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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IN RE: KUGEL MESH CA 07-1842-ML-LDA
HERNIA PATCH PRODUCT
LIABILITY LITIGATION

MAY 17, 2016

PROVIDENCE, RI

BEFORE MAGISTRATE JUDGE LINCOLN D. ALMOND

APPEARANCES:

FOR THE PLAINTIFF: JUSTIN PARAFINCZUK, ESQ.
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1 MAY 17, 2016

2 THE COURT: All right. United States Magistrate
3 Judge Almond. We're on the record for a telephonic
4 hearing in the In Re: Kugel Mesh Hernia Patch Product
5 Liability Litigation, Civil Action 07-MD-1842-ML. The
6 particular motion at issue is number 5173, plaintiff's
7 motion to compel defendant's answers to plaintiff's
8 expert interrogatories. That motion was filed with
9 reference to the Norma Olmo case, 13-3820 ML. Why don't
10 we start out the attorneys participating in this
11 telephonic hearing identifying themselves for the record
12 starting with plaintiff's counsel.

13 MR. PARAFINCZUK: Good Afternoon, your Honor.
14 Justin Parafinczuk on behalf of the plaintiff Norma
15 Olmo.

16 THE COURT: All right.

17 MR. ALEXANDER: This is Eric Alexander on behalf
18 of the defendant, your Honor.

19 THE COURT: Okay. I've reviewed the briefs and
20 there's a few preliminary conclusions I've reached which
21 I think I'll just throw out there to allow the attorneys
22 to put their arguments into some context.

23 First, I do think this is a procedural matter that's
24 governed by federal law and thus I reject the
25 plaintiff's argument that this Court is controlled by

1 the Florida ruling in Allstate vs Boecher that they cite
2 and use as the basis for the interrogatory. I believe
3 that the issue is properly decided under the Federal
4 Rules of Civil Procedure, in particular, Federal Rule of
5 Civil Procedure 26, including both the rules on expert
6 discovery and the general rules on relevance and
7 proportionality.

8 In addition, it looks like a number of the
9 interrogatories, although they were interrogatories
10 served on a party, seem to be asking defendants' law
11 firm to answer certain questions. I think it's
12 interrogatories 1 through 5 and, frankly, I don't
13 believe that's appropriate. Interrogatories should be
14 asking for information from the parties, in this case
15 which are Bard and Davol, and if there was relevant
16 information in the possession of their attorneys, that
17 was not privileged, I guess a subpoena would be a more
18 appropriate way to address the issue rather than in an
19 interrogatory. So I make that observation, as well.

20 Plaintiff's counsel, why don't you explain to me why
21 you believe that this additional information beyond
22 what's normally required in a Rule 26 expert report is
23 necessary and relevant in this particular case.

24 MR. PARAFINCZUK: Well, your Honor, based on your
25 ruling, you know, regarding our argument as to the

1 Boecher case, I guess our fallback would be that at this
2 point if we're only going to apply federal procedural
3 law then we would be entitled still to updated financial
4 payments to the experts in this matter. We don't
5 believe that that financial information which goes to
6 buyer's and incentive for the experts is updated to date
7 as we're on this phone call today.

8 THE COURT: Updated as to --

9 MR. PARAFINCZUK: We assume that it has changed,
10 I would imagine substantially, with many of these cases,
11 and depending on how many of these cases that the
12 defendant's experts have reviewed. I'm certainly not
13 asking the firm itself to answer an interrogatory,
14 although it may have been misworded or inartfully
15 phrased. What we are getting at is essentially, as your
16 Honor mentioned, what has Davol paid these experts for
17 at least the last 3 years.

18 THE COURT: All right. So, Mr. Alexander, why
19 isn't that relevant to the issue of bias?

20 MR. ALEXANDER: A couple of things, your Honor.
21 First, we now seem to be getting requests for things
22 that are not spelled out appropriately in the
23 interrogatories and are not the subject of their motion.

