UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: COVIDIEN HERNIA MESH PRODUCTS LIABILITY LITIGATION NO. II,	)	
This Document Relates To:	)	MDL No. 1:22-md-03029-PBS
All Cases.	)	

JOINT STATUS REPORT

Pursuant to the Court's April 8, 2024 Order [ECF No. 292], the parties have conferred further and submit the following reports outlining the discovery issues that remain as to the motion to compel [ECF No. 287], after further conference.

The PSC requests a hearing on the remaining areas of dispute.

THE PLAINTIFFS' STEERING COMMITTEE'S ("PSC") POSITION

I. Background and the PSC's Proposed Compromise

Rather than searching the documents in their possession, custody, and control, to respond to the PSC's discovery requests, Defendants searched within the subset of documents that it gathered using responsive search terms that it then subsequently culled down using three mechanisms: (1) conducting the search on a limited number of certain custodians; (2) applying limiting terms and connectors to the search terms; and (3) conducting a manual relevancy review of what is left after the first two layers of narrowing. Although all of these narrowing mechanisms likely result in the exclusion of documents that are relevant to the claims and defenses in this case, the PSC has, with the qualifications noted below, agreed to the first two mechanisms as it recognizes that the idea behind such mechanisms is to cull a large set of data to a subset of relevant data without the need for a manual review. However, the third layer of narrowing—the relevancy

review—is both inappropriate and unnecessary given the first two mechanisms employed as well as the protective order in place. Further, because Defendants have not logged any of what they have chosen to withhold (with the exception of claims of privilege), there is no way for the PSC to ascertain what has been withheld and there is therefore no manner in which the PSC can bring a challenge of such withholding to this Court.

As outlined in the PSC's Motion to Extend the Discovery Deadlines and to Compel Discovery [ECF No. 287], it was recently discovered that critical search terms[1] were not run as part of Defendants' document production. The PSC has asked the Court to compel Defendants to run these search terms through the documents in their possession custody control without any limiting terms and connectors and to produce the non-privileged results without a further review for relevance. Pursuant to the Court's directive, the parties have met and conferred. The PSC offered the following compromise:

(1) Rather than searching through all documents in Defendants' custody and control, the PSC is willing to accept running the terms through a list of custodians but with the addition of custodians that the PSC has identified in document review as being relevant to the claims and defenses in this case.

(2) For unique terms only (*e.g.,* product names such as "ProGrip" and "Symbotex"), the PSC has asked that Defendants not apply any limiting terms or connectors. The PSC is willing to accept limiting terms and connectors when they are applied to terms that could be used in other contexts (*e.g.,* "pamphlet", "article", "doctor", etc.).

(3) Given the robust protective order in this litigation as well as the search methodology employed (relevant search terms applied to relevant custodians with limiting terms and

[1] Most critical were the two products that make up a majority of the cases in this MDL (Symbotex and ProGrip), but there were other product names and more generic terms as well.

connectors used on certain terms), the PSC asked that Defendants forego the additional relevancy review.

Defendants accepted the PSC's offer of compromise as to No. 1[2], but declined to accept the remainder of the PSC's proposal and offered no counterproposal to the PSC's attempted compromise. For the reasons stated in Section II, *infra* at 3-4, this Court should require the Defendants to produce the documents responsive to the PSC's discovery requests or, in the alternative, require Defendants to identify in a withholding log the responsive documents withheld from production on relevancy grounds so that the PSC is able to ascertain whether it should challenge the Defendants' decision to withhold certain responsive documents.

II. The PSC's Position on the Remaining Discovery Issues

A. The PSC's Proposal on Limiting Terms and Connectors is Reasonable

The use of search terms and their application to only a subset of individuals (the custodian list) are in and of themselves methods of narrowing data to relevant documents. In the interest of compromise, the PSC has accepted the search term and custodial approach in lieu of a manual review of all documents in Defendants' custody and control. In response, Defendants offer no such compromise. Instead, they insist on narrowing unique names such as "Symbotex" and "ProGrip" with limiting terms and connectors. However, doing so will necessarily exclude relevant documents from the production. Again, in the interest of compromise, the PSC does not seek to prevent the use of limiting terms and connectors for terms that could have multiple meanings or

[2] Defendants provided the following caveat "We agree to produce additional data for custodians on the list you provided, we first are determining who has data available and where is it located. For those in France, we may need to meet and confer further given the challenges of collecting from France. We will gather information about their roles and employment dates to facilitate our discussion." At this time, the PSC does not see a need for any Court intervention as to this point.

appear in a context that would not be relevant to the claims and defenses in this case (examples include "doctor", "surgeon", "article", "pamphlet", etc.).[3]

