COURT OF CHANCERY
OF THE
STATE OF DELAWARE

LORI W. WILL
VICE CHANCELLOR

LEONARD L. WILLIAMS JUSTICE CENTER
500 N. KING STREET, SUITE 11400
WILMINGTON, DELAWARE 19801-3734

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Bradley R. Aronstam, Esquire
Roger S. Stronach, Esquire
Ross Aronstam & Moritz LLP
100 S. West Street, Suite 400
Wilmington, Delaware 19801

William M. Lafferty, Esquire
Susan W. Waesco, Esquire
Morris, Nichols, Arsht & Tunnell LLP
1201 N. Market Street
Wilmington, Delaware 19801

RE: *Fortis Advisors LLC v. Johnson & Johnson, et al.*
C.A. No. 2020-0881-LWW

Dear Counsel:

I have reviewed the parties' submissions regarding the plaintiff's Motion to Compel. The Motion seeks two forms of discovery from the defendants: (1) expanded responses to three interrogatories, and (2) additional document custodians. I granted the Motion, in part, on the first matter after oral argument. This is my decision on the second matter. For the reasons stated below, I conclude that the remaining portion of the Motion should be denied with the exception of one custodian.

I. BACKGROUND

Plaintiff Fortis Advisors LLC (in its capacity as a representative of former stockholders of Auris Health, Inc.) filed its Complaint against defendants Johnson

& Johnson ("J&J"), Ethicon, Inc., and four J&J executives on October 12, 2020.[1] The Complaint raises multiple breach of contract, fraud, and other claims arising from J&J's February 2019 acquisition of Auris. The plaintiff contends that, despite certain promises in a Merger Agreement (including over $2 billion in future earnout payments upon the achievement of certain milestones), J&J conducted a clandestine "bakeoff" between Auris's iPlatform technology and the Verb surgical robot technology that J&J already owned.

Because the defendants moved to dismiss the Complaint in part and answered the remaining allegations, discovery is underway. The plaintiff served document requests on October 28, 2020, January 1, 2021, March 5, 2021, and August 6, 2021.[2] After numerous meet and confers, the parties originally negotiated a list of 18 document custodians. The list was expanded to a total of 32 custodians as a result of multiple requests by the plaintiff.[3] In reaching agreement on those custodians, the defendants agreed to consider providing "additional custodians in light of the discovery record as it develops."[4] The defendants have represented that, after

[1] Dkt. 1.

[2] Dkts. 5, 26, 37, 74.

[3] Pl.'s Mot. Compel Ex. 15, at 18.

[4] Pl.'s Mot. Compel Ex. 12, at 1-2.

applying search terms, there is a universe of approximately two million documents to review from the current set of 32 custodians.[5]

Among the limited documents that the defendants produced to date is a PowerPoint presentation about the purported bakeoff, which the plaintiff says exemplifies the need for additional custodians.[6] That presentation refers to a Confidential Disclosure Agreement between Verb and Ethicon (the J&J subsidiary that acquired Auris) pertaining to iPlatform and the Verb platform.[7] The presentation also lists 24 members of a "Clean Team"—half of whom are already designated as document custodians.[8]

The plaintiff's Motion seeks the inclusion of two additional sets of document custodians based on that presentation. First, the plaintiff asks that the in-house lawyers involved in negotiating the Confidential Disclosure Agreement be added since none are currently custodians. Second, the plaintiff asks that any individual listed as a Clean Team member "with a material or managerial role" in the alleged bakeoff be designated a custodian.[9] The plaintiff argues that the defendants have

[5] Defs.' Opp'n 11.

[6] Pl.'s Mot. Compel ¶ 20.

[7] Pl.'s Mot. Compel Ex. 13.

[8] Pl.'s Mot. Compel Ex. 11, at 3.

[9] Pl.'s Mot. Compel ¶ 21.

failed to sufficiently demonstrate that the information is not subject to discovery on the basis of undue burden or otherwise. In response, the defendants argue that they have provided a more than sufficient set of custodians to meet the needs of the case, that the information sought is duplicative, and that the request is premature.[10]

II. ANALYSIS

This court will grant a motion to compel discovery for any non-privileged matter relevant to the subject matter of the pending action if it "appears reasonably calculated to lead to the discovery of admissible evidence."[11] The scope of permissible discovery is broad but not without limits. Under Court of Chancery Rule 26(b)(1), the court may limit discovery when:

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.[12]

[10] Defs.' Opp'n 1, 11–14.

[11] Ch. Ct. R. 26(b)(1).

[12] *Id.*

The burden is on the objecting party—here, the defendants—to show that the information sought is improperly requested.[13] The scope of discovery is squarely within the sound discretion of this court.[14]

At this stage of the discovery process, I conclude that the defendants have demonstrated that the plaintiff's request to add additional Clean Team members as document custodians is unreasonable. The defendants have agreed to a significant number of custodians, as they should in a case of this size and complexity. As counsel for the defendants articulated at oral argument, the document custodians were designated after defense counsel interviewed their clients about the individuals with relevant sources of data.[15] The agreed-upon list of 32 custodians already includes 12 members of the Clean Team (10 of whom have managerial roles). Adding more members of that team at this point seems cumulative and needlessly duplicative, particularly because a gap in the custodians already designated is not apparent to me. This court has "recognized that considerations of subject matter, time, and space are important to confine the scope of discovery to those matters that

[13] *Van de Walle v. Unimation, Inc.*, 1984 WL 8270, at *2 (Del. Ch. Oct. 15, 1984).

[14] *See Grunstein v. Silva*, 2009 WL 4698541, at *20 (Del. Ch. Dec. 8, 2009).

[15] Tr. of Sept. 14, 2021 Oral Arg. 103-04; *see also* Pl.'s Mot. Compel Ex. 12, at 7–16.

are truly relevant and to prevent discovery from evolving into a fishing expedition . . . ."[16]

The plaintiff asserts that the defendants cannot meet their burden of showing that the discovery sought is duplicative without providing greater proof. In this instance, I disagree. The parties have engaged in multiple rounds of negotiations over a proper list of custodians. The defendants vetted that list with their clients. The number of custodians (32) is substantial and so is the volume of documents currently being reviewed from those custodians. Half of the Clean Team members at issue in the Motion are already custodians. Drawing on common sense, I find those facts sufficient to support the defendants' position that the additional discovery requested is unduly burdensome and cumulative.[17]

As a result, it is not necessary to require the defendants to provide a search term hit report evidencing that the discovery is burdensome or cumulative. Had the plaintiff identified a discrete list of individuals after diligence, it might be appropriate to require the defendants to provide more information—like hit count—

[16] *Plaza Sec. Co. v. Off.*, 1986 WL 14417, at *5 (Del. Ch. Dec. 15, 1986).

[17] *See In re Comtech/Gilat Merger Litig.*, C.A. No. 2020-0605-JRS, at 47 (Del. Ch. Aug. 18, 2020) (TRANSCRIPT).

to support their objections. That information is often useful to the court in ruling on burden objections.[18]

But providing search term reports for custodial documents is no small task. A party must interview the potential custodian, identify the locations of documents, collect documents from all potential sources (often including cell phones), load the data into a review database, deduplicate it, and *then* run search terms.[19] With 32 custodians already agreed to, and at least 10 individuals from the Clean Team who meet the criteria of this Motion, I see no basis to require the defendants to undertake that effort now.

My decision is driven, in large part, by the fact that discovery is ongoing. At argument, counsel for the plaintiff acknowledged that custodial discovery had recently commenced.[20] If it becomes apparent that there are certain individuals who have sources of data that are relevant and non-duplicative, the plaintiff may be within its rights to ask for those documents. At this stage, however, it would be premature to supplement the list of 32 custodians with additional Clean Team members.

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[18] *See QuietAgent, Inc. v. Bala*, C.A. No. 10813-VCZ, at 31-32 (Del. Ch. Jan. 10, 2019) (TRANSCRIPT).

[19] Edward P. Welch et al., *Mergers & Acquisitions Deal Litigation* § 8.02[D] (2020) (describing the process of harvesting data from a client's systems).

[20] Tr. of Sept. 14, 2021 Oral Arg. 91-92.

I reach a different conclusion, in part, on the request to add as custodians counsel who drafted the Confidential Disclosure Agreement. Given the timing of that agreement (three weeks before the merger) and its subject matter, it seems reasonable that the lawyers who drafted it may have relevant documents. Here, I do not find that the defendants have met their burden to show that the plaintiff's request is entirely improper. Simply because a client has relevant documents does not mean her lawyer's documents (which may well exclude the client) are duplicative.[21] At present, no lawyers involved in the Confidential Disclosure Agreement (or otherwise) are custodians.

I conclude that one lawyer with responsibility for, and a direct role in, drafting the Confidential Disclosure Agreement should be added as a document custodian. Because I lack insight into who that person should be, I direct the parties to meet and confer to select the proper custodian. To address the concerns inherent in the production of a lawyer's documents, that individual's data need only be collected across the time period from January 1, 2019 to April 22, 2019 and only documents sent to the contractual counterparty "across the transom" need be produced.[22]

[21] Defs.' Opp'n 13.

[22] Pl.'s Mot. Compel Ex. 14, at 1.

Accordingly, the plaintiff's Motion to Compel is DENIED, in part, and GRANTED, in part. To the extent necessary to implement this decision, IT IS SO ORDERED.

Sincerely,

/s/ Lori W. Will

Lori W. Will
Vice Chancellor

cc: All counsel of record (by *File & ServeXpress*)