

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:19-cv-01335-JLS-KESx

Date: December 4, 2020

Title: MICROVENTION, INC. v. BAL T USA, LLC

PRESENT:

THE HONORABLE KAREN E. SCOTT, U.S. MAGISTRATE JUDGE

Jazmin Dorado
Courtroom Clerk

Not Present
Court Reporter

ATTORNEYS PRESENT FOR
PLAINTIFF:
None Present

ATTORNEYS PRESENT FOR
DEFENDANT:
None Present

PROCEEDINGS (IN CHAMBERS):

Order Granting, in Part, and Denying, in Part, Plaintiff’s Motion to Compel Document Production (Dkt. 54)

I. BACKGROUND.

In July 2019, Plaintiff MicroVention, Inc. (“Plaintiff”) filed a Complaint accusing Defendant Balt USA, LLC (“Defendant”) of infringing four patents related to medical device technology. (Dkt. 1.) The parties later dismissed claims related to one patent, leaving three at issue. (Dkt. 29.) At about the same time, the parties filed a Joint Rule 26(f) Report proposing a fact discovery cutoff date in October 2020. (Dkt. 19-1 at 3.)

The claim construction hearing scheduled for April 2020 was continued multiple times due to the COVID-19 pandemic. (Dkt. 38, 41.) In July 2020, Plaintiff filed a Petition for *Inter Partes* Review (“IPR”) of the ‘338 patent. (Dkt. 43 at 2.) At the Court’s invitation, Defendant filed a motion for a stay in August 2020. (Dkt. 46, 47.) Due to the Court’s calendar, the motion was set for a hearing in January 2021. (*Id.*) The Court vacated the claim construction hearing until its ruling on the stay motion. (Dkt. 53.)

Meanwhile, the parties proceeded with discovery. Plaintiff served a fifth set of Requests for Production (“RFPs”) (nos. 138-189) and sixth set of RFPs (no. 190) on June 9, 2020. (Dkt. 54-3 and 54-4.) Defendant served objections and written responses on July 9, 2020. (Dkt. 54-5 and 54-6.) As to most categories of requested documents, Defendant represented that it “has

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already produced, or will produce, nonprivileged documents responsive to this request that are in the possession, custody, or control of Balt and that can be located after a reasonable search.” (Id.)

II. THE INSTANT DISCOVERY MOTION.

On November 12, 2020, Plaintiff filed a motion to compel Defendant to produce documents in response to RFPs sets five and six. (Dkt. 54.) Defendant has not yet produced all documents in response to these RFPs but has committed to doing so on or before January 15, 2021. (Dkt. 54-1 at 4.) Plaintiff argues that (1) it will be prejudiced by receiving any remaining documents in mid-January only six weeks before the fact discovery cutoff, and (2) Defendant has not provided a reasonable justification for its document production taking so long. (Id.) Plaintiff provided a proposed order requiring Defendant to produce all outstanding documents within 10 days of the order’s entry, or by about December 25 if the order were entered on December 15, the noticed hearing date. (Dkt. 54-34.) Plaintiff also seeks sanctions in the amount of about \$30,000 for fees incurred to bring this motion. (Dkt. 54-1 at 54; Dkt. 55 at 6.)

Defendant counters that the parties have no real dispute and asks that Plaintiff be sanctioned for filing a premature motion. (Dkt. 54-1 at 8.) On October 29 and 30, 2020, before the motion was filed, Defendant made its 10th rolling production and informed Plaintiff that it intended to produce more documents in November. (Id. at 12.) It produced more documents on November 10. (Id.; Dkt. 54-20 at ¶¶ 5-9 [describing productions over time responsive to RFPs sets 5 and 6].) Defendant points out that neither party has completed document production yet. (Dkt. 54-20 at ¶ 11.)

With this background, Plaintiff’s motion presents two questions to the Court: (1) should Defendant be compelled to complete its document production by a date certain before January 15, 2021? ; and (2) should Defendant be compelled to provide an amended written response to RFP 174?

A. Defendant’s Production Date.

A timeline taken from the parties’ emails provides the following background:

9/16/20: Plaintiff asked Defendant to commit to finalizing its production by 9/30. (Dkt. 54-11 at 5.)

9/22/20: Plaintiff again asked Defendant to commit to finalizing its production by 9/30. (Dkt. 54-10.)

9/23/20: Defendant responded that in light of the Court taking the claim construction hearing off calendar and scheduling the stay motion for January 2021, “we believe it would be prudent for the parties to have the benefit of the Court’s ruling ... before demanding specific discovery deadlines.” (Dkt. 54-11 at 3.)

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- 9/24/20: Plaintiff responded that the Court had not stayed the case and there was no justification to slow discovery. (Dkt. 54-13 at 4-5.)
- 9/25/20: Plaintiff wrote again that it has “repeatedly asked for a date certain” by which Defendant would produce all documents and its “patience is running short.” Plaintiff requests a final production by 10/2. (Dkt. 54-12 at 2.)
- 9/29/20: Plaintiff asked Defendant to consent to a telephonic discovery hearing with the Magistrate Judge to ask if the Court intended to allow the parties to “slow roll” discovery. (Dkt. 54-13 at 3-4.)
- 9/29/20: Defendant responded that it has been diligently conducting ESI key-word searches and other efforts to respond to the RFPs and that this “would take some time,” such that threatening to involve the Court to speed up production was “premature and unwarranted.” (Dkt. 54-13 at 2.)
- 10/12/20: Plaintiff complained that it had not received Defendant’s final production by 10/2, so Plaintiff again requested a telephonic hearing with the Magistrate Judge. (Dkt. 54-14 at 5-6.)
- 10/13/20: Defendant reminded Plaintiff that it never agreed to 10/2 as its production deadline and pointed out that both parties were continuing to collect, review, and produce responsive emails. (Dkt. 54-14 at 5.)
- 10/14/20: Plaintiff responded that the “problem” was Defendant’s refusal to commit to a date certain for completing its production. (Id. at 4.)
- 10/20/20: Plaintiff again proposed presenting to the Magistrate Judge the issue of whether Defendant was required to commit to a date certain for completing its production. (Id. at 3.)
- 10/21/20: Defendant agreed to commit to a date certain for completing its production: January 15, 2021. (Id. at 2-3.)
- 10/21/20: Plaintiff objected that January 15, 2021, was an unacceptable date for Defendant completing its production and advised that it would move forward with a motion to compel seeking sanctions. (Id. at 2.)
- 10/30/20: Defendant explained that it was still “actively engaged” in the process of collecting and identifying responsive documents, and it expected to have more documents ready for production in November. (Dkt. 54-18 at 2.)