It is difficult to imagine a limiting term and connector applied to words like "Symbotex" and "ProGrip" that would have the effect of excluding irrelevant documents while also keeping relevant ones. On a recent conferral call, Defendants' counsel came up with an example that illustrates the PSC's point. Specifically, counsel gave an example of a tear in the packaging not being relevant. But, given that one of the PSC's allegations is that the material used in the Symbotex and ProGrip is weak and prone to tearing, the PSC pointed out that such a term and connector to exclude a torn package would necessarily exclude documents discussing one of the PSC's alleged defects, which is clearly relevant to the claims in this case. There are an endless number of examples that lead to the same conclusion when the search term involved is unique, like the name of Defendants' hernia mesh products, with no other meaning in any language. Therefore, the PSC urges the Court to compel Defendants to run unique search terms without the use of limiting terms and connectors. In the event that some innocuous document about a torn package is produced, there is no harm to Defendants as, again, there is a protective order in place and the burden of such a document would fall on the PSC—a burden the PSC has repeatedly indicated it is willing to accept.

B. Defendants Should Forego the Relevancy Review or Produce a Relevancy/Withholding Log

Defendants' insistence on a hands-on manual "relevancy review" process not only defeats the purpose of using search terms (with limiting terms in most instances) on a limited number of

[3] The PSC envisions a conferral process beginning with the PSC providing a list of terms that it contends are so unique that limiting terms and connectors are not necessary, which would mostly include proper nouns such as product names. Defendants would have an opportunity to respond, and the parties would come to an agreement on the "unique terms list".

custodians, which, by design, is meant to cull down datasets to relevant and responsive documents, it is also unnecessarily burdensome for Defendants. Indeed, Defendants' approach creates a self-imposed burden and expense that is not necessary in light of the two level of narrowing described above *and* the robust, ironclad protective order (with a claw back provision) already in place in this MDL. *See, e.g., Ball v. Manalto, Inc.*, No. C16-1523 RSM, 2017 WL 1788425, at *2 (W.D. Wash. May 5, 2017) (in response to defendants' claimed "burden" of having to analyze every page of the production, the Court agreed with plaintiff that defendants' "alleged expense in producing these records could be greatly reduced" via methods such as utilizing keywords for litigation counsel and a claw back mechanism in the case of a claimed privilege and utilizing the confidentiality designation provided by the protective order for trade secret concerns: "These discovery requests are relevant given [plaintiff's] claims and not 'disproportionately broad and unduly burdensome' given plaintiff's attempts to narrow with appropriate search terms. Any concerns over confidentiality are adequately addressed by the Stipulated Protective Order already in place."). The same is true here.

Further, Defendants' approach is extremely prejudicial to plaintiffs in this MDL because it results in Defendants asserting narrow relevance and responsiveness criteria without disclosing to plaintiffs any information about what has been withheld. Rule 34 governs requests for production of documents. *See generally* Fed. R. Civ. P. 34. A party asserting an objection to a particular request "*must specify the part [to which it objects] and permit inspection of the rest.*" Fed. R. Civ. P. 34(b)(2)(C) (emphasis added). To remedy the prejudice created by Defendants' withholding of documents through the "relevancy review" and failure to disclose *anything* about such withholding, the PSC requests that the Court order Defendants to produce all non-privileged documents responsive to the search terms (within the framework of the PSC's proposed

compromises in Nos. 1 and 2 above). In the alternative, the PSC requests that the Court order Defendants to provide a "relevance log" or withholding log that describes the responsive documents being withheld because Defendants considers them not relevant or not responsive to the PSC's document requests. "Relevance logs" are appropriate in situations such as this where a party has withheld large amounts of ESI on the basis of responsiveness or relevance that otherwise hit on applicable search terms. *See, e.g., Borizov v. Olsen-Foxon*, No. 19 C 7549, 2023 WL 2587879, at *3–4 (N.D. Ill. Mar. 21, 2023) (ordering defendant to either produce all non-privileged emails withheld from the ESI protocol or (2) prepare a log of the emails deemed irrelevant (or that were otherwise withheld), including a brief description setting forth the basis for the withholding, and produce the log to plaintiff); *see also SRS Acquiom Inc. v. PNC Fin. Servs. Grp., Inc.*, No. 119CV02005DDDSKC, 2023 WL 6796431, at *3 (D. Colo. July 7, 2023) (in response to defendants' claim of irrelevance, the Court upheld a Special Master ruling that "[i]f Defendants believe that communications are irrelevant, they may withhold a communication and note it on a relevancy log," which would "include all of the information that would be included on a privilege log" and "should be sufficient for Plaintiffs to determine if the document is relevant and discoverable.").

