

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: COVIDIEN HERNIA MESH
PRODUCTS LIABILITY LITIGATION
(NO. II)

MDL NO. 22-03029-PBS

ORDER ON PLAINTIFFS' MOTION TO QUASH
DEFENDANTS' CROSS-NOTICES OF DEPOSITIONS (#233)

KELLEY, U.S.M.J.

Plaintiffs, in this federal multidistrict litigation related to Covidien hernia mesh products, move to quash defendants' cross-notices of depositions of corporate employees Steven Drury, Jonathan Thomas and Scott Chouinard, originally noticed by one of two sets of plaintiffs (the "Multifilament" as opposed to "Non-Multifilament") in the Massachusetts state court litigation related to Covidien hernia mesh products, *Bettie Ann Smith v. Covidien PLC, et al.*, Middlesex Superior Court No. 1781CV01845, *see* #233-1. (#233; #238, supplement to motion to quash).¹ Defendants oppose. (#239.)

As to Drury, the Motion to Quash is **DENIED AS MOOT**. The Multifilament Plaintiffs have withdrawn that original notice of deposition. (#239-1 at 2.)

¹ Defendants also cross-noticed the Drury, Thomas, and Chouinard depositions as to the Non-Multifilament Plaintiffs and in the Minnesota state court litigation related to Covidien hernia mesh products, *In re Covidien Hernia Mesh Litigation*, Hennepin County District Court, No. 27-CV-21-14780. *See* #233-1. Defendants represent that the Minnesota state court plaintiffs have not moved to quash. (#239 at 5 n.2.)

The Motion to Quash is **DENIED WITHOUT PREJUDICE** to the extent that plaintiffs seek an order quashing defendants' anticipated cross-notices of as-of-yet scheduled depositions.² From the representations of defense counsel, it appears that the plaintiffs in the Massachusetts state court litigation are seeking to depose twenty to thirty corporate witnesses whom defendants will make available. About two-thirds of those witnesses are outside the United States and the parties have coordinated as to their depositions, scheduled for three or so weeks in March 2024. About one-third of those witnesses are in the United States and the parties have not coordinated as to their depositions. (#239 at 4); *see* #239-4 at 4-6 (excerpt of transcript of October 20, 2023 status conference before Massachusetts Superior Court Judge Barry-Smith). Thus, disputes may arise as to a relatively small number of domestic corporate witnesses. If defendants do ultimately serve cross-notices as to any of these witnesses and plaintiffs feel that they will not be able to adequately prepare for or participate in the scheduled depositions, plaintiffs are free to file motions to quash at that time.

As to Thomas, whose deposition is scheduled for December 13, 2023, to be continued, if necessary, on December 14, *see* #233-1 at 12, the Motion to Quash is **ALLOWED**. Judge Saris has already declined to mandate that plaintiffs in this litigation coordinate with the depositions in the Massachusetts state court litigation. (#163 at 13, 33.)³ And defendants have not convinced this

² *See* #233 at 2 (“For the same reasons as set forth below, any further attempts to cross-notice should be quashed as well”).

³ Judge Saris was not particularly receptive to defense counsel's request at the October 25, 2022 status conference that counsel be permitted “to reserve on” and “revisit” the issue of coordination:

What can I say? I mean, we're on different tracks. I've already said they can't duplicate exactly what was done. I've already said that they get the limit, what's it, seven hours under the local rules? So if it's the next day or whether it's two months from then, what does it matter? . . . If you can coordinate, fine, but I'm not mandating it. . . . It's unfortunate that we have completely different counsel, and

court that any reconsideration of Judge Saris' prior ruling is warranted. First, plaintiffs were entitled to rely on Judge Saris' ruling in reviewing document productions and preparing for depositions in this litigation to date. The parties held a meet-and-confer on October 12, 2023 regarding defendants' intent to cross-notice all domestic depositions, and the cross-notices of the Thomas and Chouinard depositions were served on October 19 and November 10, respectively. *See* #233 at 1; *see also* #233-1 at 4, 14. It is unfair to expect plaintiffs to adjust their approach, in reasonable reliance on Judge Saris' prior ruling, when just two months separated the meet-and-confer and the first cross-noticed deposition at issue, and just two weeks separate this order and that deposition.

