UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: DAVOL, INC./C.R. BARD, INC., POLYPROPYLENE HERNIA MESH PRODUCTS LIABILITY LITIGATION

Case No. 2:18-md-2846

JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

This document relates to:
Johns v. CR Bard et al.,
Case No. 2:18-cv-01509

ORDER ADDRESSING DISCOVERY DISPUTE

Now before the Court is the parties' discovery dispute regarding the discoverability of redacted reports from Jordi Labs, LLC, testing the molecular weight of Avaulta transvaginal pelvic mesh and the proper scope of the supplemental deposition of Ahmed El-Ghannam, Ph.D., Plaintiff Steven Johns's expert. At the direction of the Court, the parties submitted email letter briefing. The briefing is now complete.

I. Background

Earlier this year, Defendants C.R. Bard., Inc. and Davol, Inc. filed a motion to strike the additional reports and reliance lists of Plaintiff's expert Dr. El-Ghannam. (ECF No. 40.) Specifically, Defendants argued that Dr. El-Ghannam's February 6, 2020 supplemental report and reliance list and his February 10, 2020 rebuttal report and reliance list presented new opinions, analysis, and data that were available to Dr. El-Ghannam at the time he submitted his original expert report and gave his original deposition. (*Id.* at PageID #2019–20.) The supplemental report and reliance list were an improper supplement under Federal Rule of Civil Procedure 26. (*Id.* at PageID #8201.) Accordingly, the supplemental materials were stricken except for differential scanning

calorimetry ("DSC") testing data from the Polymer Center of Excellence and materials relating to medical grade polypropylene, which Defendants had sought repeatedly during discovery. (*Id.* at PageID #8203–04.) Defendants' motion to strike Dr. El-Ghannam's rebuttal report and materials was denied, but Defendants were permitted to take a second deposition of Dr. El-Ghannam to address the new information in his rebuttal report and to file further *Daubert* motions related to the rebuttal report after his second deposition. (*Id.* at PageID #8205–06.)

In response to Defendants' request ahead of this second deposition that Dr. El-Ghannam produce "[a]ll materials and documents you reviewed, relied upon, and/or created in reaching the opinions set forth in your February 10, 2020 Rebuttal Report," Plaintiff produced a heavily redacted document comprised of three reports from Jordi Labs concerning DSC testing, thermogravimetric analysis ("TGA"), and gel permeation chromatography ("GPC") on Avaulta devices, the subject of transvaginal pelvic mesh device litigation. The parties appear to agree that patient information, device-identifying information, and the DSC and TGA test results were redacted. At a hearing on October 28, 2020, Defendants informed the Court of this dispute. (ECF No. 360 at PageID #18811–12.) The parties submitted letter briefing via email as directed. Defendants argue that the redacted portions of the reports are discoverable, and Plaintiff argues that the redacted portions are neither discoverable nor a proper subject of questioning during Dr. El-Ghannam's second deposition.

II. Discoverability

Federal Rule of Civil Procedure 26(a)(2)(B)(ii) requires disclosure of "the facts or data considered by the witness in forming" his opinions. Fed. R. Civ. P. 26(a)(2)(B)(ii).

"The deposition-discovery rules," such as Rule 26, "are to be accorded a broad and liberal treatment." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). The Sixth Circuit has abided by the Supreme Court's direction and interpreted Rule 26(a)(2)(B) broadly, explaining that the opposing party must disclose more than "the facts known or relied upon by [their] testifying experts." *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 716 (6th Cir. 2006) (considering whether attorney-opinion work product was discoverable under the Rule). Put differently, a party is entitled to access to "all materials reviewed or considered by the expert, whether or not the expert report ultimately refers to those materials as a basis of his or her opinions." *United States v. Am. Elec. Power Serv. Corp.*, Nos. 2:99-cv-1182, 2:99-cv-1250, 2006 WL 3827509 (S.D. Ohio Dec. 28, 2006). In this circuit, courts have similarly interpreted "considered" in Rule 26(a)(2)(B)(ii) generously, concluding that "considered" includes "anything received, reviewed, read, or authored by the expert, before or in connection with the forming of his opinion, if the subject matter relates to the facts or opinions expressed." *Euclid Chem. Co. v. Vector Corrosion Techs., Inc.*, No. 1:05 CV 80, 2007 WL 1560277, at *4 (N.D. Ohio May 29, 2007) (citations omitted). This includes documents and sources the expert has reviewed *but rejected* in reaching an opinion in order to facilitate effective cross-examination. *W. Res., Inc. v. Union Pac. R.R. Co.*, No. 00-2045-CM, 2012 WL 181494, at *9 (D. Kan. Jan. 31, 2002); Steven S. Gensler & Lumen N. Mulligan, 1 Fed. R.Fed. R. Civ. Pro., Rules & Comment. Rule 26 (WestLaw Feb. 2020 Update) ("The requirement of a detailed report serves several functions. It helps the opposing party to meaningfully depose the expert.") Ambiguities are resolved in favor of discovery. *Id.*; *W. Res., Inc.*, 2012 WL 181494, at *16 (citing *BCF Oil Refin., Inc. v. Consol. Edison Co.*, 171 F.R.D. 57, 62 (S.D.N.Y.