24 THE COURT: Well, hold on a second.

25 MR. ALEXANDER: So I --

1 THE COURT: So hold on a second. I want to be
2 just practical about this.

3 MR. ALEXANDER: Yes.

4 THE COURT: So, Interrogatory Number 6 --

5 MR. ALEXANDER: Right.

6 THE COURT: -- says: Please state the total
7 amount of money paid to Dr. Gryska, Dr. Reitman, and
8 Dr. Becker. I guess Reitman is not a doctor. Or any --

9 MR. ALEXANDER: She is.

10 THE COURT: Oh, she is. All right. Or any
11 entity owned or controlled by them by Bard and Davol.
12 So I think --

13 MR. ALEXANDER: Right, and their reply said they
14 only wanted that information for the last 3 years, which
15 is what Mr. Parafinczuk -- I'm sorry if I'm
16 mispronouncing your Honor. I don't think he's been
17 involved in the case before, wanted and said that he
18 only wants it for what's been earned on these cases.
19 Number 6 doesn't say the last 3 years. It's for all
20 times. It doesn't say for litigation only. It says for
21 anything which would include consulting, that would be
22 work-product consulting. It doesn't say for composix
23 civil cases or hernia cases. It is all amounts paid to
24 them for any purpose from time immemorial, which is
25 overbroad, and that's part of the issues and I'm happy

1 to address if they want to kind of narrow this down and
2 we could draft in a practical matter, but we did respond
3 to the interrogatories as phrased, and to the motion as
4 framed, and it is a little bit of a shifting plate, and
5 you know to deal with the narrowest thing that we're now
6 talking about of the last 3 years for composix Kugel
7 cases where the witness has been designated as an
8 expert, that is something that they certainly had the
9 opportunity to ask Dr. Gryska, Dr. Reitman -- she is a
10 -- has a doctorate law degree from MIT, so she probably
11 deserves being called a doctor. At their depositions
12 they didn't frame those questions. What they did ask
13 about was earnings from everything from all times where
14 the expert said: I don't know it offhand. But they do
15 have earnings information from all prior cases including
16 the depositions those folks gave just in December, and
17 they got all of the invoices for this case for those
18 witnesses. Dr. Becker is a little bit of a different
19 situation because she has no case specific opinions and
20 has no case specific earnings for this case, and
21 whatever they have about her earnings from composix
22 Kugel from before is still the case because she's not,
23 you know, getting paid just to be named in the case, not
24 deposed and not doing the report.

25 THE COURT: That's Dr. Reitman?

1 MR. ALEXANDER: They really if they --

2 THE COURT: Hold on, Mr. Alexander.

3 Mr. Alexander, that's Dr. Reitman?

4 MR. ALEXANDER: No, I'm sorry. That's
5 Dr. Becker. So for Dr. Becker, she has no case specific
6 opinions, she wasn't deposed, she has no earnings on the
7 Olmo case, but they do have information available to
8 them from her prior depositions on what she and the
9 companies she was affiliated with were paid from past
10 work on cases where she was named as an expert in
11 composix Kugel litigation. It's a little bit hard to
12 try to, you know, frame what we're talking about here.
13 And the issue with Dr. Reitman is that they're asking
14 about the amount that she was paid or any company she
15 owns was paid. She doesn't own a company and she hasn't
16 been paid. She's a salaried employee of a company that
17 gets paid, and we have produced all of their invoices in
18 this case in connection with her deposition in the
19 Bowersock case a couple of months ago. We produced
20 them. She answered questions about them. In all of her
21 generic deposition and trials she answered questions
22 about the total amount earned. They really do have this
23 if they piece it together but it's not on Bard, as you
24 pointed out. These are interrogatories directed to Bard
25 to be, you know, answering interrogatories in this

1 situation about the total amount paid to these
2 witnesses, and again answering the question as framed,
3 for all sources, all times, all potential litigations,
4 you know, maybe as paid directly by law firms because
5 when these individuals are retained by our law firm, or
6 another law firm on behalf of this client, they're
7 typically paid or, you know, the company they work for
8 in the case of Dr. Reitman, are paid by the law firm.
9 So we have that as a basic problem of just that these
10 weren't particularly well-framed, and we have a shifting
11 slate of how -- what we're supposed to be responding to,
12 but we do finally offer how this issue of how is this
13 case specific discoveries and stuff, all they're
14 supposed to be doing.

15 As for case specifics, we produced full invoices.
16 Even, you know, since the deposition we produced them
17 for Dr. Gryska. They have the total amount paid to
18 these people in this case. They know their rate
19 structure. They have all -- everything available from
20 before, too.

21 THE COURT: Hold on a second, Mr. Alexander.
22 That's been produced as part of the report and what
23 they've been paid for their work on the Olmo case,
24 right?