Here, a relevance log setting forth the relevant metadata fields, such as Identified/Bates No., Date/Time, From, To, CC, and Email or File Name, and the justifications for the withholdings would at a minimum give the PSC (and the Court) a means of examining whether the withheld documents are in fact unresponsive and irrelevant. Accordingly, in the event the Court does not order a production of all non-privileged documents responsive to the search terms, the PSC respectfully requests a relevance/withholding log be produced in the form outlined by the PSC.

III. The PSC's Update on other Discovery Issues

In its Motion to Extend the Discovery Deadlines and to Compel Discovery [ECF No. 287], the PSC outlined a number of ongoing discovery issues. The parties are cooperatively meeting and conferring on these issues. To the extent an *impasse* is reached, the PSC will bring it to the Court's attention in a proper motion.

As to the timeline of discovery, the PSC has asked for a 30(b)(6) Deposition on ESI, which, in light of the outstanding discovery issues and current schedule, the PSC submits should be conducted as soon as possible but no later than May 20, 2024. The topics of this deposition notice are directed to the manner and channels in which the Defendants store electronic information so that the PSC is able to ascertain how electronically stored information is created and maintained in the ordinary course of business. This is necessary so that the PSC has access to the same knowledge as Defendants regarding Defendants' databases, sharefiles, custodial file preservation, etc. The Defendants have offered the last week of June for this deposition and have indicated they will not be able to offer any earlier dates. Given the numerous outstanding discovery issues and the fundamental importance of the ESI 30(b)(6) deposition to these issues, the PSC is concerned about conducting the deposition two months from now on the current timeline. At this time, the PSC is hopeful that Defendants will offer an earlier date but, in accordance with the Court's directive at the 4/8/24 hearing regarding the new date for the close of discovery, the PSC is bringing its timing concerns to the Court.

THE DEFENDANTS' POSITION

I. The Defendants' Position: the PSC's Offer was not a Compromise

The Defendants agreed to the PSC's first condition to the extent the requested custodial data is reasonably available. The PSC sent the new list of custodians Wednesday evening, April 24, 2024. Defendants agreed to collect data for custodians on that list whose data is available and

located in the United States. The Defendants agree to seek authority to move French data to the United States for any custodians located in France. Defendants agree to meet and confer with the PSC further on issues that may arise as to the availability of the requested custodial data. Defendants agree to run the current terms on the new data collected. It is Defendants' position that this agreement to significantly expand the list of hernia mesh custodians – which is not easy and is not inexpensive -- is sufficient to resolve the current issues pending before the Court.

Defendants anticipated the PSC would agree to relevancy review after the Court's discussion of that issue on April 8th. Defendants also anticipated some compromise on the use of the search terms generated by other plaintiffs in related litigation since no search terms have been suggested by the PSC here even though discovery has been open for more than a year. Defendant's positions on these two issues are discussed further below following the PSC's discussions of each.

II. The Defendants: Disconnecting Product Terms from Other Terms Is Not Necessary to Ensure Fulsome, Proportional Discovery

Defendants continue to oppose disconnecting search terms for the reasons discussed during the April 8th hearing and in its prior briefing. Disconnecting terms presents an undue burden, and is unlikely to locate additional, unique information in data that is already well-vetted for relevance. The connecting terms the PSC seeks to undo were designed by the Middlesex plaintiffs in an effort to focus keyword searches on finding relevant information. But those connectors were extremely broad – the product term either had to be in the same document as another term, or within 350 words of the other term. (See Middlesex agreed upon search terms, Defendants' Ex. 8, ECF 291-9.) And the Middlesex keyword combinations were numerous. (Id.) Product terms alone would collect numerous irrelevant records, such as product orders for providers not at issue and other irrelevant documents that simply mention product names (such as a particular product manager's business title in an email signature line). The data at issue has already been reviewed multiple

times for relevance, removing connecting terms is highly unlikely to lead to new unique, relevant information. The better path to resolution and locating new information is to focus on the new custodians the PSC recently selected.

III. The Defendants' Position: the Federal Rules Only Permit Production of Relevant Information and Do Not Require a "Relevancy Log"

Defendants have already conducted the relevance review at issue. Contrary to their position, the PSC is simply not entitled to all documents hitting on keywords. Defendants explained the importance of relevance review and the need to consider proportionality in its prior brief at pages 9 – 15 [ECF 291]. In short only relevant, proportional discovery is permitted. Defendants determine how best to identify relevant information for production.

At the PSC's request and as suggested by the Court, Defendants shared their Document Review relevance instructions given to attorney reviewers. The instructions listed and described several broad categories of hernia mesh documents to be coded relevant. The instructions also described a few categories of documents to be withheld subject to Defendants' written objections -- foreign regulatory documents, non-final drafts of marketing materials and financial documents. Even in the "withhold" categories, reviewers were instructed to produce those documents when other relevant topics appeared in the same document (i.e., when a relevant topic such as sales training appears in a document that also contains profits or revenues, reviewers were told to code the entire document as relevant).