1997)).

The redacted portions of the Jordi Labs reports fall within the definition of Rule 26(a)(2)(B)(ii). Dr. El-Ghannam's expert opinion is that the molecular weight of Defendants' Avaulta device, transvaginal pelvic mesh, decreases over time, indicating degradation. To support that opinion, Dr. El-Ghannam listed Avaulta DSC and other molecular weight data in his reliance list. (Ex. 1 at 45.) Moreover, Plaintiff produced some portions of the Jordi Lab reports that Dr. El-Ghannam purportedly relied on, while redacting the portions at issue. It is difficult to believe that Dr. El-Ghannam did not at the least review or read the redacted versions of the reports before or while forming his opinion, particularly when Plaintiff has produced about half of the report unredacted and the entirety of the Jordi Lab reports addresses the Avaulta device and various methods of testing its molecular weight. (*See, e.g.*, Jordi Lab Reps. at 42 (describing the object of the testing method as molecular weight).) In the Rule 26 context, "Defendant[s] should not have to rely on [P]laintiff's representation that these documents were not considered by the expert in forming his opinion." *BCF Oil*, 171 F.R.D. at 62. Here, the best evidence that Dr. El-Ghannam considered the redacted parts of the Jordi Lab reports is that he considered other parts of the reports on the same subject matter.

The best case for Plaintiff under these circumstances is that there is an ambiguity—whether portions of a redacted report, which an expert has otherwise relied on, are discoverable when the report pertains to the same subject matter—and ambiguities are resolved in favor of discovery. Even if Dr. El-Ghannam ultimately did not *rely* on the redacted portions of the Jordi Lab reports, Plaintiff must produce those portions so that Defendants can effectively cross-examine Dr. El-Ghannam about why he declined to do so when he appears

to have relied on some of the reports. For this reason, Plaintiff must produce the unredacted Jordi Lab reports.[1]

Plaintiff's arguments to the contrary are unpersuasive. First, Plaintiff argues that some of the redacted information is patient health data. (Pl. Br. at 3.) This dispute is manufactured. Defendants clearly state that they are willing to "preserv[e] protections for patient identifying information," and request that Plaintiff provide a cross-reference list for the purposes of reading and interpreting the reports with patient redactions left intact. (Def. Br. at 3 n.2.) This is reasonable and feasible.

Next, Plaintiff contends that Dr. El-Ghannam did not actually rely on the redacted portions of the Jordi Lab reports when reaching his opinion in his rebuttal report in this case. (Pl. Br. at 4.) Although Plaintiff generally asserts that El-Ghannam did not "consider" those portions, he appears to mean that Dr. El-Ghannam did not "include any examples or references" to the redacted versions of the report. (*Id.* at 5.) This interpretation of "considered" runs counter to *Regional Airport Authority* and the approach of most courts in this circuit as set forth above. *See also Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 306 (W. Va. 1998) (explaining that "'considered' clearly invokes a broader spectrum of thought that the phrase ['']relied upon['']").

