

STATE OF NORTH CAROLINA
COUNTY OF CLEVELAND

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
13 CVS 1037

SAFETY TEST & EQUIPMENT)
COMPANY, INC.,)
)
Plaintiff,)

v.)

AMERICAN SAFETY UTILITY)
CORPORATION; CHARLES R.)
PRICE; CHARLES A. PRICE; JOHN)
E. HAMRICK; and CHRISTOPHER T.)
MCMAHAN,)
)
Defendants.)

**ORDER ON MOTION TO EXCLUDE AND
FOR SANCTIONS**

THIS MATTER is before the Court on Defendants’ Motion to Exclude and for Sanctions (“Motion”). For the reasons stated below, the Motion is DENIED.

Defendants contend that Plaintiff Safety Test & Equipment Company, Inc. (“Safety Test”) failed to produce its customer sales invoices through discovery, and that the sales invoices were improperly presented to the Court for the first time at summary judgment. Defendants seek sanctions against Safety Test under Rule 37 of the North Carolina Rules of Civil Procedure for failing to produce the sales invoices through discovery, and an order from the Court excluding Safety Test from using the invoices and “any other documents or records not produced by Plaintiff through discovery in this action” at trial. (Mot. Exclude & for Sanctions.)

Defendants focus on Safety Test’s use of the sales invoices at the summary-judgment stage of this litigation. There, Safety Test compared its customer sales invoices to Defendant American Safety Utility Corporation’s (“ASUC”) sales invoices to support Safety Test’s argument that the individual Defendants misappropriated Safety Test’s confidential pricing information. (App. to Pl.’s Resp. Opp’n to Defs.’ Mot. Summ. J. pt. I, Ex. 1.) The ASUC sales invoices that Safety Test used in that

comparison were produced in discovery, but Safety Test's own customer sales invoices used in the comparison were not. The Court ultimately found that the sales invoices created an issue of material fact as to Safety Test's customer-pricing claim. *Safety Test & Equip. Co. v. Am. Safety Util. Corp.*, 2015 NCBC LEXIS 40 (N.C. Super. Ct. Apr. 23, 2015).

Defendants make two main arguments in connection with the Safety Test sales invoices. First, Defendants argue that the Safety Test sales invoices were clearly subject to Defendants' discovery requests. Second, Defendants argue that Safety Test unfairly and inappropriately presented a "price undercutting" theory of trade-secret misappropriation for the first time at summary judgment, and that Defendants were unfairly surprised by that argument and the supporting evidence.

The Court finds that Defendants' second argument—that they were unfairly surprised by Safety Test's price-undercutting theory of misappropriation and the supporting sales invoices—is without merit and deserves no further discussion. The Court has more carefully considered and more fully addresses Defendants' position that Safety Test failed to produce responsive documentation to Defendants' discovery requests.

In support of their argument, Defendants point to numerous discovery requests that they contend required Safety Test to produce its sales invoices if Safety Test intended to use the invoices to prove its claims. Several of those requests are broadly worded to request any document "related to" or which "evidence, reflect, support, or detract" from Safety Test's allegations of misappropriation. (Defs.' Suppl. Supp. Mot. Exclude & for Sanctions Ex. C, at 21–23, 26–27, 33–34.)

In response, Safety Test asserts that it consistently objected to Defendants' requests as being overly broad, and that Defendants requested certain specific invoices, such as invoices to certain customers or by certain salesmen, but only within specific date ranges that would not have included the Safety Test sales invoices that Defendants now move to exclude. In other words, Safety Test says that Defendants could have requested invoices for specific customers and for specific

salesmen, but that Defendants failed to do so. Safety Test argues that absent more-specific requests, it was not required to determine which invoices fell within the broad category of documents that Defendants requested.

It is notable that Defendants have not presented this issue to the Court through a motion to compel. Further, Defendants did not object to the Court's consideration of the sales-records comparison during the briefing or argument on Defendants' Motion for Summary Judgment.

The Court concludes that the Safety Test customer invoices for time periods that precede the individual Defendants' departure from Safety Test do not, on their face, reflect ASUC's misappropriation of confidential pricing through subsequent sales to the same customers. The Court further concludes that the Safety Test customer invoices were not responsive to Defendants' request for documents "evidencing" or "related to" misappropriation, and that Safety Test should not, based on those discovery requests, be precluded from comparing its own sales invoices to ASUC sales invoices to prove its misappropriation claim.

A closer question is presented as to whether the Safety Test customer invoices were responsive to Defendants' Request for Production No. 13, if Safety Test intended to compare its invoices to ASUC invoices to prove its misappropriation claim. Defendants' Request for Production No. 13 requested "[a]ll documents related to the nature, amount, method of calculation and calculation of [Safety Test's] alleged damages as described in Plaintiff's Complaint." (Defs.' Suppl. Suppl. Mot. Exclude & for Sanctions Ex. C, at 27.) Safety Test objected to the request as overly broad based on the "related to" language but agreed to produce its financial statements and tax returns, internal accounting reports of its annual sales and profits, and "such other non-privileged documents that evidence the monetary impact of Defendants' conduct as are located through a reasonable search." (Defs.' Suppl. Suppl. Mot. Exclude & for Sanctions Ex. C, at 28.)

The Court notes that Safety Test obtained an expert report after it disclosed its sales invoices during summary judgment briefing. That report, however, did not

include, and the expert had not reviewed, the specific Safety Test invoices that are at issue in this Motion.

The question, then, is whether Safety Test must be barred from using customer invoices that were not specifically requested through a more particularized request but which arguably fall within a broad request of any document “relating to” the misappropriation claim.

The Court concludes that ASUC could have requested production of specific Safety Test customer sales invoices but failed to do so. The Court bases its conclusion on its consideration of the entire record, and specifically on its findings that Defendants were on notice of Safety Test’s allegation that the individual Defendants had obtained Safety Test’s confidential pricing information and had used that information on ASUC’s behalf, and that the individual Defendants had knowledge of those customers to whom they made sales both for Safety Test and ASUC. Further, the Court finds no indication that Defendants requested that Safety Test produce itemized customer lists or sales records relating to Safety Test’s misappropriation claim that Safety Test failed to produce.

The Court further concludes that Safety Test did not improperly submit the comparison of Safety Test and ASUC sales invoices for the Court’s consideration in its opposition to Defendants’ Motion for Summary Judgment. It would be improper to exclude that comparison or the customer invoices from presentation as evidence at trial. Likewise, it would be improper and premature to issue a blanket order precluding Safety Test from introducing into evidence all documents that have not been produced in discovery. Rather, if Safety Test seeks to introduce a document not produced in discovery, the Court will make a particularized inquiry into whether Safety Test should have produced but did not produce the document in discovery. The Court reiterates, as it has on previous occasions, that it will not allow a document that was clearly requested in discovery but not produced to be later introduced into evidence at trial.

Finally, in light of its findings, the Court concludes that there is no basis to levy Rule 37 sanctions against Safety Test.

Defendants' Motion to Exclude and for Sanctions is DENIED.

IT IS SO ORDERED, this the 10th day of November, 2015.

/s/ James L. Gale

James L. Gale
Chief Special Superior Court Judge
for Complex Business Cases