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

THE LITTLE HOCKING WATER ASSN., INC.,

Plaintiff,

vs. **Civil Action 2:09-cv-1081**
Judge Marbley
Magistrate Judge King

E.I. DU PONT DE NEMOURS & CO.,

Defendant.

OPINION AND ORDER

This matter is before the Court on *Dr. Simonich's, Dr. Peden-Adams', Dr. Schwartz's, Dr. Kannan's, Dr. Kramer's, Mr. Dilley's, and Little Hocking's Motion to Quash Subpoenas*, ECF 337 ("*Motion to Quash*"). For the reasons that follow, the *Motion to Quash* is **GRANTED**.

I. BACKGROUND

In approximately February 2013, plaintiff Little Hocking timely produced seven primary expert reports, *i.e.*, the reports of Drs. Franklin W. Schwartz, Kurunthachalam Kannan, Staci Simonich, Michael Kavanaugh, Margi Peden-Adams and Shira Kramer, and of Mr. Dilley. Those reports identified, *inter alia*, the experts' rate of compensation, including a breakdown of different rates charged for different services. *Exhibit 2*, attached to *Reply*. Based on Little Hocking's representation that it did not seek attorney's fees and other litigation costs as damages and that it did not intend to pursue, as a component of damages, a claim for lost profits and lost corporate opportunity by reason of fees paid to attorneys and

litigation consultants, the Court refused DuPont's request for discovery of invoices submitted by litigation consultants. *Order*, ECF 179, p. 2. The Court later ordered that all expert discovery be completed by May 22, 2014, and that motions for summary judgment be filed no later than June 15, 2014. *Order*, ECF 311, p. 1. After Little Hocking resisted the scheduling of its expert depositions, the Court ordered that the first of these depositions proceed on April 16, 2014. *Opinion and Order*, ECF 324, pp. 11-12 (ordering that the deposition of Dr. Simonich proceed on that date). The depositions of the remainder of Little Hocking's experts apparently continued through the discovery completion deadline. *See Exhibit 17*, pp. 194-95, attached to *Reply* (excerpt from Dr. Kramer's deposition taken on May 22, 2014). Prior to the depositions of Drs. Kramer, Kannan, Kavanaugh, Schwartz and Peden-Adams, and of Mr. Dilley, Little Hocking produced all documents considered and relied upon by these experts. *Declaration of Robin A. Burgess*, ¶ 6 ("*Burgess Declaration*"), attached as *Exhibit 1* to the *Reply*. During its depositions of those experts, DuPont had the opportunity to question the deponents about compensation for work performed as testifying experts; indeed, in some instances, DuPont in fact examined the deponents on this topic. *See*, *e.g.*, *Exhibit 3*, pp. 56-57 (excerpt from Dr. Simonich's deposition), *Exhibit 16*, pp. 96-100 (excerpt from Dr. Peden-Adams' deposition taken on May 9, 2014), *Exhibit 17*, pp. 194-95 (excerpt from Dr. Kramer's deposition taken on May 22, 2014). Little Hocking also permitted questioning regarding whether its experts served in any other capacity for Little Hocking, such as a litigation consultant, in addition to

serving as a testifying expert witness. *See*, *e.g.*, *Exhibit B*, pp. 49-50[1] (excerpt from Dr. Simonich's deposition, testifying that she understood from the first meeting with Little Hocking counsel that it "could be the case" and "was a potential" that she could testify as an expert in the litigation), *Exhibit C*, pp. 77-79 (excerpt from Dr. Schwartz's deposition taken on April 22, 2014, reflecting that he had been disclosed as a retained expert in March 2013 and that his work as a litigation consultant had continued into 2014), *Exhibit E*, pp. 13-15, 18 (excerpt from Dr. Peden-Adams' deposition taken on May 9, 2014, testifying that she was a litigation consultant for years before becoming a testifying expert in January 2013), *Exhibit F*, pp. 31-33 (excerpt from Dr. Kannan's deposition taken on May 14, 2014, testifying that Little Hocking retained him as a litigation consultant in the summer of 2009), attached to *Defendant E. I. du Pont de Nemours and Company's Response in Opposition to Motion to Quash Subpoenas*, ECF 353 ("*Opposition*"); *Exhibit 3*, pp. 54-55 (excerpt from Dr. Simonich's deposition, responding that she could not recall whether she performed services for Little Hocking that were not related to litigation testimony), attached to *Reply*. However, Little Hocking objected to more detailed disclosure regarding the nature and scope of certain experts' work as litigation consultants. *See, e.g., Exhibit C*, pp. 78-80 (forbidding more detailed questioning regarding Dr. Schwartz's work as a litigation consultant).

