

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON

IN RE: AVAULTA PELVIC SUPPORT SYSTEM
PRODUCTS LIABILITY LITIGATION

CIVIL ACTION NO. 2:10-md-2187

THIS DOCUMENT RELATES TO ALL CASES

PRETRIAL ORDER # 24
ORDER ON PLAINTIFFS' MOTION TO COMPEL DISCOVERY (ECF NO. 90)
& PLAINTIFFS' MOTION TO COMPEL DISCOVERY (ECF NO. 114)

Currently pending before the court are (1) Plaintiffs' Motion to Compel Discovery from Defendant Sofradim Production, S.A.S., filed September 27, 2011 (ECF No. 90); and (2) Plaintiffs' Motion to Compel Discovery from Defendant C.R. Bard, Inc., filed November 17, 2011 (ECF No. 114). Defendant Sofradim Production, S.A.S. ("Sofradim") has responded (ECF No. 96), and the plaintiffs have replied (ECF No. 100) to the first Motion. Defendant C.R. Bard, Inc. ("Bard") responded (ECF No. 120) and the plaintiffs have replied (ECF No. 125) to the second Motion. On December 13, 2011, the court conducted a hearing on the Motions. The court will address the Motions out of order because of the manner in which they were addressed at the hearing.

Plaintiffs' Motion to Compel C.R. Bard, Inc. (ECF No. 114)

The plaintiffs seek an order compelling defendant Bard to provide additional responses to Plaintiffs' First Master Set of Request for Production of Documents ("RPD") in the constituent cases of Cowen (MDL Case No. 2:10-cv-1213) (RPD Numbers 66, 72-87); Dalman (MDL Case No. 2:10-cv-1225) (RPD Numbers 57, 63, 67-77); and Everly (MDL Case No. 2:10-cv-1227) (RPD Numbers 54, 57, 59-72 and 87).

Specifically, the plaintiffs seek documents related to specific types of testing on certain Avaulta products. In response, Bard generally referred the plaintiffs to Electronically Stored Information (“ESI”), stating that “to the extent such documents exist, Bard refers Plaintiffs to the Design History File ..., laboratory notebooks, Requests for Services documents, and Requests for Manufacturing Services documents.” (ECF No. 114, p. 2; ECF No. 114-2, p. 23.) Bard further responded that “[a]dditionally, Bard will produce other documents that may be responsive to this request, as they are kept in the usual course of business in accordance with Rule 34(b) of the Federal Rules of Civil Procedure and in accordance with the parties’ agreed upon ESI protocol.” (ECF No. 114-2, p. 23.) The plaintiffs were dissatisfied with this response, in part because the various documents identified above were interspersed throughout the production, and also because Bard would not state whether documents exist that were responsive to each RPD and if so, state with specificity (by Bates number range) every document that Bard contends is responsive to each RPD. (ECF No. 114, pp. 3-4.)

The plaintiffs argued at the hearing that they are entitled to learn about testing on the Avaulta products by Bard; i.e., (1) was it done; and (2) where among the production is the testing conducted by Bard? The plaintiffs argue that from Bard’s production, even with the assistance of a computer consultant and the production of an index by Bard, they cannot ascertain whether specific types of testing were conducted by Bard. In short, the production by Bard is not in a form from which the plaintiffs are reasonably able to locate documents responsive to their request and thus, is not in compliance with Rule 34(b)(2)(E)(i) of the Federal Rules of Civil Procedure.

In response, Bard argued that it has satisfied its production requirements under Rule 34 and the applicable case law. Bard pointed out that it not only produced the

documents pursuant to the terms of Pretrial Order 11, it also produced them in text-searchable format, produced an index and showed the plaintiffs how to use the system. (ECF No. 120, pp. 8, 12.)

At the hearing, Bard explained that the four categories of documents identified above contain the universe of all testing documents related to the Avaulta products. Bard stated that the notebooks and other documents are interspersed throughout the production because the parties were instructed at the beginning of this litigation to begin production of documents on a rolling basis. In order to abide by this directive, Bard had many document reviewers and, as a result, its document production did not always produce documents in consecutive order. To address this, Bard produced an index. In addition, the documents were not identified by individual because when Bard retrieved the notebooks they were maintained in the research and development department, not by individual personnel. Bard explained that there was just one custodian for these documents (Laura Bigby), the person who assisted counsel in identifying and collecting them.

Rule 34(b)(2)(E) governs the production of documents and ESI¹ and directs as follows:

- (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
- (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

¹ Notably, the 2006 Advisory Committee Note states that a “Rule 34 request for production of ‘documents’ should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and ‘documents.’” Fed. R. Civ. P. 34 advisory committee’s note.

- (iii) A party need not produce the same electronically stored information in more than one form.

“Under the provisions of Rule 34(b)(2) a responding party clearly controls the manner in which production will occur, and specifically which of the two prescribed methods of production will be employed.” Pass & Seymour, Inc. v. Hubbell Inc., 255 F.R.D. 331, 334 (N.D. N.Y. 2008). However, the producing party “bears the burden of demonstrating that the documents made available were in fact produced consistent with that mandate.” Id. Although

Rule 34 [does] not obligate a producing party to per se organize and label usable documents for the requesting party’s convenience, a party exercising Rule 34’s option to produce records as they are kept in the usual course of business should “organize the documents in such a manner that [the requesting party] may obtain, with reasonable effort, the documents responsive to their requests.”

Armor Screen Corp. v. Storm Catcher, Inc., No. 07-81091, 2009 WL 291160, at *2 (S.D. Fla. Feb. 5, 2009) (quoting Williams v. Taser Int’l, Inc., No. 1:06-CV-0051-RWS, 2006 WL 1835437, at *7 (N.D. Ga. June 30, 2006)).

While Bard’s production in the first instance may not have been produced as kept in the ordinary course of business pursuant to Rule 34(b)(2)(E)(i) due to the constraints of rolling production schedules imposed by the court, Bard certainly went out of its way to compensate for any shortcomings in this regard by producing an index and providing substantial assistance to the plaintiffs in navigating use of the index. Likewise, the plaintiffs have made substantial efforts on their own in their attempts to obtain the documents they seek, all to no avail. In the interest of efficiency and with the assent of the parties, the court concludes that one workable solution is the taking of Rule 30(b)(6) deposition(s). These Rule 30(b)(6) depositions will not count against the number of

depositions permitted each side, and the parties are not precluded from retaking any particular witnesses' deposition for other purposes.

Accordingly, it is hereby **ORDERED** that Plaintiffs' Motion to Compel Discovery from Defendant C.R. Bard, Inc. is **DENIED** without prejudice. The parties shall bear their own costs.

Plaintiffs' Motion to Compel Sofradim Production, S.A.S. (ECF No. 90)

1. Boilerplate Objections and Failure to Specify Responsive Documents.

The plaintiffs first argue that Sofradim's responses to their First Master Request for Production of Documents ("RPDs") are fundamentally flawed in light of the boilerplate objections and because Sofradim failed to identify which documents (produced both before and in response to the production) are responsive to particular requests for production. (ECF No. 90, p. 8.) The plaintiffs argue that Sofradim has made no effort to describe or explain how it contends such documents were kept in the usual course of its business or how its production replicates how the documents were kept. (ECF No. 90, pp. 9-10.) The plaintiffs contend that Sofradim has not met its burden of demonstrating that any documents have been produced as they are kept in the usual course of business so as to satisfy Rule 34(b)(2) and, as a result, Sofradim should be required to organize and label the documents that it contends are responsive to the plaintiffs' discovery requests to correspond with the specific requests. In addition, the plaintiffs assert that if no documents responsive to a particular request have been produced, or if no responsive documents exist, Sofradim should be required to state so in writing. (ECF No. 90, p. 11.)

In response, Sofradim argues that the plaintiffs' Motion should be denied because its responses and objections are substantively appropriate and not "boilerplate." (ECF

No. 96, p. 11.) Sofradim argues that its responses comply with Rule 34(b)(2)(B) and (C); that the plaintiffs have failed to identify those discovery responses with which they take exception; that the plaintiffs' motion is untimely; and that it is premature for the plaintiffs to criticize Sofradim's inability to identify the documents it will not find during its ongoing review. (ECF No. 96, pp. 10-14.)

Sofradim further asserts that it has no duty to organize and label documents if it has produced them as they are kept in the usual course of business. Sofradim has made ten rolling productions of ESI totaling 35,171 pages and asserts it has complied with its obligations under the ESI protocol and has complied with Rule 34(b)(2)(E). (ECF No. 96, pp. 16-17.) Regarding documents previously produced in hard copy and later scanned, Sofradim served an index for these documents in August of 2010. The documents were re-served in the MDL in April and May of 2011 in searchable, electronic format. Sofradim suggests that the plaintiffs' requested relief as to these documents is belated and inappropriate. (ECF No. 96, p. 17.)

In reply, the plaintiffs assert that their Motion is timely, noting that within 30 days of receiving the responses to the at-issue discovery, they sought to confer with defense counsel and have been conferring since then. (ECF NO. 100, n. 2.) The plaintiffs continue to take issue with the slow manner in which Sofradim is responding to discovery and the nonresponsive nature of Sofradim's responses. The plaintiffs point out that the master RPDs were served on Sofradim over a year ago and Sofradim responded nearly four months ago, yet it indicates in many of its responses that it will produce if documents are located after a reasonable search. (ECF No. 100, pp. 2-4.) The plaintiffs dispute Sofradim's reliance on the hard copy documents produced a full year earlier by Bard, another defendant, in response to a separate set of discovery as

somehow being responsive to the plaintiffs' master request for production in this MDL. (ECF No. 100, pp. 3, 6-7.)

The court finds that the plaintiffs' Motion is timely. Furthermore, the court finds that Sofradim is not required under Rule 34(b)(2)(E)(i) to correlate particular documents to RFPs for the reasons discussed above related to the plaintiffs' Motion against Bard. However, because of the manner of production in this MDL, the fact that many of Sofradim's documents are in French, the recent and belated production by Sofradim, and in the interest of efficiency, Sofradim's counsel should inquire of her client as to whether particular testing (as identified in the RFPs) was performed and if so, in which category of documents the testing is located (i.e., design history files, laboratory notebooks, etc.). In the event this does not provide sufficient information from which the plaintiffs can glean the documents they seek, they may return to the court for additional relief. Thus, the court finds that Plaintiffs' Motion to Compel Discovery from Defendant Sofradim Production, S.A.S. should be denied without prejudice as to this aspect of the plaintiffs' Motion.

2. Documents in Possession of Other Covidien Defendants.

The plaintiffs next complain that Sofradim refuses to produce responsive documents that may be in the possession of any of the other Covidien defendants named herein, such as Floreane Medical Implants, S.A., Mareane, S.A., Covidien Trevoux, S.C.S, Covidien International Finance, S.A. and Covidien, p.l.c. (ECF No. 90, p. 11.)

In response, Sofradim argues that the plaintiffs' Motion is premature with respect to production related to other Covidien defendants because the parties are not yet at an impasse. Sofradim asserts that it "has not declined to produce documents on behalf of

any Covidien entities; rather, it has begun its review and production with the most relevant entity, Sofradim Production.” (ECF No. 96, p. 20.)

The plaintiffs dispute Sofradim’s argument that the parties are not at an impasse on this issue. (ECF No. 100, p. 1 n.1.)

At the hearing on this Motion, Sofradim represented that it would produce documents within the custody and control of the above entities, all of whom are named parties. (ECF No. 37.) Sofradim is aware of its supplementation obligations under the Federal Rules of Civil Procedure and continues to search for documents. In addition, the undersigned referred the parties to a recent decision in Mount Hawley Ins. Co. v. Felman Prod., Inc., 269 F.R.D. 609, 617-18 (S.D. W. Va. 2010), in which the court discussed the concept of “control” as between corporate entities under Rule 34 of the Federal Rules of Civil Procedure. The court finds that Plaintiffs’ Motion to Compel Discovery from Defendant Sofradim Production, S.A.S. should be denied without prejudice with respect to documents in the possession of other Covidien defendants.

3. Sales Representatives.

The plaintiffs seek the names of sales representatives who sold the Ugytex, Uretex and/or related mesh products regardless of where the products were sold (i.e, including Europe). Sofradim continues to indicate that it is “investigating” this issue. (ECF No. 90, pp. 17-18.)

In response, Sofradim asserts that it has produced the sales representative information, making this aspect of the plaintiffs’ Motion moot. Again, Sofradim argues that the plaintiffs’ Motion is premature, as Sofradim was continuing to investigate and no impasse had been reached. (ECF No. 96, p. 2; p. 7 n.11.)

In reply, the plaintiffs represent that Sofradim has produced responsive information, but they continue to seek fees and costs. (ECF No. 100, p. 2.)

The court finds that Plaintiffs' Motion to Compel Discovery from Defendant Sofradim Production, S.A.S. with respect to the names of sales representatives who sold certain mesh products should be denied as moot.

4. ESI responsive to Requests.

Finally, the plaintiffs argue that Sofradim should not be permitted to assert that its ESI, none of which was produced before July 1, 2011, and the vast majority of which has not been produced as of the date of the filing of the Motion, is also somehow responsive to the at-issue discovery in this matter, as it did by letter dated August 19, 2011. The defendants agreed on March 17, 2011, to produce ESI responsive to the plaintiffs' search terms for 22 custodians, but as of the date of the filing of the instant Motion, ESI had been produced on just two of those 22 custodians. The plaintiffs point out that the ESI search terms are not correlated to the plaintiffs' at-issue discovery requests, nor has any attempt been made by Sofradim to correlate any ESI production to any of the plaintiffs' requests. The plaintiffs assert that the ESI protocol explicitly states that search term searches are not intended to take the place of or limit "traditional document requests." (ECF No. 90, pp. 14-15.)

Next, the plaintiffs argue that Sofradim should be ordered to produce ESI in accordance with the parties' agreed upon ESI protocol without further delay on a rolling basis or several custodians every week (i.e., five) until all custodians have been produced. The plaintiffs point out that they served their proposed list of ESI search terms and custodians on Sofradim on January 27, 2011, and Sofradim produced a list of 22 custodians on March 17, 2011. It was not until July 15, 2011, that Sofradim produced

any ESI, and even then, it produced only a portion of two custodians' files. (ECF No. 90, p. 16.) In comparison, defendant Bard has produced ESI for more than 18 custodians in the same time frame. (ECF No. 90, p. 16, n.12.)

In response, Sofradim concedes that the plaintiffs' "motion is correct in one aspect: Sofradim's production of documents and ESI is taking too long." (ECF No. 96, p. 2.) Sofradim explains that the ESI and documents in the case are mainly in French and technical in nature and, as a result, Sofradim has had to review the documents in French using US-qualified, native-fluency French speaking attorneys. (ECF No. 96, p. 2.) Sofradim points out that it started its review with its two key and most senior custodians, Michel Therin (Managing Director, Research & Development) and Christophe Cosson (Quality Assurance & Regulatory Affairs Director). (ECF No. 96, p. 3.)

Sofradim asserts that it has the right and obligation to conduct a relevancy review prior to production of documents identified in the ESI. (ECF No. 96, p. 9.) Sofradim asserts that there are 19,865 not responsive documents. (ECF No. 96, p. 10.)

In reply, the plaintiffs assert that Sofradim correctly identifies the issue of "pre-production review" as one in dispute; i.e., that Sofradim

is *not* producing all documents within its custody and control responsive to Plaintiffs' Master RPD's, but rather is running ESI searches for a handful of custodians using a list of agreed upon keywords and then withholding any ESI that its attorneys deem to be non-responsive to Plaintiffs' RPD's. (Dkt. No. 96, pp. 1, 6 and 10). As explained more fully below, Sofradim is thereby restricting both plaintiffs' RPD's and their separate ESI keyword search requests.

(ECF No. 100, p. 8.) According to the plaintiffs, Sofradim is improperly limiting its responses to Plaintiffs' Master RPDs to only the ESI obtained from their keyword/custodial searches that its attorneys deem to be also responsive to those Master

RPDs. (ECF No. 100, p. 9.) “Sofradim’s position presents an untenable double-edged sword: Plaintiffs’ Master RPD response will be improperly limited to the ESI search terms culled for a select group of custodians, and *vice versa*, the only ESI to be produced will be that deemed by Sofradim’s attorneys to *also* be responsive to Plaintiffs’ Master RPD’s.” (ECF No. 100, p. 9.) The plaintiffs point out that they are entitled to all non-privileged documents in Sofradim’s possession, custody or control that are responsive to the Master RPD, as well as all non-privileged ESI that is responsive to their separate ESI keyword search requests. (ECF No. 100, p. 10.)

At the hearing, Sofradim advised the court that it has since completed its ESI production and paper and electronic document productions for 16 custodians. By the end of the year, Sofradim will complete production for a total of 20 custodians. The plaintiff has since served a second set of document requests for 26 additional ESI recipients. Sofradim has completed and produced all defense fact sheets.

Sofradim has made substantial progress in bringing its document production up-to-date. However, the court is not persuaded by the plaintiffs’ argument that Sofradim should turn over all ESI without first reviewing it for relevance. ESI is a method of finding documents that may be responsive to a request for production, and a producing party has the right and obligation to review it for relevance and privilege. Indeed, “[a] responding party should follow reasonable procedures to protect privileges and objections in connection with the production of electronically stored information.” The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production, No. 10, at 51 (2d ed., Jun 2007).

The court did express concern regarding the percentage of non responsive documents within Sofradim’s ESI, totaling almost eighty percent. The court instructed

counsel for Sofradim and the plaintiffs to confer immediately to craft a workable and efficient solution to satisfy the plaintiffs' concerns regarding the number of non responsive documents. The court expects that whatever protocol the parties devise should be completed by **March 1, 2011**. The court finds that Plaintiffs' Motion to Compel Discovery from Defendant Sofradim Production, S.A.S. should be denied without prejudice as to this aspect of the plaintiffs' Motion.

As set forth more fully above, it is hereby **ORDERED** that Plaintiffs' Motion to Compel Discovery from Defendant Sofradim Production, S.A.S. is **DENIED**. The parties shall bear their own costs.

The court **DIRECTS** the Clerk to file a copy of this Amended Notice of Hearing in 2-10-md-2187, and it shall apply to each member Avaulta-related case previously transferred to, removed to, or filed in this district, which includes counsel in all member cases up to and including civil action number 2-11-cv-00984. In cases subsequently filed in this district, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action at the time of filing of the complaint. In cases subsequently removed or transferred to this court, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action upon removal or transfer. It shall be the responsibility of the parties to review and abide by all pretrial orders previously entered by the court. The orders may be accessed through the CM/ECF system or the court's website at www.wvsc.uscourts.gov.

ENTER: December 16, 2011


Mary E. Stanley
United States Magistrate Judge