Plaintiff provides few facts about the circumstances of the production task to support its claim that January 15, 2021, would be an unreasonable date for Defendant to complete its production (such as discussing the scope of the RFPs, how long it took Plaintiff to produce similar documents, how many key-word searches are being run on how much ESI, how much more Plaintiff expects to receive, etc.). Defendant also has not explained much about its production efforts and why they are taking so many months. It is clear, however, that Defendant has responded to nearly 200 RFPs, produced a high volume of documents (see Dkt. 54-31 referring to production through BAL0204218), engaged in numerous, lengthy “meet and confer” exchanges about these RFPs and other discovery (see, e.g., Dkt. 54-9), and conducted key-word searches through ESI to locate potentially responsive documents. Given the extensive

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scope of such discovery efforts, Plaintiff has failed to demonstrate that Defendant is behaving unreasonably. The Court rejects Plaintiff's characterization of Defendant as having stopped or stalled discovery until a ruling on the stay motion.

Plaintiff has also failed to demonstrate prejudice. First, there is not much difference in receiving the last remaining documents right around the Christmas holidays (by succeeding on this motion) versus in mid-January (a date to which Defendant already committed). The Court is hard-pressed to see how Plaintiff thought it was better to spend \$30,000 on this motion rather than asking Defendant to stipulate to a 2-week extension of the discovery cutoff date to ameliorate the feared prejudice (particularly given the reality that the COVID-19 pandemic precludes the Court from conducting civil jury trials).

Second, it may be that Defendant will only produce a small number of documents in January 2021 that will not require any follow-up discovery. It may be that the Court will grant Defendant's stay motion. If so, the delay in Defendant finalizing its production until mid-January will not cause Plaintiff any prejudice, even without extending the discovery cutoff. But if those things do not happen, it appears likely that Plaintiff can address any potential prejudice then, because Plaintiff will be able to demonstrate "good cause" to obtain a short extension of the discovery cutoff.

For these reasons, Plaintiff's motion to compel Defendant to complete its document production prior to January 15, 2021, is DENIED.

B. RFP 174.

RFP 174 requests "Documents that refer or relate to manufacturing production and detailed cost reports including standard cost and any variances, for the Accused Products from inception to the present." (Dkt. 54-1 at 36.) Defendant responded with objections then stated, "Subject to and without waiving these objections and to the extent Balt understands the request, Balt is willing to meet and confer to discuss the scope and/or relevance, if any, of this request." (Id.)

Plaintiff argues that Defendant's written response is deficient because, "Balt has failed to give a definitive answer as to whether documents responsive to RFP No. 174 (Fifth Set of RFPs) exist or not." (Dkt. 54-1 at 5.) The Court agrees that Defendant's written response does not conform to the requirements of Rule 34, and Defendant should serve an amended written response.

Regarding production, Defendant produced "standard" manufacturing cost information but did not produce information identifying cost variances. (Dkt. 54-1 at 48.) Plaintiff argues that to know the true manufacturing costs, it must know the cost variances over time due to "things such as changes in the costs of raw materials, changing vendors, etc." (Id. at 49.)

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Through the meet and confer process, Defendant agreed in October 2020 to “assess what manufacturing variance data may be available” and produce such data if available. (Dkt. 54-18 at 3.) Later that month, Defendant produced a “spreadsheet identifying monthly manufacturing variances at Balt that spans the entire time period during which the accused Optima product was produced.” (Dkt 54-1 at 52.)

In its supplemental brief filed on December 1, 2020, Plaintiff does not mention the spreadsheet or discuss if/how it fails to provide the requested information. Instead, Plaintiff argues that Defendant has still not stated whether documents showing cost variances exist. (Dkt. 55 at 5.) This can be addressed in an amended written response.

For these reasons, Defendant shall serve an amended written response to RFP 174 **on or before January 11, 2021.**

C. Sanctions.

Because the Court has denied some relief and granted some relief, it has discretion to grant or deny sanctions in the form of fee-shifting. Fed. R. Civ. P 37(a)(5)(C). The Court declines to shift fees. The Court recognizes that given the weeks-long requirements for filing a motion under Local Rule 37-2, litigants are often forced to initiate such motions while still meeting and conferring to avoid being left without a remedy if their trust in opposing counsel’s commitments proves unfounded. Still, it appears that this motion was unnecessary. The Court encourages counsel to consider scheduling a standing, weekly discovery call rather than relying exclusively on emails, the tone of which can sometimes seem imperious or snippy, even if not intended to be so. The parties are also encouraged to use the Court’s letter briefing and telephonic hearing procedure to resolve any future disputes.

The hearing scheduled for December 15, 2020, is hereby ordered OFF CALENDAR.

Initials of Deputy Clerk JD