The PSC's position is directly contrary to another MDL court's order in the *In Re Avaulta, Pelvic Support System* litigation. That litigation involved the same attorneys representing the PSC here, as well as Defendants Covidien and Sofradim. Judge Mary E. Stanley was not persuaded by the same argument that relevance review should not be permitted:

> *... 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.***

In Re Avaulta, Pelvic Support System, Civil No. 2:10-md-02187 (D. W.V. Dec. 16, 2011)(emphasis added). Judge Stanley relied on Sedona Principle 10, which states "[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). It simply makes sense that Defendants need to conduct relevance review to identify documents reasonably withheld on the basis of written objections, such as employee personnel files, irrelevant financial documents, documents outside the time scope, etc.

If the Court permits the relevance review, the PSC then suggests that Defendants must create and produce a "relevancy log" of documents not produced including a description of the reason why documents were not considered relevant. This would be enormously complicated and burdensome considering Defendants' review in this litigation to date has resulted in production of approximately *1.8 million documents*. In addition, a relevance log would be **duplicative** of Defendants' written objections, which clearly outline *what* documents are being withheld. For example, in response to PSC's RFP No. 84 (seeking financial statements, cash flow statements, accounts receivables, officer compensation, etc.) Defendants were clear:

> *RESPONSE: Defendants object because such financial information is not discoverable in product liability litigation. …* ***Defendants maintain these objections and are not searching for such financial documents on the basis of these objections.***

A "relevancy log" is not needed to know that financial documents, like other documents similarly objected to, are being withheld.

The PSC cites two cases in support of a relevancy log but the details of the affected document populations in those cases are not known, nor is it known whether some questionable conduct by the producing party warranted such extreme measures. To be *clear* -- relevancy logs are *not* the norm. *See Parker v. Atlantic City Board of Education,* Civil No. 15-8712 (JHR/JS) (D.N.J. Feb. 17, 2017) ("The Federal Rules do not require the production of a 'document' or 'relevancy log' of the sort that defendants request. The Court agrees with plaintiff that 'the log Defendants seek will impose an [unnecessary] onerous and undue burden upon Plaintiff and the Court.' "); *see also Willmore v. Savvas Learning Co. LLC,* Civil No. 22-2352 (TC/)ADM (D. Kan. Sept. 19, 2023)(finding the producing party did not waive relevancy objections when it agreed to produce documents responsive to a keyword search and rejecting the demand for a relevancy log for documents withheld). Here, there is an additional concern about varying from prior relevance reviews. These were conducted in response to related litigation in Massachusetts state court beginning with productions in 2021. Numerous discovery disputes were heard, with Judge Barry-Smith holding monthly status conferences where discovery issues were heard and resolved. Defendants request that this Court *not* require a relevancy log since such a log would undoubtedly result in more discovery about the discovery conducted over the last several years, which would be extremely burdensome to resolve.

IV. The Defendants' Update on other Discovery Issues

Defendants agree that the parties have met and conferred on a number of issues. The discussions are civil and cooperative. Defendants will continue their efforts to be transparent about discovery conducted to date in this and related litigation over the last several years.

As for the ESI deposition, the PSC requested an ESI deposition earlier in April but did not serve topics until late afternoon Friday April 26th . The day before in a meeting between counsel, the PSC insisted that Defendants produce a witness for the ESI deposition by May 20th. Defendants

suggested the third week in June given a scheduled ESI deposition in the two related litigations on issues the PSC have also raised. Defendants asked the obvious question about how could they comply with the demand for a prompt deposition when the PSC had not yet served a notice or deposition topics. Up until this point, Defendants anticipated the MDL ESI deposition would focus on the same topics raised in Middlesex. However, the Notice – which arrived the next day -- contained 29 wide-ranging topics. The MDL notice now has a much longer lead time to identify and prepare witnesses since the Middlesex deposition focuses on chats application and SharePoints. The PSC's Notice seeks testimony on numerous topics including identification, collection, review and production of electronically stored information over the last four years. It also includes topics on numerous databases, email systems, preservation of ESI, disaster recovery systems, search software and retention policies. No single individual knows the answers to all of these topics. Many are historic technical questions pre-dating Covidien's acquisition by Medtronic in 2015.

Plaintiffs should not be permitted (or even encouraged) to serve a 30(b)(6) Notice with numerous, complex topics with less than one month before the date sought for the deposition, especially in the absence of agreement on the date or even an opportunity to meet on the topics as required by amended Rule 30(b)(6).

FOR THE PSC:

Dated: April 29, 2024

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