UNITED STATES DISTRICT COURT
THE 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:
ALL CASES.

ORDER

This matter is before the Court on Secant Medical Inc.'s ("Secant") request for attorneys' fees. Secant, a non-party in this action, requests that the PSC be ordered to pay its attorneys' fees for attorney and paralegal review of documents in response to the PSC's third-party discovery requests. For the following reasons, the Court **DENIES** Secant's request for attorneys' fees and costs.

I. BACKGROUND

Secant is, among other things, "a biomaterial supplier of medical textiles that are component parts for medical devices." (Doc. 397 at 2). In June 2019, the PSC issued a subpoena requesting that Secant produce contracts, communications, and related ESI between Secant, Defendants, and Becton, Dickinson and Company. (*See generally* Doc. 397-1). Responding to the PSC's subpoena, Secant objected that, "[t]o the extent that the Subpoena seeks electronic data from 2011 or earlier, Secant will have to incur significant cost and time in obtaining such data" because "to the extent it exists, [it] is stored on backup tapes." (Doc. 397-2 at 3).

On January 3, 2020, Defendants noticed a 30(b)(6) deposition of Secant on topics dating back to 2000. (Doc. 290). Shortly thereafter, the PSC served Secant with a second subpoena,

(Doc. 397-3 at 6–12), to which Secant objected, in part, because, "beyond the cost and time required to restore [backup] data, significant time and expense will be required to review the data for relevancy and responsiveness," (Doc. 397-4 at 4).

The PSC and Secant subsequently met and conferred regarding Secant's obligation to produce documents. (*See generally* Docs. 398-2–398-4). They agreed that Secant would restore a limited number of backup tapes and that the PSC would pay for the vendor costs associated with that process. (Doc. 398-2 at 2). Further, they agreed on a set of search terms to be applied to the restored data. (Doc. 397 at 6; Doc. 398 at 3).

On March 11, 2020, Secant's counsel informed the PSC that "[t]he cost to restore the 3 tapes is around $1,000.00 and the cost of processing the data for 3 email custodians, performing the searches and processing and storing for the first month is around $1,500.00." (Doc. 398-3 at 2). The PSC approved Secant to proceed with the restoration and processing of those 3 tapes accordingly. (*Id.*). At the request of the PSC, Secant obtained an estimate of the cost to restore, process, and host the data from the remaining backup tapes. (Doc. 398-4 at 2–3). Based on that estimate, the PSC requested that Secant discontinue its work restoring backup tapes. (Doc. 398 at 3). "The PSC inquired as to whether Secant would produce documents obtained during the 'test run,' and Secant's counsel responded that it would release the documents upon the PSC's payment of $28,138.50 in attorney and paralegal time billed by Secant." (*Id.*).

The PSC refused to pay that amount, and the parties subsequently raised the issue of attorneys' fees with the Court. After hearing from the parties and counsel for Secant at the June 18, 2020, CMC, the parties and Secant submitted their briefs, (Docs. 396–98), on the dispute, which is now ripe for resolution.

II. STANDARD OF REVIEW

The Federal Rules permit a party to obtain discovery from third parties. *See generally* Fed. R. Civ. P. 45. "A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(d)(1). "The court for the district where compliance is required must enforce this duty and impose an appropriate sanction--which may include lost earnings and reasonable attorney's fees--on a party or attorney who fails to comply." *Id.*

> Undue burden is to be assessed in a case-specific manner considering such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed. Courts must balance the need for discovery against the burden imposed on the person ordered to produce documents, and the status of that person as a non-party is a factor.

In re: Modern Plastics Corp., 890 F.3d 244, 251 (6th Cir.), *reh'g denied* (May 17, 2018), *cert. denied sub nom. New Prod. Corp. v. Dickinson Wright, PLLC*, 139 S. Ct. 289, 202 L. Ed. 2d 136 (2018).

III. DISCUSSION

The parties offer competing arguments regarding who should be responsible for Secant's attorneys' fees and costs. Secant maintains that the PSC should be ordered to pay for all of its vendor costs, its "legal fees and costs to respond to the subpoena issued on January 10, 2020," and its "legal fees and costs incurred litigating this cost-shifting fee dispute under Rule 45." (Doc. 397 at 10). The PSC contends that it should not be required to pay any of Secant's attorney's fees. (Doc. 398 at 10). If the Court is inclined to award attorneys' fees to Secant, the PSC requests that Defendants be ordered to share in those costs. (*Id.*). Defendants take no position on whether the PSC should be required to compensate Secant, but they insist that they should not be required to share in any cost-shifting award. (Doc. 396).

Whether cost-shifting is appropriate here turns on whether the PSC failed to take reasonable steps to protect Secant from undue burden or expense. If the PSC had attempted to enforce in full either or both of the subpoenas served on Secant without offering to share costs, the Court would likely order cost-shifting. But, on the record before the Court, that is not what happened. Instead, the PSC worked to narrow its request for information to three backup tapes for which it agreed to pay the relevant vendor costs. And when Secant informed the PSC that restoration of the remaining backup tapes would cost tens of thousands of dollars, it the instructed Secant not to do so. The Court has little trouble finding that these steps were reasonably designed to minimize the burden and expense on Secant.

Secant, of course, is concerned with the attorneys' fees and costs that it incurred in reviewing the data recovered from the three backup tapes for relevancy and privilege. But those fees and costs are a problem of Secant's own making. According to Secant, after applying the agreed search terms to the restored data, it identified 54,176 documents as potentially relevant. There is no question that is a significant number of documents, suggesting that the search terms were too broad and likely to result in numerous irrelevant documents being subject to some form of review. As best the Court can tell, however, Secant did not raise this issue with the PSC. Instead, before being instructed to stop work, Secant's counsel and paralegals proceeded to review 4,563 documents, resulting in fees of $28,138.50. (Doc. 398-7 at 2–5).

