to return Biothera's Trial Property "forthwith" (Doc. 36 at 18), and the Court's Order of December 14, 2012 required Medpace to return Biothera's Trial Property "by 12/21/12" (Doc. 42). These Orders were based on the express finding that Biothera had presented "compelling evidence" of potential irreparable harm because "prospective acquirers will not proceed with a sale without the Trial Property." (Doc. 36 at 15). Throughout 2013, Biothera repeatedly sought, and received, Medpace's assurance that Medpace had complied with the Court's Orders and returned a full and complete set of Biothera's Trial Property. For instance, on January 8, 2013, counsel for Medpace provided that:

- "In your January 4 letter you ask, once again, for Medpace to confirm that it has produced all of the trial data. I will confirm, once again, that it has."
- "Medpace has fully complied with the Court's November 6, 2012 order."
- "Medpace produced all of the trial data in its possession for the four Biothera studies."
- "Medpace did not withhold, deduplicate, redact, or alter any of the trial data before production."
- "Medpace produced the trial data in accordance with the Court's November 6, 2012 Order and regardless of whether the trial data was responsive to any of Biothera's discovery requests."

(Cockson Decl. ¶ 10, Ex. I, at 3).

However, Medpace now suddenly confesses that monitoring reports, site contacts, and protocol deviations were "not uploaded to the FTP site as a part of the Trial Master File" (and thereby produced to Biothera) until October 2013, nearly a year after this Court's Orders. (Cockson Decl. ¶ 11, Ex. J, at 1-2; ¶ 12, Ex. K, at 45, 55).

Following the preliminary injunction, Biothera repeatedly contacted Medpace and made multiple "demands" that Medpace comply with this Court's Orders and return Biothera's Trial Property as fast as possible. (Doc. 90 at 6). However, Medpace did not undertake the steps of verifying that information from ClinTrak had been copied to the FTP server for Biothera to access. Medpace's corporate representative, Terri Gaffney, testified that she had <u>not done anything</u> to determine if documents were missing from Biothera's colorectal Trial Master Files. (Cockson Decl. ¶ 4 at 114-115). Ms. Gaffney was <u>not aware of any review taking place</u> to determine if monitoring reports were in one

of the applicable Trial Master Files (*Id.* at 53), even though monitoring reports are required by applicable regulations, and by Medpace's own standard operating procedures, to be in a Trial Master File (*Id.* at 74).

On May 24, 2013, Biothera produced the reports of its expert witnesses: Stacie Switzer, its industry expert, and Renee Marino, its damages expert. These reports affirmatively disclosed, and were fundamentally premised upon, Biothera's ongoing audit of the Trial Property, and they clearly reflected that Biothera thought that critical pieces of the Trial Property were either not performed or not produced by Medpace.

Ms. Switzer's report explained that, "[u]pon receipt of the Trial Property, Biothera had concerns about the organization, completeness, and accuracy of the Trial Property, so it hired a third-party auditor to review and audit the TMFs." (Cockson Decl. ¶ 13, Ex. L, at 28). Her report also noted the audit's preliminary findings: "(1) routine monitoring reports are missing; (2) regulatory packages are missing; (3) enrollment trackers are missing; (4) randomization documentation is missing; and (5) communication plans are missing." (*Id.*) Moreover, Ms. Switzer's first two bases for concluding that Medpace's performance did not satisfy the standards in the MSA and Task Orders were explicitly based on the audit. (*Id.* at 30-31).

Likewise, the May 24, 2013 report of Ms. Marino, Biothera's damages expert, also explicitly notified Medpace that Biothera was auditing the Trial Master Files. (*See* Cockson Decl., ¶ 20, Ex. R, at ¶ 45). Moreover, Ms. Marino's report, like Ms. Switzer's, was premised on the idea that Biothera's Trial Master Files had been returned by January

2013. (*Id.* at ¶¶ 8, 45, Schedule 2). In fact, Ms. Marino's calculation of conversion damages was based on the amount of time Biothera's Trial Property was withheld by Medpace, and she relied on Medpace's representations in measuring that time period.

Thus, Medpace knew from at least May 24, 2013 that Biothera was concerned about numerous documents missing from Biothera's Trial Master Files. (Doc. 90 at 8). In fact, in early June, Medpace was sufficiently concerned about the ongoing Trial Property audit that it moved the Court to extend expert report deadlines to allow Biothera to complete the process, and, on June 14, 2013, the Court amended the Calendar Order to allow for supplemental expert reports.

