UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In Re: Disposable Contact Lens AntiTrust Litigation

Case No. 3:15-md-2626-J-20JRK

This Document Relates to:
All Actions
_____/

O R D E R

I. Status

This cause is before the Court on Class Plaintiffs' Motion to Compel Defendant CooperVision to Include Additional Custodians and Provide a Hit List (Doc. No. 276, filed August 10, 2016; Doc. No. S-284, filed August 22, 2016) ("Motion")[1] and the accompanying Declaration of Peggy Wedgworth in Support of Class Plaintiffs' Motion (Doc. No. 277, filed August 10, 2016; Doc. No. S-282, filed August 22, 2016). Defendant CooperVision, Inc. ("Defendant") responded in opposition to the Motion. See Defendant's Response to Class Plaintiffs' Motion (Doc. No. 286, filed August 24, 2016; Doc. No. S-292, filed August 30, 2016) ("Response"), accompanying Declaration of Christopher Yates in Support of Defendant's Response (Doc. No. 287, filed August 24, 2016; Doc. No. S-293, filed August 30, 2016), and accompanying Declaration of Clay Arnold in Support of Defendant's Response (Doc. No. 288, filed August 24, 2016). With leave of Court, Class Plaintiffs replied, and Defendant filed a sur-reply. See Class Plaintiffs' Reply to Defendant's

[1] There are two versions of the Motion and a number of filings related to it: a redacted public version; and an unredacted version filed under seal with the Court's permission because it contains confidential and sometimes proprietary information. If there are two docket numbers listed for a particular filing, the docket number beginning with "S-" denotes the version filed under seal.

Response (Doc. No. 300, filed September 1, 2016; Doc. No. S-314, filed September 13, 2016) ("Reply") and accompanying Declaration of Peggy Wedgworth in Support of Reply (Doc. No. 301, filed September 1, 2016; Doc. No. S-315, filed September 13, 2016); Defendant's Sur-Reply in Support of Its Response to Class Plaintiffs' Motion (Doc. No. 305, filed September 7, 2016) ("Sur-Reply") and accompanying Declaration of Christopher S. Yates in Support of Defendant's Sur-Reply (Doc. No. 306, filed September 7, 2016; Doc. No. S-316, filed September 13, 2016).

The undersigned held oral argument on the Motion on September 21, 2016. See Minute Entry (Doc. No. 322), filed September 21, 2016; Transcript (Doc. No. 325; "Tr."), filed September 29, 2016. Following oral argument, with leave of Court (see Doc. Nos. 323, 332), the parties filed a joint statement regarding the issues. See Statements of Defendant and Plaintiffs in Response to a Question the Court Asked During Oral Argument on September 21, 2016 (Doc. No. 334, filed October 12, 2016) ("Joint Statement").

II. Discussion

A. Relevant Background

Defendant has already produced to Class Plaintiffs documents with respect to all nine custodians for whom it produced discovery to the New York Attorney General ("NYAG"). Motion at 5. Defendant has also agreed to produce documents for three additional custodians: a director of price and promotions; a director of marketing and brand management; and a director of professional and academic affairs, who supports the sales team (this is a position that was created in August 2015, about a year after implementation of the Unilateral Pricing Policies ("UPPs")). Tr. at 6-7.

B. Additional Custodians Sought

Class Plaintiffs seek to compel Defendant to produce documents for seven additional upper-management custodians and eleven sales managers. Motion at 3-4. The seven additional upper-management custodians are "persons responsible for the development, implementation, coordination and enforcement of the UPP." Id. at 5-6. They "participated in trade associations and/or working groups that discussed or implemented UPPs." Id. at 10. "They also served as conduits of relevant information both internally, and to and from the [eye care providers ("ECPs")] and Defendant manufacturers." Id. The sales managers "are the eyes and ears" of the Defendant company, who often communicate with ECPs. Tr. at 11. There are eighteen regional sales directors who work for Defendant and 120 sales representatives below them. Tr. at 43. Eleven sales managers, say Class Plaintiffs, represent "a sample," although Class Plaintiffs recognize that eleven "may be more than the typical sample[.]" Tr. at 11.

Pursuant to Rule 26, Federal Rules of Civil Procedure, a party may obtain discovery:

> that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. 26(b)(1).

The potential relevance of the information sought is essentially undisputed; Defendant argues, however, that the emails Class Plaintiffs rely upon to argue that particular custodians will likely have relevant information do not actually show as much. Response at 10-14. Defendant also contends Plaintiffs can get some of the information it seeks from

these custodians elsewhere. See id. The parties mainly dispute whether the documents sought from the seven additional upper-management custodians and the eleven sales managers are proportional to the needs of the case: particularly whether the burden/expense of the discovery outweighs its likely benefit. See Motion at 19-20; Response at 8-9; Reply at 6-7; Sur-Reply at 4-7.

Regarding the seven additional upper-management custodians that Class Plaintiffs seek, Defendant asserts their documents "are duplicative of 12 previously agreed-upon custodians, and of the documents Plaintiffs have and will continue to receive from other defendants and third-party trade associations and retailers." Response at 10.[2] Defendant points out that the Contact Lense Institute ("CLI") and the American Optometric Association ("AOA") are producing documents that will aid Class Plaintiffs in their evaluation of Defendant's participation in trade associations. Id. at 12; Tr. at 22.[3]

Regarding the eleven sales managers, Defendant contends that "a conspiracy cannot be inferred" from "evidence that a manufacturer acts in response to retailer complaints, or terminates a discounter in response to a retailer's request . . . because this kind of behavior is to be expected." Response at 14. Defendant also argues that the information Class Plaintiffs seek from these sales managers is "captured by the reports that the regional

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[2] Defendant also intimates that the documents of Bob Weiss are not in its custody, possession, or control because he is not an employee of Defendant. See Response at 10; Sur-Reply at 6. Mr. Weiss is the "CEO and President of Cooper Companies who own all CVI UPP brand's trademarks." Reply at 4. Given his position and connection to Defendant, it appears unlikely Defendant would encounter any real issues in retrieving his documents.

[3] Defendant admits that typically, Class Plaintiffs would not be prohibited from obtaining the CLI and AOA-related documents from the custodians at issue in addition to the associations themselves. Tr. at 42. Defendant argues that documents should be obtained from the CLI and AOA, rather than the custodians at issue, as part of its overall contention that the cost of producing the discovery sought is prohibitive. Response at 12; Tr. at 42.

managers prepared on a monthly basis and sent up the chain of command to agreed-upon custodians[.]" Id.

In attempting to meet its burden of showing that the discovery sought is overly burdensome, see, e.g., Fed. R. Civ. P. 26(b)(2)(B), Defendant states that it already spent $700,000 to produce the documents from the nine custodians for the NYAG investigation, Response at 1, and contends through its Senior Counsel that "[t]he costs [Defendant] would incur in collecting, reviewing, and producing documents for 18 additional custodians in this litigation will be at least $1.5 million," Arnold Decl. at 2. Although Senior Counsel for Defendant provides the expected cost and explains that Defendant's legal department is small and must rely on costly outside vendors to assist with e-discovery, Senior Counsel for Defendant does not provide a breakdown of the expected cost or any other information to assist the Court in determining the potential financial burden or how to possibly alleviate it. See generally Arnold Decl.

The number of custodians' files to be searched is obviously a very case-specific determination. The undersigned, having reviewed all of the parties' papers and the authority cited therein, and having considered the positions taken by the other Defendants in this matter (as explained in the Joint Statement), finds as follows. As far as the seven upper-management custodians that Class Plaintiffs request, it is likely that responsive information is largely covered by other sources and agreed-upon custodians. However, two additional custodians of Class Plaintiffs' choosing are warranted. As far as the eleven sales managers requested, given the nature of the conspiracies alleged and the description of the roles of these individuals, the undersigned finds that a sample of four sales managers of Class Plaintiffs' choosing is appropriate. In short, considering the custodians already agreed upon

and the documents they are likely to have, limiting the additional custodians sought in this manner strikes the proper balance: it allows for the discovery of relevant and hopefully non-duplicative information but limits the cost of the search.

C. Hit List

Aside from the issues related to the custodians, Class Plaintiffs also seek to compel Defendant to provide a "hit list," which is generated when a "producing party's vendor applies agreed-upon search terms to the collected data of agreed-upon custodians[.]" Motion at 1 n.2, 4. The hit list contains "the number or percentage of documents that hit on particular search terms so that the litigator can evaluate the efficacy of the search terms." Id. at 1 n.2. According to Class Plaintiffs, "[w]ithout such hit list, which [Defendant] clearly will have once they begin to run the searches, Plaintiffs are hindered by this information imbalance." Id. at 7. Class Plaintiffs contend that "[i]t is of no additional burden or cost for [Defendant] to produce something that is in their possession." Id. According to Class Plaintiffs, if the Court is inclined to order a different number or combination of custodians than they proposed (as the Court has done here), a hit list would help with proportionality. Tr. at 19. Defendant contends that Class Plaintiffs' request for a hit list is "moot" because the parties reached an agreement regarding the search terms to be used. Response at 15.

Given the restrictions placed upon the number of custodians by the Court and the parties' agreement as to the search terms to be used, a hit list seems to be less valuable than it might otherwise be. If one is automatically generated based upon the custodians that Class Plaintiffs request as a result of the rulings in this Order, however, Defendant should produce it to Class Plaintiffs to assist in determining the efficacy of the agreed-upon search terms.

III. Conclusion

After due consideration, it is

ORDERED:

1. Class Plaintiffs' Motion to Compel Defendant CooperVision to Include Additional Custodians and Provide a Hit List (Doc. No. 276, filed August 10, 2016; Doc. No. S-284, filed August 22, 2016) is **GRANTED in part and DENIED in part**.

2. The Motion is **GRANTED** to the extent that Defendant shall produce documents for two additional upper-management custodians of Class Plaintiffs' choosing and four sales managers of Class Plaintiffs' choosing. If automatically generated, Defendant shall also provide a hit list for these custodians.

3. Otherwise, the Motion is **DENIED**.

DONE AND ORDERED at Jacksonville, Florida on November 1, 2016.

James R. Klindt

JAMES R. KLINDT
United States Magistrate Judge

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Copies to:
Counsel of Record