Should the PSC be responsible for the fees and costs associated with the review? Not based on the evidence before the Court. In the Court's experience, and based on its knowledge of the local market, $28,138.50 is seriously excessive for this type of review. In conducting the review, counsel charged $515 per hour, and his paralegals charged $245 per hour and $260 per hour respectively. (*Id.* at 5). A reasonable review of this quantity of documents could have been

performed for a fraction of the cost using contract attorneys and a sophisticated discovery platform, like Nebula.

More importantly, the PSC was not informed of this information before Secant proceeded with its review. If it had, the outcome would likely be different. For example, if Secant had informed the PSC that running the search terms against the restored data identified 54,176 documents and the PSC then refused to modify those search terms, the Court would likely have found that unreasonable and that the PSC failed to comply with its obligation to minimize the burden and expense on Secant. But the PSC was never provided that information. And, absent Secant having raised that issue with the PSC, it cannot be faulted for not taking steps to mitigate an issue of which it was unaware.

Similarly, if Secant had informed the PSC that it intended to have a partner and two paralegals perform a review of those documents for relevancy and privilege and the PSC raised no objection, the Court would likely have found the PSC's refusal to pay at least some of the fees and costs for that review unreasonable. But that is not what happened here. If it had, the Court has no doubt that the PSC would have refused to proceed with a review conducted by paralegals and a partner charging $515 per hour. Again, the PSC's actions were not unreasonable given the information available to them.

At bottom, Secant does not dispute the relevance of the documents or the PSC's need for them. And the record demonstrates that the PSC narrowed its the breadth of the document request and the time period covered by it as part of the meet and conferral process. *Cf. In re: Modern Plastics Corp.*, 890 F.3d at 251 ("Undue burden is to be assessed in a case-specific manner considering such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are

described and the burden imposed."). As discussed above, Secant, not the PSC, was responsible for the burdensome amount of attorneys' fees and costs it incurred. The Court, therefore, will deny Secant's request.

Secant's arguments to the contrary are not persuasive. First, it contends that "[t]he PSC was aware that Secant was not willing to incur outside vendor costs and legal fees for reviewing any recovered documents for responsiveness and privilege. Knowing this, the PSC gave permission for Secant to proceed." (Doc. 397 at 6). Secant, however, offers no evidence to support this. And any such evidence is absent from the record.

On February 12, 2020, Secant proposed restoring one of the backup tapes as a "test run" if the PSC was "willing to cover the expense." (Doc. 398-2 at 2). After Secant confirmed that "[t]he cost to restore the 3 tapes is around $1,000.00 and the cost of processing the data for 3 email custodians, performing the searches and processing and storing for the first month is around $1,500.00." (Doc. 398-3 at 2). The PSC approved Secant to proceed with the restoration and processing of those 3 tapes at "those price points." (*Id.*). Although Secant asserts that there was always an understanding that the PSC would pay attorneys' fees and costs for the review of the data from those tapes, (Doc. 393, 11:25–12:9; *id.*, 12:22–13:2; Doc. 397 at 4–5), the record does not support that conclusion.

Second, Secant argues, "[i]f the PSC had no intention of paying Secant's costs and fees, including attorney's fees for reviewing the documents, it needed to advise Secant before Secant incurred such fees." (Doc. 397 at 6). While that would be a convenient rule for third parties everywhere, that is not how third-party discovery operates in this country. As a general rule, third parties are required to respond to Rule 45 subpoenas and bear the associated costs, including attorneys' fees. One of the exceptions to that general rule is if the party serving the subpoena fails

to take reasonable steps to "avoid imposing undue burden or expense on a person subject to the subpoena," Fed. R. Civ. P. 45(d)(1). But, as discussed above, that is not what occurred here. Secant, not the PSC, was obligated to raise the issue of undue burden and provide the PSC with the necessary information to evaluate Secant's undue burden argument. Because Secant did not do so here, its argument fails.

Third, Secant asserts that the Court is required to protect third parties from significant expense. (Doc. 397 at 7–8). When ruling on a motion to compel, a court may compel a third party to produce documents, but "the order must protect" third parties "from significant expense resulting from compliance." Fed. R. Civ. P. 45(d)(2)(B)(ii). Here, no motion to compel is before the Court. In any event, under this provision, expenses incurred in complying with a subpoena must be reasonable, and the determination of whether expenses are significant or reasonable are within the discretion of the trial court. *Linglong Americas Inc. v. Horizon Tire, Inc.*, No. 1:15CV1240, 2018 WL 1631341, at *2 (N.D. Ohio Apr. 4, 2018). The Court has already concluded that Secant's fees for the review of the relevant documents were not reasonable. This argument is, therefore, of little help to Secant.

Finally, Secant argues that having Secant "bear these litigation costs is contrary to the protections Congress guaranteed to biomaterial suppliers under the BAAA [Biomaterial Access Assurance Act of 1998]." (Doc. 397 at 10; *see also id.* at 2 (discussing the BAAA)). If true, that would be a strong argument. But Secant does not develop it, so neither does the Court.

IV. CONCLUSION

For the foregoing reasons, Secant's request for attorneys' fees and costs is **DENIED**.

IT IS SO ORDERED.

Date: July 7, 2020

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

s/Kimberly A. Jolson
KIMBERLY A. JOLSON
UNITED STATES MAGISTRATE JUDGE