The August 5, 2013 report of Medpace's industry expert, Dr. Bertram Spilker, block quoted the portion of Ms. Switzer's report in which she lists five categories of missing documents; and his only response was that Ms. Switzer failed to demonstrate these omissions were "significant." (*See* Cockson Decl., ¶ 23, Ex. U, at 46-47). Dr. Spilker had interviewed Medpace's Ms. Gaffney on July 9, 2013, and she had again specifically confirmed that "[t]here were no missing monitoring reports for the BTCRC1031 study that I am aware of. They were all posted in ClinTrak." (*Id.* at 52, 65). Given Dr. Spilker's August report, Biothera again asked Medpace, on the last day of discovery, to confirm that it had returned all of Biothera's Trial Property; and Medpace again confirmed that it had returned all of Biothera's Trial Property. (*See* Cockson Decl. in Support of Opening Brief ¶ 13, Ex. L at 52:3-53:2; Opening Brief at 5-6).

Alas, Medpace now confesses that in late September 2013 it discovered that a "small number of documents" had not been uploaded to the FTP server (Doc. 90 at 9), and that it "immediately corrected this oversight" (*Id.* at 10). The record reveals a less favorable characterization.

Medpace uploaded approximately 800 files (which equates to well over 5,000 pages) to the FTP server on October 8, 2013. And while Medpace claims that on September 25, 2013, when it learned these documents were not included on the FTP server, it immediately uploaded these documents to the FTP site (*id.* at 9-10), and made Biothera "aware of their availability within 24 hours" (*Id.* at 2), the truth sullies Medpace more than it has acknowledged. That is, Medpace never informed Biothera of this issue by phone call, letter, email, or any other communication, and, indeed, Biothera has never formally supplemented its document production. (*See* Conners Decl. ¶ 5). Instead, Medpace simply uploaded the documents and referenced them obliquely in a subsequent 86-page supplemental expert report. This report was issued on October 9, 2013, weeks after Medpace had discovered the issue, months after fact discovery had formally closed, and shortly before Medpace's final fact witnesses were scheduled to testify.

At oral argument, the Court specifically admonished Medpace for the underhanded way in which it dealt with disclosure of the late production of the missing pieces of the Trial Property.

II. STANDARD OF REVIEW

Rule 41(b) authorizes the involuntary dismissal of an action "[i]f the plaintiff fails to prosecute or to comply with these [Federal Rules of Civil Procedure] or a court order[.]" Fed. R. Civ. P. 41(b); *Knoll v. AT&T*, 176 F.3d 359, 363 (6th Cir. 1999) ("[Rule 41(b) dismissal] is available to the district court as a tool to effect management of its docket and avoidance of unnecessary burdens on the tax-supported courts [and] opposing parties.").

In determining whether dismissal under Rule 41(b) or Rule 37(b) is appropriate, this Court must consider the following factors: "(1) whether the party's failure to cooperate is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dilatory conduct of the party; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered." *Stough v. Mayville Cmty. Sch.*, 138 F.3d 612, 615 (6th Cir. 1998). "Although none of the factors is outcome dispositve, … a case is properly dismissed by the district court where there is a clear record of delay or contumacious conduct." *Schafer v. City of Defiance Police Dep't*, 529 F.3d 731, 737 (6th Cir. 2008) (quoting *Knoll*, 176 F.3d at 363). Sanctions may include dismissal of a case when a party has "acted in bad faith" or when conduct was "tantamount to bad faith." *Laukus v. Rio Brands, Inc.*, 292 F.R.D. 485, 502-503 (N.D. Ohio 2013).

III. ANALYSIS

A. Dismissal

This Court declines to dismiss this civil action.[1] Medpace clearly erred when it: (1) failed to contact Biothera the moment Medpace realized the relevant Trial Property had not been produced; and (2) repeatedly certified that it had fully returned Biothera's Trial Property, without taking the steps to verify the truth of those representations. However, involuntary dismissal is still an extraordinary sanction.

For a party's conduct to rise to the level of culpability that warrants dismissal, its conduct must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings. *Mulbah v. Detroit Bd. of Educ.*, 261 F.3d 586, 591 (6th Cir. 2001). While the Court finds Plaintiff's conduct to be negligent, the Court does not believe that the conduct rises to the level of either intentional or reckless, although it is a close call as to the latter. Moreover, when dismissing with prejudice, the Sixth Circuit generally urges restraint and frowns upon dismissing cases under Rule 41(b) for failure to comply with court orders. (*Id.*)

B. Civil Contempt and Sanctions

To warrant civil contempt, this Court needs to find, by clear and convincing evidence, that Medpace violated a definite and specific order of this Court requiring it to perform or refrain from performing a particular act. *Johnson v. Glover*, 934 F.2d 703, 707 (6th Cir. 1991).

[1] The Court warns Medpace that the Court will dismiss Medpace's claims if Medpace engages in further egregious misconduct.

Biothera has proven as much here.[2] However, since the facts support a finding that Medpace was unaware, (albeit negligently unaware), that it was violating this Court's Orders, the Court declines to find civil contempt *per se*. Still, Biothera was clearly prejudiced by Medpace's negligence, and the Court intends to sanction Medpace's misconduct, pursuant to the Court's inherent authority, by awarding to Biothera recovery of its reasonable attorneys' fees and costs improperly caused by Medpace's failure to timely produce portions of the Trial Property. *See, e.g., First Bank of Marietta v. Hartford Underwriters Ins. Co*., 307 F.3d 501, 513 (6th Cir. 2002) (courts possess inherent authority to sanction bad faith, vexatious, or wanton conduct without regard to whether such conduct could be sanctioned under other applicable rules or statutes).[3]

Biothera's breach-of-contract and conversion claims are based upon the absence of documents that Medpace was obligated to provide, and Biothera's theories of liability and damages models assume the absence of documents that Medpace did not provide until ten months after the deadline imposed by the Court. Biothera has incurred hundreds of thousands of dollars in professional fees, which represent thousands of hours of work, preparing its breach-of-contract and conversion claims based on Medpace's now-false

[2] An award of compensatory damages and attorneys' fees and costs is the typical sanction for civil contempt. *Williamson v. Recovery Ltd. P'ship*, 467 F. App'x 382, 392-402 (6th Cir. 2012) (affirming an order of contempt for willfully violating a discovery order and awarding $234,982 in attorneys' fees and costs).

[3] Additionally, federal courts have the inherent power to impose sanctions to prevent the abuse of the judicial process. *Chambers v. NASCO, Inc*., 501 U.S. 32, 43-46 (1991). *See also Link v. Wabash R.R.*, 370 U.S. 626, 629-30 (1966) (federal trial courts have the inherent power to manage their own dockets).

certifications. (*See* Cockson Decl. ¶ 25). This constitutes legally cognizable prejudice under this Circuit's precedents. *See, e.g.*¸ *Harmon v. CSX Transp., Inc.*, 110 F.3d 364, 368 (6th Cir. 1997) ("failure to cooperate in discovery" which wasted defendant's "time, money, and effort in pursuit of cooperation which [the plaintiff] was legally obligated to provide" constituted prejudice). Accordingly, this Court shall award attorney fees and costs to Biothera. Within 21 days of this Order, Biothera shall present evidence establishing its attorneys' fees and costs caused by Medpace's failure to timely produce portions of the Trial Property.

IV. CONCLUSION

Accordingly, for the reasons stated here, Defendant's motion for involuntary dismissal and civil contempt is **DENIED**, but its motion for sanctions is **GRANTED**. (Doc. 82). Defendant shall file a motion for attorney fees and costs within 21 days of the date of this Order.[4] Additionally, counsel shall meet and confer and then file with the Court a joint proposed amended calendar order within 14 days of the date of this Order.

IT IS SO ORDERED.

2/3/14

/s/ Timothy S. Black
Timothy S. Black
United States District Judge

[4] While this Court intends to mitigate the prejudice to Biothera with an award of attorneys' fees and costs, the Court strongly encourages the parties not to engage in excessive satellite litigation regarding the computation of fees and costs. The parties are aware that it is essentially impossible to determine exactly what fees and costs have been wasted as a result of Medpace's failure to produce the entirety of the Trial Property. While an award of fees and expenses is necessary, this Court does not intend to award a windfall. Moreover, given the history of discovery disputes in this case, the Court is convinced that these issues might have been avoided had the parties been engaged in cooperative litigation. The fair and efficient resolution of complex litigation requires counsel to act cooperatively. *See* Manual for Complex Litigation § 10.21 (4th Ed. 2004). Here, there is enough blame to go all the way around the room.