Plaintiffs argue that they will be unduly burdened by mandatory coordination of the Thomas (and Chouinard) deposition in part because they will not have enough time to review defendants' recent document productions, made on October 23, 2023, *see* #239-10 at 2. (#233 at 7.) Defendants dispute plaintiffs' need to review these document productions before the Thomas (and Chouinard) deposition but do not dispute that the productions consisted of over 100,000 documents. *See* #233 at 7; *see also* #239 at 10.

plaintiffs are going to have a problem because there may be inconsistent positions taken. . . .

Id. at 32-34. In their opposition, defendants do not meaningfully address Judge Saris' prior ruling. Instead, they rely on Judge Barry-Smith's more recent comments, *see* #239 at 3:

If it's helpful or necessary to say anything or enter any orders about trying to cross-notice among the cases, I'm happy to do it because it seems to make a lot of sense, *especially if their depositions are taking place abroad.* . . .

(#239-4 at 6) (emphasis supplied). The parties have coordinated as to the international depositions. Domestic depositions are at issue here.

Moreover, defendants do not claim that custodial document productions are now complete. They claim that custodial document productions were “substantially complete,” as of September 27, 2023. (#239 at 10.)

Defendants’ arguments with respect to the overlap of lead counsel for plaintiffs in this litigation and numerous plaintiffs in the Massachusetts state court litigation as well as the timing of the re-production here of the documents from the latter (made on April 20, 2023, *see* #239-9 at 2) miss the mark. (#239 at 10.) Counsel have had access to the state court documents for many months, however, that does not change the fact that plaintiffs in this litigation were entitled to rely on Judge Saris’ prior ruling. Nor does it change the fact that defendants in this litigation continued to make document productions after that re-production, including on October 23, 2023. *See* #239 at 11 (noting that, contrary to plaintiffs’ claim, four privilege logs have been produced in this litigation; but that production was admittedly made on September 5, 2023, *see* #239-11 at 2.)

Plaintiffs also argue that they would be unduly burdened by mandatory coordination of the Thomas (and Chouinard) deposition because the plaintiffs in the Massachusetts state litigation have been split between the multifilament and non-multifilament products and plaintiffs here do not plan to draw such a distinction. (#233 at 2, 5); *see* #238 at 1-2; *see also* #163 at 5 (lead counsel “envision for this MDL not making that distinction between multi- and mono-filament and just addressing all of Covidien’s products and product lines”). This court does not see the issue as simply a matter of time for questioning the corporate witnesses. This court agrees with defendants, *see* #239 at 3, 11 & n. 6, that were it simply a matter of time during the depositions, the issue might be resolved by an agreement to leave the depositions open or by some order limiting time allotted to other counsel. Rather, plaintiffs were entitled to rely on Judge Saris’ prior ruling, and reversal of that ruling now could deprive plaintiffs of adequate time to prepare *substantively* for questioning

the corporate witnesses. The court also notes that requiring plaintiffs' counsel to prepare to question the corporate witnesses with little to no break after the questioning by counsel for the Multifilament Plaintiffs (or Non-Multifilament Plaintiffs or the plaintiffs in the Minnesota state court litigation) seems less efficient; giving plaintiffs' counsel time to review the completed depositions and prepare over the course of a few days or weeks seems the better course.

Two depositions are less convenient to a deponent than one, to be sure. But this court does not understand how Thomas could possibly be unduly burdened by having to prepare for and appear at a second deposition within a relatively short span between the first on December 13-24, 2023, and the close of general corporate discovery of defendants in this litigation on April 8, 2024, *see* #64 at 2. That span may be even shorter given that March 2024 will mostly be dedicated to the international depositions.

As to Chouinard, the Motion to Quash is **DENIED WITHOUT PREJUDICE**. Chouinard's deposition is scheduled for January 25, 2024, to be continued, if necessary, on January 26, *see* #233-1 at 2, which is only about four to six weeks before the international depositions and nine weeks before the close of general corporate discovery. Plaintiffs' argument regarding the need for more time to review the October 23, 2023 document productions is less compelling as to Chouinard. Further, because Thomas will presumably have been deposed by the Multifilament Plaintiffs before January 25-26, 2024, a renewed motion as to Chouinard might give this court a sense of the amount of time that those plaintiffs (and the Non-Multifilament and Minnesota state court litigation plaintiffs) took to question Thomas and the focus of their questioning. As such, a renewed motion might give the court a better sense of whether coordination as to Chouinard would be feasible and not as prejudicial to plaintiffs in this litigation as they presently fear.

#233, plaintiffs' Motion to Quash, is therefore **DENIED IN PART** and **ALLOWED IN PART**.

November 29, 2023

/s/ M. Page Kelley
M. Page Kelley
United States Magistrate Judge