Plaintiff also appears to argue that Dr. El-Ghannam relied on the redacted portions in the transvaginal pelvic mesh MDL, but not this MDL, rendering those redacted portions part of his "past knowledge and experience." (*Id.*) It is true that Defendants are not "entitle[d] . . . to everything [Dr. El-Ghannam] worked on throughout his career" or any

[1] The Court is aware that Defendants have access to what appears to be the unredacted Jordi Labs reports because they were produced in full in the transvaginal mesh litigation. (ECF No. 360 at PageID #18811–12.) Plaintiff does not argue that he should not have to produce the report for this reason. Therefore, the Court does not consider this argument.

materials he once read, reviewed, authored, etc. *Acosta v. Wilmington Tr.*, No 1:17-CV-1755, 2019 WL 329592, at *1 (N.D. Ohio Jan. 25, 2019). But the redacted portions of the Jordi Labs reports are not far-removed documents that Dr. El-Ghannam once reviewed in his professional capacity or general materials that "provided [Dr. El-Ghannam] with career experience." *Id.* The redacted portions of the reports are clearly materials "received, reviewed, read, or authored by the expert, *before* or in connection with the forming of his opinion" related to "the subject matter" or "facts" of the opinion, which are fair game in discovery. *Euclid Chem. Co.*, 2007 WL 1560277, at *4 (emphasis added).

Moreover, Plaintiff obscures key distinguishing facts here. In *Acosta*, the Defendants sought discovery of a distinct group of documents pertaining to the expert's prior employment. *Id.* Here, Defendants hardly ask for far-removed documents nor are they relying on Dr. El-Ghannam's "general remarks in a deposition about his expertise." (Pl. Br. at 4 (citing *Euclid*, 2007 WL 1560377, at *3).) Rather, they ask for the entirety of the Jordi Labs reports—part of which Plaintiff produced.

Finally, Plaintiff argues that any broad mention of molecular weight data in his reliance list is too general to count as a reference to the Jordi Lab reports; in fact, Dr. El-Ghannam was referring to the data used by Defendants' expert, Dr. Reitman. (Pl. Br. at 5.) But again, Defendants are entitled to more than Plaintiff's representation that Dr. El-Ghannam did not consider the reports or that Dr. El-Ghannam meant something different than what he stated in his reference list. *BCF Oil*, 171 F.R.D. at 62. The list refers to data regarding Avaulta's molecular weight, which the Jordi Lab reports contain.[2]

[2] Moreover, it would be strange to reward Plaintiff for his expert's vagueness given the clear dictates of Rule 26(a)(2)(B), which requires specificity in a testifying expert's reports. Fed. R. Civ. P. 26(a)(2)(B); *see supra* Gensler & Mulligan (describing the expert report as "detailed

III. Scope of Deposition Questioning

Because Dr. El-Ghannam considered the complete Jordi Labs reports when forming the opinion in his rebuttal report, it is a proper subject of questioning during his deposition. Indeed, the purpose of expert disclosures under Rule 26(a) is to adequately equip the opposing party to cross-examine the expert witness. *City of Owensboro v. Ky. Utils. Co.*, No. 4:04CV-87-M, 2008 WL 4542674, at *2 (W.D. Ky. Oct. 8, 2008); *see also W. Res., Inc.* 2012 WL 181494, at *9. Even when documents are not discoverable under Rule 26(a)(2)(B), parties are not precluded "from obtaining further information through ordinary discovery tools," such as a deposition. *United States v. Bazaarvoice, Inc.*, No. C 13-00133 WHO (LB), 2013 WL 3784240, at *2 (N.D. Cal. July 18, 2013). In this case, Rule 26(a)(2)(B) compels disclosure of the redacted Jodri Lab reports as materials considered by Dr. El-Ghannam informing his expert opinion in his rebuttal report. Therefore, it is difficult to imagine how this topic would be outside of the bounds of a deposition regarding the rebuttal report.

Plaintiff argues that if the redacted parts of the reports are discoverable, they should not be a subject of questioning during Dr. El-Ghannam's second deposition because he did not rely on those portions to form his opinion in his rebuttal report. (Pl. Br. at 5.) This logic is circular. The redacted Jordi Lab reports are discoverable under Rule 26(a)(2)(B) because Dr. El-Ghannam considered them in forming his opinion in his rebuttal report. Thus, the unredacted portions are discoverable and within the proper scope of this second deposition.

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and complete"). Such a result would be an end-run around Rule 26(a)(2)(B) and only serve to incentivize gamesmanship in discovery by encouraging vague statements.

IV. Conclusion

Accordingly, Plaintiff is shall produce the unredacted Jordi Lab reports, with the exception of patient information, along with a cross-reference document accounting for the redaction of patient information ahead of Dr. El-Ghannam's deposition. Defendants may address the entirety of the Jordi Lab reports during Dr. El-Ghannam's deposition to the extent that such questioning is appropriate, relevant, and otherwise permitted by law.

IT IS SO ORDERED.

12/17/2020
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE