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CIVIL DIVISION
Case No. 247-7-20 Wncv

Hayek Medical Devices (North America), LTD vs. State of Vermont

Opinion and Order on State's Second Motion to Compel

This matter came before the Court for hearing on Defendant State of Vermont's second motion to compel. Plaintiff Hayek Medical Devices (Hayek) was represented by Attorneys Hoechst and Hunter. The State was represented by Assistant Attorneys General Kelly, Rowntree, and Hauser. After considering the written submissions and the arguments of counsel, the Court makes the following determinations.

In November 2022, the Court granted, in part, and denied, in part, the State's first motion to compel. The State's instant motion arises out of its second set of interrogatories and requests to produce. When the State's motion originally was filed, Hayek had represented that it would supplement previous answers but had not yet done so. On February 17, 2023, the Court gave Hayek a deadline to supplement and told the State to report to the Court what issues remained in dispute after the production. Hayek supplemented, and the State reported as to the matters that remain in contest. It did so by reproducing all the back and forth as to each specific dispute up to that point.

Following the Vt. R. Civ. P. 26(h) conferring process and supplemental discovery responses noted above, the present dispute is limited to Interrogatories Nos. 3, 4, 6, 13, 19, and 21 and Request to Produce No. 3.

A. Interrogatories Nos. 3 and 4

In these Interrogatories, the State seeks to learn which agents of Hayek were involved in answering its first set of requests to admit and which were involved in providing supplemental responses to its first set of interrogatories. Hayek has represented that Wolf Hayek (Plaintiff's principal) was involved and, otherwise, objects arguing that disclosing additional names would violate the work-product doctrine.

The parties do not appear to dispute that the State properly could have asked for a list of persons with knowledge about each of the discovery inquiries. Instead, they spar over case law, which, for the most part, discusses requests to provide lists of the persons that a company's attorneys chose to interview regarding the particular litigation dispute. The cases are divided on that point: some find that such a request is appropriate; others find that it infringes upon the work-product doctrine because it reveals the persons who counsel, through her efforts and analysis of the dispute, has decided to interview about the matter. *See, e.g., United States v. All Assets Held at Bank Julius Baer & Co.*, 270 F. Supp. 3d 220 (D.D.C. 2017) (discussing the differing opinions).

In the Court's view, the State's request here is a hybrid of the above inquiries that does not implicate the concerns underlying the work-product doctrine. The State has not asked for a list of the persons Hayek's attorneys chose to interview. It does not seek to obtain or benefit from defense counsel's mental efforts in investigating and analyzing the case or from their thoughts or strategies. *Cf. Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (work product's focus is on protecting the strategies and mental impressions of counsel). On the contrary, the State hopes only to identify purely factual information: the names of the persons who provided the information used to respond to discovery demands. If Wolf Hayek were being deposed, the State would be permitted to ask him who provided the information to him from which he certified the answers to Interrogatories. If the State were to notice Rule 30(b)(6) depositions for each discovery request, Hayek would be required to designate the person or persons with knowledge for each request.

Assuming, *arguendo*, that the work-product doctrine is implicated in requests that seek a list of persons interviewed by counsel, it is not raised by the State's Interrogatories Nos. 3 and 4.¹ *See In re Aetna Inc. Sec. Litig.*, No. CIV. A. MDL 1219, 1999 WL 354527, at *2 (E.D. Pa. May 26, 1999) (identification of persons provided factual support for allegations of complaint not protected); *In re*

¹ As a result, the Court need not weigh in on the question of whether the work-product doctrine would bar a straightforward request for the names of persons interviewed by counsel. To the extent *Bose v. Rhodes College*, No. 16-cv-02308-JTF-tmp, 2017 WL 4479258 (W.D. Tenn. Oct. 6, 2017), concludes that a request similar to the State's in this action is "tantamount" to a request for a list of persons counsel chose to interview, the Court disagrees.

Theragenics Corp. Sec. Litig., 205 F.R.D. 631, 636-37 (N.D. Ga. 2002) (similar); *In re Dayco Corp. Derivative Sec. Litig.*, 99 F.R.D. 616, 624 (S.D. Ohio 1983) (work product does not protect “names of witnesses from whom counsel obtained the information”); 8 Arthur Miller, Charles Wright & Mary Kane, *Fed. Prac. & Proc. Civ.* § 2023 (3d ed.) & nn.19-20 (work product provides “no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party’s lawyer has learned, or the persons from whom he or she had learned such facts”).

Hayek shall submit responses.

B. Interrogatory No. 6

In this Interrogatory, the State wants to know what family, business, or personal relationships Zeev Hayek, Shahar Hayek, and Anat Hayek have to Wolf Hayek. Wolf is a principal of Hayek. The Court apprehends from oral argument that the State is trying to investigate the difference among or connections among Hayek and United Hayek Industries, Ltd. (manufacturer of the ventilators), and its principals. Hayek has represented that there are no connections and that it should not have to disclose personal relationships or third-party documents. On the other hand, at oral argument, the State has pointed to an “agreement” between the two entities, signed by one of the subject individuals, that somehow places limits on the ability to resell the ventilators.

While the Court sees the State’s request as overbroad, it also seeks information that may have relevance to the dispute at issue. The Court understands that there are other discovery demands that have been directed at the

connections between Hayek and United Hayek. As for the individuals in this Interrogatory, the Court will order limited responses to Interrogatory No. 6. Specifically, Hayek shall disclose any connections whatsoever between Hayek and Zeev Hayek, Shahar Hayek, and Anat Hayek; disclose any business relationships between Wolf Hayek and those persons that have any link to Hayek; and shall disclose the familial relationships, if any, between Wolf Hayek and each of the other persons listed in this Interrogatory.

C. Interrogatory No. 13

In this Interrogatory, the State seeks to learn all of the hospitals that Hayek is aware of that have ever used the RTX Model 01 ventilators for Covid treatment. Hayak has produced information on that issue only up to the point in time when it ostensibly made representations to the State that its ventilators are appropriate for that use, *i.e.*, before the State agreed to buy. It claims later information is irrelevant. The Court disagrees. The information is relevant to the question of whether the ventilators are useful in treating Covid. It is the Court's understanding that that issue divides the parties and may divide their experts. While the Court understands the legal limitation Hayek seeks to place on such information, its relevance is both deeper and more expansive.

Hayek shall provide a full response.

D. Interrogatory No. 19

In this Interrogatory, the State wants to know “all efforts taken by Hayek to mitigate damages.” Hayek maintains that it has provided its complete responses. The State disagrees. The Court sides with Hayek. The responses appear sufficiently descriptive of Hayek’s alleged mitigation efforts. Further, to the extent that Hayek attempts to go substantively beyond such disclosures in the future, without appropriate excuse, there are remedies and sanctions that might be considered to protect the State’s position. Vt. R. Civ. P. 37.

E. Interrogatory No. 21

In this Interrogatory, the State broadly wants to know the bases for any denials in response to its first and second requests to admit. Hayek responded essentially by saying that it provided those responses in those denials and eventually cited the State to specific Bates-numbered documents. The State counters those responses are incomplete and that the reference to documents does not comport with the demands of Vt. R. Civ. P. 33(c). The Court agrees with Hayek and concludes that its responses are sufficient under the Rules. Further, as noted above, to the extent that Hayek attempts to go substantively beyond such disclosures in the future, without appropriate excuse, there are remedies and sanctions that might be considered to protect the State’s position. Vt. R. Civ. P. 37.

F. Request to Produce No. 3

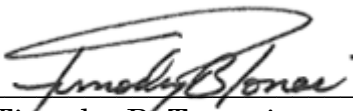
This request asks Hayek to identify and produce all communications it had with the State reflecting that the State had required Hayek to pay to have rejected

ventilators shipped back to Hayek. (The allegation that the State had established such a requirement was set out in Hayek's response to Interrogatory No. 22.)

Hayek's responses to Request No. 3 have evolved over time: sometimes it suggested that responsive documents existed and had been produced; other times it said that no responsive documents exist. At hearing, Hayek confirmed that it had performed an exhaustive search and had been unable to locate any responsive documents, which is consistent with its most recent written response. The State is entitled to rely upon that response.

It is unclear whether resolution of that issue has any impact on the continuing accuracy of Hayek's response to Interrogatory No. 22. If any amendment to that Interrogatory is required, it shall be made within 14 days of this Order.

Electronically signed on Thursday, August 31, 2023, pursuant to V.R.E.F. 9(d).


Timothy B. Tomasi
Superior Court Judge