25 MR. ALEXANDER: Yeah, and in deposition and in

1 connection with deposition. So anything case specific
2 earnings we've produced all of that. There's, you know,
3 no question that they know what has been billed in
4 connection with their work and, like I said, for
5 right(inaudible) it goes to the company she works for
6 not to her.

7 THE COURT: So why wouldn't it be a fair question
8 at trial for them to ask, you know, how much money in
9 total have you received from Bard and Davol, whether
10 it's over the last 3 years or some other period? Why
11 wouldn't that be relevant to the issue of bias? I don't
12 see anything in Rule 26 that limits discovery to what's
13 required to be produced in an expert report.

14 MR. ALEXANDER: We agree, they can ask that
15 question, and they asked some questions along those
16 lines at deposition, but the expert either knows it or
17 they don't. I mean, the instance here was --

18 THE COURT: But they're asking Bard and Davol
19 now. Wouldn't Bard and Davol have some record of what
20 they've paid to these individuals? I assume they send
21 them a 1099 of any compensation or some other tax
22 reporting document?

23 MR. ALEXANDER: Well, it's, you know, Reed Smith,
24 when Reed Smith retains the expert on behalf of Bard is
25 the one typically paying their bills and so, this as it

1 goes, would include any number of different law firms.
2 For instance, Dr. Reitman's company, the company she
3 works for exponent, has done work in the pelvic mesh
4 litigation. Is this interrogatory calling upon Bard to
5 go through all of its outside counsel and to try to
6 track that down? You know, that's a lot broader than
7 what has Bard paid to these people directly. That
8 information about direct payments, you know, that really
9 applies to Dr. Gryska who had a licensing agreement over
10 some technology, and that was actually produced in
11 generic discovery and he's answered questions about
12 that, answered questions in deposition. But the real
13 issue is, if the witness doesn't know, if it's like,
14 hey, how much have you ever been paid in history, and
15 they say I don't know. Whatever I said before in my
16 generic deposition was an amount paid, or in prior
17 depositions is amount paid, but I don't really track
18 that cumulatively for all time, but I know what I've
19 been paid in this case. Maybe they even prefer that
20 answer. You've been paid so much you don't even know
21 how much it is. But I don't think that there's any
22 obligation under any source, and we have no cases cited
23 to support this, that there's an obligation on a party
24 to track down and compile a number for this, given that
25 we have these various sources of potential payment over

1 time, and as phrased, this question isn't specific to
2 this litigation, frankly litigation in general, any time
3 frame, any product. As framed, it would be any amount
4 paid. And for Bard and Davol, I don't think they've
5 directly paid Dr. Becker. I don't think, you know, paid
6 directly.

7 THE COURT: Let me ask you a question.

8 MR. ALEXANDER: Yeah.

9 THE COURT: I'm looking at Dr. Gryska's
10 deposition --

11 MR. ALEXANDER: Hmmm, hmmm.

12 THE COURT: And there was a question posed by
13 plaintiff's counsel: Do you know the total amount of
14 fees that had been paid to you by Reed Smith? You mean
15 ever? And then there's an objection by a Mr. Ash who I
16 assume is defense counsel: Yeah. And then
17 Mr. Ash says: Reed Smith doesn't actually pay him, the
18 company does, but go ahead, if you can answer.

19 MR. ALEXANDER: I think it depends on the
20 individual engagement. Sometimes it would be directly
21 from Davol in the case of like royalties, like the
22 royalties for a hernia product that he developed, could
23 go directly from Davol. But for certain litigation
24 engagements it comes directly from the client.

25 THE COURT: All right, let me ask --

1 MR. ALEXANDER: Let me just, it comes directly
2 from the law firm, so it depends.

3 THE COURT: All right. Let me ask
4 Mr. Parafinczuk, what is it that you're asking for in
5 terms of compensation?

6 MR. PARAFINCZUK: Your Honor, we're asking for
7 exactly that, is the compensation they received from
8 Davol on litigation, cases, support or opinions that
9 they provided. I find it hard to believe that Davol
10 does not have a record of that. I find it hard to
11 believe that it's extremely difficult for Davol, or
12 Davol, to come up with that information. We're not
13 asking the doctors, which I assume the doctors know
14 exactly how much they've been paid as well.

