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Docket: BLS 1

Date: November 28, 2017

Parties: MEDICAL SOURCE, INC. et at VS. PERKINELMER HEALTH SCIENCES, INC.

Judge: Edward P. Leibensperger

ORDER ON MOTIONS REGARDING DISCOVERY FROM A NON-PARTY

In this commercial dispute regarding a product sold by PerkinElmer to plaintiff, discovery is sought by plaintiffs from a non-party, Virscidian, Inc. Plaintiffs move for the issuance of a letter rogatory to compel the production of documents from, and the appearance for deposition of Virscidian, a company located in North Carolina (Paper No. 36). In response, Virscidian moves for a protective order to limit the scope of discovery and to require that plaintiffs bear the cost of the review and production of responsive documents (Paper No. 37).

At the hearing of these motions on November 8, 2017, I asked the parties to confer, again, to limit the areas of dispute. I pointed out that plaintiffs are entitled to some discovery as requested but that plaintiffs "must take reasonable steps to avoid imposing undue burden or expense" on Virscidian. See, Mass. R. Civ. P. 45 (b). Pursuant to Rule 45 (b), I indicated that denial of Virscidian's motion for protective order would be conditioned "upon the advancement [by plaintiffs] of the reasonable cost of producing the documents"Id. I then ordered the parties to submit a chart showing plaintiff' revised requests for documents, Virscidian's objections, and Verscidian's estimate of the cost of responding to the narrowed requests. The

-1-

requested chart was filed on November 20, 2017, as a Joint Supplemental Submission (Paper No. 43), .

Plaintiffs allege that PerkinElmer's Time-of-Flight Mass Spectrometer ("TOF"), as purchased by them, is defective. Virscidian developed a software component of the TOF called "Solo." Plaintiffs believe that Virscidian is in possession of documents that directly relate to alleged flaws in the software component. Plaintiffs allege that the software issues are "at the heart of the defective TOFs. Plaintiffs requested approval of a subpoena for the production of documents from Virscidian responsive to 14 enumerated requests. In addition, plaintiffs requested approval of a subpoena to Virscidian to produce a witness, designated by the corporation, to testify as to 18 described subject areas.

Virscidian's motion for a protective order, supported by an affidavit from its founder and CEO, Joseph D. Simpkins, points out that Virscidian is a small company with only four, full-time, employees in addition to Mr. Sinvkins. Mr. Simpkins estimates that it would take his employees approximately 600 hours to find, review and produce documents responsive to the requests. Such an effort would substantially interfere with Virscidian's ongoing business. "Even if we outsourced the project, I would still need to be substantially involved to oversee capture of the .pst files, confirm they are frilly indexed, answer questions and review flagged emails. Outsourcing it to a firm that I trust and has the competence to review the emails could cost as much as \$150,000, assuming a charge of \$250 per hour." Simpkins Affidavit, 116.

My order to the parties to re-confer regarding the scope of plaintiffs' discovery requests and to provide an estimate of the cost to Virscidian resulted in the Joint Supplemental Submission. It should be noted that counsel for PerkinElmer is also representing Virscidian with

respect to its motion for a protective order. Pursuant to my order to re-confer so as to narrow the areas of dispute, the 14 requests for documents were narrowed by plaintiff to six requests. Nevertheless, the Joint Supplemental Submission contains an estimate from Virscidian of "associated costs" of production of approximately \$507,000, more than a three-fold increase over Mr. Simpkins' initial estimate of cost. A Supplemental Affidavit from Mr. Simpkins attempts to provide an hourly estimate for the calculation of cost. The \$507,000 estimate appears to be based on an estimate now of 1890 hours at a rate of approximately \$265 per hour to perform the tasks to produce the documents. Moreover, Mr. Simpkins pleads that his business will be disrupted.[1]

I find that Mr. Simpkins' estimates appear to be excessive. Like any citizen, Virscidian is obligated to comply with legal process and to bear at least some cost in doing so. I recognize, however, that Virscidian is a small company. It's business should not be overwhelmed by having to comply with plaintiffs' subpoena. Accordingly, the following Order attempts to balance the right of plaintiff to obtain discovery and to protect Virscidian from undue burden and expense.

ORDER

1. Plaintiffs' requests for documents related to Virscidian's "Solo" software is hereby narrowed further to include only documents concerning Solo Quant. Virscidian is not required to produce documents concerning its core product, Analytical Studio. This ruling applies to Requests Nos. 1 to 5 in the Joint Supplemental Submission.

2. As a result of the narrowing of the requests described in paragraph 1, above, the estimate of "associated costs" to Virscidian of producing the documents decreases to approximately

[1] Mr. Simpkins also indicates that he will be the Rule 30 (b) (6) witness but because of back surgery on November 21, 2017, he will not be available until February 2018.

-3-

\$101,000. To avoid disruption to Virscidian's business, I order that plaintiffs be responsible to pay the fees of third-party contractor, to be engaged by Virscidian, to conduct the search and review. The contractor will search for, review and produce documents, after consultation with Virscidian, responsive to all six paragraphs of plaintiffs' requests in the Joint Supplemental Submission, as modified by this Order in paragraph 1. Plaintiffs shall be responsible to pay only the fees of the contractor, not the internal cost of Virscidian's employees or officers incurred to assist the contractor. Plaintiffs' responsibility to pay the costs of the contractor is capped at \$50,000. In order to trigger plaintiffs' obligation to pay the contractor, the contractor shall submit to plaintiff's counsel, every fifteen days, detailed bills showing the hours spent, the hourly rates of its employees, and the status of the production.

3. Virscidian's motion for a protective order is DENIED, conditioned upon plaintiffs' obligation to pay a contractor engaged by Virscidian as described in paragraph 2, above. Virscidian shall produce responsive documents pursuant to the subpoena by no later than February 28, 2018.

4. Plaintiffs may proceed with the deposition of a corporate witness designated by Virscidian, presumably Mr. Simpkins. The deposition shall not exceed 8 hours. The deposition shall take place at a mutually agreed upon location in North Carolina. The deposition shall take place upon a mutually agreed upon date, no later than March 31, 2018. The scope of the deposition

includes all of the subject areas indicated in the initial subpoena.

-4-

5. If either plaintiffs or Virscidian believe an order from a North Carolina court is necessary to enforce this Order, plaintiffs shall file, within 14 days of this Order, a revised motion for a letter rogatory with the appropriate exhibits, including a copy of this Order and the Joint Supplemental Submission.

By the Court,
Edward P. Leibensperger
Justice of the Superior Court