UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

MICHIGAN BIODIESEL, LLC,

Debtor.
_____/

Case No. DK 10-05786
Hon. Scott W. Dales
Chapter 7

THOMAS R. TIBBLE,

Plaintiff,

v.

MICHIGAN PROTEIN, INC.,

Defendant.
_____/

Adversary Pro. No. 12-80339

ORDER REGARDING MOTION TO STRIKE

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

Defendant Michigan Protein, Inc. ("Michigan Protein") filed a motion for summary judgment seeking dismissal of the complaint of plaintiff (and chapter 7 trustee) Thomas R. Tibble (the "Trustee"), which eventually[1] prompted a response from the Trustee. The Trustee's response depends on affidavits from two persons omitted from the list of potential witnesses he supplied during discovery: Dirk Longstreth and Karen L. Doster. The Trustee did not identify these witnesses in his disclosures under Fed. R. Civ. P. 26, or in any discovery response served by the Trustee before the close of discovery.

[1] The Trustee missed the deadline for responding to Michigan Protein's motion, but the court granted his motion to file an untimely response.

Invoking Fed. R. Civ. P. 37(c), Michigan Protein filed the Motion of Michigan Protein, Inc. to Strike Undisclosed Witness Affidavits Submitted by Plaintiff in Opposition to Michigan Protein, Inc.'s Motion for Summary Judgment (the "Motion to Strike," DN 45). The court held a hearing to consider the Motion to Strike on August 21, 2013 in Kalamazoo, Michigan.

Early in the case, following a pretrial conference under Fed. R. Civ. P. 16, the court issued a Pretrial Order dated January 11, 2013 (DN 11) establishing deadlines for the progress of this case, including a discovery deadline of May 9, 2013. On stipulation, the court extended the discovery deadline or "Cutoff Date" to June 9, 2013 (the "Cutoff Date").

Under the court's rules, litigants have an obligation to make initial disclosures (even without an adversary's request) of the names and contact information of each individual likely to have discoverable information that the disclosing party may use to support his claims or defenses. *See* Fed. R. Civ. P. 26(a)(1)(A)(i). In addition, in response to interrogatories from one's adversary, a litigant must provide complete and truthful responses. *See* Fed. R. Civ. P. 33. Litigants also have a duty to supplement these disclosures. Fed. R. Civ. P. 26(e).

Michigan Protein contends, without contradiction, that the Trustee did not identify Dirk Longstreth and Karen L. Doster in his disclosures under Fed. R. Civ. P. 26(a), nor in any discovery response served by the Trustee before the Cutoff Date. Instead, more than a month after discovery and after Michigan Protein moved for summary judgment, the Trustee filed Plaintiff's Supplemental Response to Defendant's First Set of Interrogatories and Requests for Production of Documents (attached to the Motion to Strike as Exh. D).

As the parties agreed during oral argument on August 21, 2013, the issue —whether the court may consider testimony from the omitted witnesses— depends upon the court's application of Fed. R. Civ. P. 37(c), which provides in relevant part as follows:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence *on a motion*, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. . . .

Fed. R. Civ. P. 37(c)(1). In our Circuit, this rule generally "mandates that a trial court punish a party for discovery violations in connection with Rule 26 unless the violation was harmless or is substantially justified." *See R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 271 (6th Cir. 2010). The Trustee has the burden of proving that his discovery violation was harmless. *Id*. at 272. Both parties agreed during oral argument that Rule 37 gives the court discretion to address violations in a flexible way. Indeed, the court may grant relief "in addition to or instead of" precluding admission of evidence. Fed. R. Civ. P. 37(c)(1).

In response to the court's questions, Michigan Protein confirmed its opposition to any reliance on testimony from Mr. Longstreth, but clarified that its principal concern with respect to Ms. Doster was her reliance on, and conclusions regarding, certain U.S. Department of Agriculture market survey reports (the "USDA Reports") that the Trustee did not disclose before the Cutoff Date. Michigan Protein's argument is easily summarized: the Trustee had a duty to identify his intention to use testimony from Mr. Longstreth as part of his initial disclosures, in response to specific interrogatories, and during the Trustee's deposition, but he failed to do so. In addition, he had a duty to identify the USDA Reports. The Trustee also had a duty to timely supplement his responses. Fed. R. Civ. P. 26(e). According to Michigan Protein, the Trustee's omissions deprived it of its right to investigate the Trustee's case before the Cutoff Date.

For his part, the Trustee contends that he was not specifically aware of the need to call Mr. Longstreth to testify about Restaurant Recycling, Inc.'s dealings with the Debtor until the Debtor's principal, John Oakley, testified during his deposition in early June, 2013. Even though the Trustee's theory of his case depended upon showing disparate treatment between

Michigan Protein and Restaurant Recycling (the Debtor's only other relevant customer), the Trustee says he thought he could make his case based solely on invoices and similar business records from the Debtor, without testimony from a Restaurant Recycling representative such as Mr. Longstreth. Trustee's counsel's strategy shifted after hearing directly from Mr. Oakley.

Given that the Trustee's theory of his case depended so heavily on the different treatment of Michigan Protein as compared to Restaurant Recycling, it would have seemed inevitable for the Trustee to disclose his need to elicit testimony from someone at Restaurant Recycling to explain the relationship in an effort to show that the Debtor's dealings with Michigan Protein were not within the ordinary course of business. Similarly, although with less conviction, the court observes that the Trustee probably should have foreseen the need to show a market price for the products at issue in this litigation, likely from government documents such as the USDA Reports, earlier than a week before the Cutoff Date. Given that the Cutoff Date was a few short business days after Mr. Oakley's deposition, it was incumbent upon the Trustee to alert Michigan Protein to the role that Mr. Longstreth and the USDA Reports would play in the Trustee's case in chief so that the parties could consider extending discovery again. Instead, the Trustee adverted to the testimony from Mr. Longstreth and the USDA Reports while trying to persuade the court to consider the Trustee's untimely (and at that time undrafted) response to Michigan Protein's timely summary judgment motion.

Reasonably relying on the pretrial record as it existed on the Cutoff Date, Michigan Protein filed its summary judgment heedless of the Trustee's intention to call Mr. Longstreth or offer the USDA Reports at trial. This ignorance —a product of the Trustee's omissions and inattention—unfairly deprived Michigan Protein of the opportunity to offer the best possible articulation of its summary judgment argument. Under these circumstances, the court concludes

that the Trustee violated his discovery obligations, and that the violation was neither substantially justified nor harmless. The question of sanction and remediation remains.

Federal courts favor decisions on the merits. This proclivity suggests that the sanction of preclusion is too harsh, particularly in the absence of bad faith. Moreover, as the Trustee's counsel points out, the court has not set a trial date, so it is eminently reasonable to extend discovery for the limited purpose of remedying the prejudice caused by the Trustee's untimely identification of Mr. Longstreth, Ms. Doster, and the USDA Reports, and the court will do so. This will give Michigan Protein a full and fair opportunity to prepare for trial or to amend its summary judgment motion, if advisable.

The court must also endeavor to redress the financial harm resulting from the Trustee's violation. The expense of additional discovery is not, in the court's opinion, prejudicial to Michigan Protein. Rather, if Michigan Protein suffered prejudice, it lies in (1) the reasonable expense (if any) incurred in preparing its summary judgment motion *based on the state of the Trustee's disclosures on the original Cutoff Date*;[2] (2) the reasonable expense of responding to the Trustee's motion to extend time to respond to the summary judgment motion; and (3) the reasonable expense of making the Motion to Strike.

Finally, because the court will be reopening discovery and enlarging the deadline for Michigan Protein to amend its summary judgment motion, the court will hold in abeyance further proceedings regarding that motion.

[2] For example, to the extent that Michigan Protein's summary judgment motion was drafted or "in the works" before the Cutoff Date, it is difficult to imagine prejudice. Given Michigan Protein's voluminous submission, the court expects that its counsel did most of the research and drafting before June 9, 2013, and to that extent may not seek recovery. In any event, it is impossible to determine the breadth of Michigan Protein's prejudice until after the additional discovery because, for example, Michigan Protein may see no need to amend its summary judgment motion.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion to Strike (DN 45) is GRANTED IN PART and DENIED IN PART.

IT IS FURTHER ORDERED as follows:

(1) the Cutoff Date, as previously extended to June 9, 2013, is further extended to October 31, 2013;

(2) Michigan Protein may amend or withdraw its summary judgment motion on or before November 29, 2013;

(3) the Trustee shall respond to Michigan Protein's amended motion for summary judgment on or before December 14, 2013;

(4) Michigan Protein may file a motion seeking the reasonable expenses incurred as a result of the Trustee's discovery violation on or before November 29, 2013;

(5) the Trustee may file a response to Michigan Protein's motion seeking reasonable expenses on or before December 14, 2013;

(6) the court will hold a pretrial conference after November 29, 2013, at a place and time to be determined in consultation with counsel.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order upon John T. Gregg, Esq., and John T. Piggins, Esq., pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4.

END OF ORDER

IT IS SO ORDERED.

Dated August 26, 2013

Scott W. Dales
United States Bankruptcy Judge