15 MR. ALEXANDER: But they don't. They answer
16 questions where they say we don't know.

17 THE COURT: Mr. Alexander, don't respond directly
18 to plaintiff's counsel.

19 MR. ALEXANDER: I'm sorry. I'm sorry, your
20 Honor.

21 THE COURT: That's okay. I mean, it will be
22 clear at trial that these experts are hired experts of
23 defendants so, you know, that's why Rule 26 says produce
24 the compensation to be paid in the case at hand and a
25 list of all other cases during the previous 4 years that

1 the witness, expert witness testified at trial or by
2 deposition just to show that the person has some
3 connection with the defendant or the party who's
4 presenting the expert. Why do you need this additional
5 information? Why isn't there enough in the record for
6 you to ask the questions and make it clear to the jury
7 that these are paid experts of the defendants?

8 MR. PARAFINCZUK: We can certainly establish that
9 for this case, your Honor, that the amount of bias
10 increases tremendously. It affects our case and it
11 affects the jurors opinions of their experts when they
12 hear exactly how much Davol has paid these experts over
13 the past 3 years. That goes to their bias in the fact
14 that their opinion is probably not going to go any other
15 way but the way that Davol wants it to go. So, in
16 comparison, this case, the experts were maybe paid
17 anywhere from 20 to 50 thousand dollars. Now, multiply
18 that by however many other cases they have been on which
19 we're probably talking in the millions of dollars. That
20 has a much more serious consequence in front of the
21 jury, and it is fair game for me to cross-examine an
22 expert and for me to have Davol answer how much money
23 they paid these guys.

24 THE COURT: All right.

25 MR. PARAFINCZUK: At a minimum.

1 THE COURT: All right.

2 MR. ALEXANDER: If I can respond.

3 THE COURT: You can respond Mr. Alexander.

4 MR. ALEXANDER: Yeah. I'm sorry, I'm not sure
5 what Mr. Parafinczuk is talking about. There's no
6 testimony that these people have been paid \$50,000 for
7 this case. That's just made up. And they reference
8 here to they should get to know -- they want to be able
9 to present to the jury the amounts that have been paid
10 in connection with consulting, which he's talking about,
11 including litigation consulting that wouldn't be
12 directly discoverable under Rule 26(b). There's no
13 basis to provide that information. And it is unclear, I
14 mean I can go through the motion, and obviously we are
15 in the situation where we are (inaudible)where generic
16 discovery has been done and there's been an order
17 precluding further generic discovery in this case. It's
18 unclear that plaintiff has consulted or mustered the
19 information about total amount paid that would be
20 available. If they just checked the trial transcripts
21 from -- frankly if they want to get to the big numbers,
22 they should look at what was it that these people earned
23 through the trials in court. There's been relatively
24 little in this litigation in the last couple of years
25 that bears the information that's been produced in

1 generic discovery and all the individual depositions
2 that have been taken where they say here's how much I've
3 made, here's what I think my total is. They probably
4 could get that from other sources of other litigations,
5 but there's just no obligation under Rule 26 for the
6 party, because that's what we're talking about, for the
7 party to muster and come up with a number for all
8 sources, for all what he's talking about, litigation
9 earnings, paid through outside counsel for any product.
10 It's just quite broad and not covered by Rule 26. Plus
11 in this case, we do have a scheduling order, and the
12 scheduling order does say here's when written discovery
13 is to be served about factual matters, and then it sets
14 out specifically what type of expert discovery is to be
15 envisioned. There's no provision in there for serving
16 interrogatories relating to expert issues. It's not
17 part of what was envisioned for case specific discovery
18 in this case, and that, I think, makes sense. If you
19 put it together with Rule 26, where there's a
20 requirement, as your Honor points out, that the
21 disclosure about compensation relates to what you're
22 getting for this case, then beyond that they are
23 entitled to ask the expert anything they want. They
24 could have asked a lot more, and the expert knows or the
25 expert doesn't know, and the expert, as it is in this

1 case, works like Dr. Reitman works for a company that
2 gets paid, and she gets paid a salary, she's not
3 necessarily going to know the answer to every question
4 they ask, and then they can use that. Nobody is under
5 an obligation to come up with precise numbers for Davol,
6 through its lawyers, directly, whatever, isn't obligated
7 to come up with more than it has, it's complied with
8 rules.