On May 7, 2014, DuPont asked Little Hocking to produce certain compensation information related to Little Hocking's experts:

[1] The cited pages are the deposition transcript pages.

> [P]lease also provide the following in advance of the upcoming depositions [which DuPont represents to be the depositions of Drs. Peden-Adams, Kramer, and Kannan] retention agreements between Little Hocking and/or any of its attorneys and the deponent; copies of invoices submitted by the deponent to Little Hocking and/or any of its attorneys; communications between the deponent and Little Hocking and/or its attorneys regarding compensation; any Form 990 provided by Little Hocking and/or its attorneys to the deponent.

Exhibit D (email dated May 7, 2014), attached to *Opposition*. During the deposition of Dr. Peden-Adams, counsel for Little Hocking acknowledged receipt of that email and advised that Little Hocking was "still considering" whether or not to produce Dr. Peden-Adams' litigation consultant agreement. *Exhibit E*, pp. 68-69, attached to *Opposition*.

On May 20, 2014, DuPont filed a notice of its intent to serve subpoenas on May 28, 2014 "or as soon thereafter as service may be effectuated" on Mr. Dilley and Drs. Kannan, Kramer, Peden-Adams, Schwartz and Simonich, seeking production of the following information:

> Retention agreements and/or contracts between you and Little Hocking and/or any of its attorneys; copies of invoices submitted by you to Little Hocking and/or any of its attorneys; any timekeeping records; communications between you and Little Hocking and/or its attorneys regarding compensation; any Form 990 provided to you by Little Hocking and/or its counsel.

Notice of Intent to Serve Civil Case Subpoena, ECF 331, p. 1 and *Exhibit A* (proposed subpoenas) attached thereto.[2] The proposed subpoenas specified a production date of June 11, 2014. *Id*. DuPont ultimately served three of the subpoenas on June 2, 2014; one subpoena on June 3, 2014; and another subpoena on June 5,

[2] A similar notice and proposed subpoenas were filed on May 22, 2014. ECF 332.

2014. All subpoenas established a production date of June 11, 2014. *Exhibits 1*, *3*, *4*, *5*, *6* (subpoenas directed to Drs. Schwartz and Peden-Adams; Mr. Dilley; and Drs. Kramer and Simonich, respectively), attached to *Motion to Quash*; *Declaration of D. David Altman*, ¶ 5 ("*Altman Declaration*"), attached to *Motion to Quash*. On June 2, 2014, Dr. Kannan's subpoena was given to J. Mark Noordsy, a Senior Attorney with NYS Department of Health. *Exhibit G*, PAGEID#:14477 (affidavit of service).[3]

After DuPont issued the subpoenas, Little Hocking offered to produce invoices and redacted retention agreements relating to testifying experts. *Exhibit 13*, p. 3 (email chain), attached to *Motion for Protective Order*. DuPont refused to accept this production. *See id.*; *Opposition*, p. 2 n.2. Unable to resolve their dispute, Little Hocking filed the *Motion to Quash* on behalf of its testifying expert witnesses.[4] In the alternative, Little Hocking asks the Court to modify the subpoenas to require production of only redacted invoices relating to testifying experts' work on expert reports and redacted non-testifying consulting agreements. DuPont opposes Little Hocking's motion and proposed accommodation. *Opposition*. With the filing of the *Reply*, this matter is ripe for resolution.

II. STANDARD

Under Rule 45 of the Federal Rules of Civil Procedure, parties may command a non-party to, *inter alia*, produce documents. Fed. R.

[3] The parties disagree whether this service was sufficient to effect service on Dr. Kannan.

[4] Dr. Kannan's counsel authorized Little Hocking's counsel to move to quash the subpoena purportedly issued to Dr. Kannan. *Reply*, p. 5.

Civ. P. 45(a)(1). Rule 45 further provides in pertinent part:

> On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:
>
> > (i) fails to allow a reasonable time to comply;
> > (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
> > (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
> > (iv) subjects a person to undue burden.

Fed. R. Civ. P. 45(d)(3)(A). The movant bears the burden of persuading the court that a subpoena should be quashed. *See*, *e.g.*, *Baumgardner v. La. Binding Serv., Inc.*, No. 1:11-cv-794, 2013 U.S. Dist. LEXIS 27494, at *4 (S.D. Ohio Feb. 28, 2013); *Williams v. Wellston City Sch. Dist.*, No. 2:09-cv-566, 2010 U.S. Dist. LEXIS 122796, at *21 (S.D. Ohio Nov. 2, 2010).

III. DISCUSSION

Little Hocking argues that the Court should quash the subpoenas because they were served, if at all, after the discovery completion deadline. *Motion to Quash*, pp. 5-6; *Reply*, pp. 5-7. DuPont contends that the compressed timeline for completing expert discovery, as well as Little Hocking's refusal to produce discoverable information, "dictated the timing" of DuPont's subpoenas. *Opposition*, pp. 3-6, 9-10.

As a general matter, a party must serve its Rule 45 subpoenas within the discovery completion period. *See*, *e.g.*, *Ying Liu v. Next Step Res. of Ohio, Inc.*, No. 2:10-CV-146, 2013 U.S. Dist. LEXIS 14775, at *4 (S.D. Ohio Jan. 31, 2013) (addressing exceptions that are inapplicable in this case and granting motion to quash subpoena). In

the case presently before the Court, the uncontroverted record establishes that DuPont made no attempt to serve its subpoenas until after the May 22, 2014 expert discovery completion date. Moreover, DePont did not move to extend this deadline prior to serving its subpoenas. Although DuPont blames Little Hocking's "strategy" for DuPont's failure to meet this Court's expert discovery completion deadline, DuPont is silent as to why it failed to seek an extension of that deadline.[5] DuPont's failure to meet the Court's expert discovery completion deadline warrants the grant of the *Motion to Quash*. *See*, *e.g.*, *Thomas v. City of Cleveland*, No. 01-3064, 57 Fed. Appx. 652, at *654 (6th Cir. Jan. 30, 2003) (finding no abuse of discretion in denying a motion to compel or to quash subpoena "where the discovery was sought and the subpoena was served after the twice-extended discovery deadline").

DuPont suggests that it is now prepared to move to re-open expert discovery for the limited purpose of serving the six subpoenas. *Opposition*, n.9. The Court is not persuaded that any such request is supported by the necessary good cause. *See* Fed. R. Civ. P. 16(b)(4). DuPont has already received all materials relied on and considered by Little Hocking's experts as well as information regarding these testifying experts' rate of compensation. DuPont has also had the opportunity to depose these experts regarding these fees. Moreover, Little Hocking has offered to provide the invoices and redacted retention agreements relating to the testifying experts. Other than its conclusory assertion that it wants the subpoenaed information "for

[5] Indeed, DuPont even rejected Little Hocking's offer to seek an extension of certain deadlines. *See* ECF 352-1 (email chain from May 2014).

any hearings regarding the exclusion of Little Hocking's experts[6] or trial[,]" *Opposition*, p. 6, DuPont does not explain its need for this information. Finally, the expert discovery completion date has already been extended a number of times. Under all these circumstances, the Court is not persuaded that DuPont has established good cause to re-open expert discovery in order to obtain the information sought by its subpoenas.[7]

WHEREUPON, *Dr. Simonich's, Dr. Peden-Adams', Dr. Schwartz's, Dr. Kannan's, Dr. Kramer's, Mr. Dilley's, and Little Hocking's Motion to Quash Subpoenas*, ECF 337, is **GRANTED**.

December 10, 2014

s/Norah McCann King
Norah McCann King
United States Magistrate Judge

[6] DuPont has moved to exclude the testimony of six of Little Hocking's experts. ECF 340, 341, 342, 343, 344, 347. It is not apparent to the Court how the information presently sought by DuPont would be relevant to a *Daubert* analysis. The Court acknowledges that the requested information may be relevant to the experts' credibility at any trial.

[7] Having so concluded, the Court has not considered Little Hocking's other arguments in support of its *Motion to Quash*.