9 THE COURT: Well, Mr. Alexander, let me
10 understand your point here. So if you ask somebody a
11 detailed question during a deposition and they don't
12 have instant recollection of that, there's no other way
13 to get the information? Isn't that how discovery works?
14 It would be unlikely that most deponents can answer a
15 question like that off the top of their head. Usually
16 those kinds of questions are asked through
17 interrogatories or through document requests where you
18 can get the underlying information. Most people, an
19 expert like Dr. Gryska, for instance, is not going to
20 know, and I think he testified to this, he has no idea
21 off the top of his head how much he's received from Bard
22 or Davol. He said, I send them an invoice, I don't keep
23 a copy, I assume they send me a check and they send me a
24 tax form but I don't really keep track of it.

25 MR. ALEXANDER: Absolutely. And in connection

1 with the depositions, the typical practice as they could
2 have done, and as, you know, frankly we typically do, is
3 to ask for documents to be produced that provide
4 information about compensation beyond just the case and
5 that's what you want to know about. They could have
6 asked for that. They could have had him show up with
7 his 1099s or whatever, or provide documents that he had
8 available. What we produced in connection with the
9 deposition, and I think the only thing that's here,
10 because their motion doesn't call for anything relating
11 to what was or wasn't done in connection with the
12 depositions, was all of the information relating to the
13 amounts billed or paid for this case. So they have
14 complete records on amounts paid in connection with the
15 Olmo case. If they wanted more than that, the
16 appropriate way is to try and get it from the witness,
17 and like you said, because not everyone has instant
18 recall about, you know, exactly how many hours you
19 billed, or what you've been paid, they could have asked
20 for documents in connection with those depositions.
21 They didn't. Instead they filed this motion to compel
22 before those depositions even happened, and then when
23 they did the depositions, they didn't request a full
24 range of financial documents that they might have
25 requested through the experts, and they didn't ask a

1 full range of probing economic questions. They asked
2 very broad, if you go to -- I don't think it's really
3 the obligation of the Court to go through something
4 regard (inaudible) but if you go through the testimony
5 that's been attached, the highlighted parts, I mean they
6 asked the total amount of fees that Bard or Davol has
7 paid. Question back from Dr. Gryska, as an expert
8 witness for the composix Kugel litigation, as an expert
9 witness in general. I mean that's pretty broad and
10 understandable why he doesn't know that. But if they
11 wanted to get what they're now saying is I want to know
12 how much you've been paid in the last 3 years for the
13 composix Kugel litigation, they could have asked that
14 question. They didn't ever ask that in deposition.
15 They could have asked him to show up with documents that
16 evidenced what he's been paid in connection with the
17 composix Kugel litigation the last 3 years. They could
18 have broken it up in various ways. They could have done
19 a lot of things, but they didn't. All that we have.
20 And all that we can respond to as the party are these
21 interrogatories, and like you said, the only one that
22 conceivably has anything to do with what now seems to be
23 at issue is interrogatory number 6 which is total amount
24 paid by Bard to these experts, or any entity owned or
25 controlled by them. No 3 year limit. No litigation

1 limit. No product limit. Nothing. And, you know, you
2 and me (inaudible) about for Dr. Gryska, you know, maybe
3 some of his consulting goes back 15 years. It's not
4 understandable that -- I mean, it's understandable that
5 in a deposition when asked that he wouldn't be able to
6 give you an answer but it's not for Bard or Davol to go
7 back and do more on this. There's stuff that's actually
8 in the production relating to like income from
9 consulting, has already been produced as part of generic
10 discovery, for Dr. Gryska, the amounts paid in
11 connection with the royalties he got under Crurasoft
12 product produced in generic discovery. So what's left
13 that's case specific really would be what he'd been paid
14 for this case and can you update us. So, I mean, I
15 can't imagine anymore that Bard or Davol could have
16 done, or that Dr. Gryska in particular could have done
17 in deposition on the pending requests not requests that
18 (inaudible) made.

19 THE COURT: All right. Mr. Parafinczuk, is there
20 anything you want to respond to, briefly?

21 MR. PARAFINCZUK: Not really, your Honor.

22 THE COURT: All right.

23 MR. PARAFINCZUK: We just want the question
24 answered. That's all.

25 THE COURT: Okay. I'll take the matter under

1 **advisement. I'll get a short electronic order out in**
2 **the next day or so. Thanks for your arguments,**
3 **Gentlemen. The Court will be in recess.**

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C E R T I F I C A T E

I, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/JOSEPH A. FONTES

COURT REPORTER

MAY 22, 2016