

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

C.R. BARD, INC. and BARD
PERIPHERAL VASCULAR, INC.,

Plaintiffs / Counterclaim-
Defendants,

v.

ANGIODYNAMICS, INC.,

Defendant / Counterclaim-
Plaintiff.

Civil Action No. 20-1544-CFC-SRF



MEMORANDUM ORDER

At Wilmington this **12th** day of **September, 2023**, the court having considered the letter briefing on the parties' competing discovery motions, (D.I. 426; D.I. 427; D.I. 432; D.I. 433), IT IS ORDERED that the parties' discovery motions are addressed as follows:

1. Background. This is the latest in a series of discovery disputes in a case pending since 2012 and transferred to this district in 2020. (D.I. 2; D.I. 200) The parties have already been through two jury trials in 2019 and 2022 in a related civil action, as well as an appeal to the Federal Circuit. (C.A. No. 15-218-JFB-SRF, D.I. 449; D.I. 468; D.I. 565) Under the operative scheduling order deadlines in this case, the deadline for production of documents expired on June 2, 2023. (D.I. 273) The fact discovery deadline was extended by stipulation to August 29, 2023. (D.I. 412) Opening expert reports were due on September 1, 2023. (D.I. 399) Expert discovery closes on October 27, 2023, and case dispositive motions are due on November 14, 2023. (*Id.*) A jury trial is scheduled to begin on April 29, 2024. (D.I. 273)

2. Plaintiffs' motion to compel the production of high-level financial data from June 2017 to the present is GRANTED-IN-PART. On or before September 19, 2023, Defendant shall produce: (a) documents containing its standard costs for the accused products from 2019 to present; and (b) documents containing its U.S. sales of non-power port products, including net sales, units, and standard costs from 2019 to present. Plaintiffs' motion to compel is DENIED in all other respects for the reasons previously stated by the court.¹ (D.I. 350; D.I. 407)

3. Defendant's motion to compel Plaintiffs to produce financial information individually for each named plaintiff is DENIED. Defendant requests, "individually for each Bard plaintiff, itemized costs, revenues, and profits for Bard's port products, as well as documents relating to transfer pricing, including the underlying records for Bard's port products." (D.I. 427 at 3) Defendant claims such information is necessary to refute Plaintiffs' lost profits claim, and the late-produced deposition transcript of Jason Miles² from the related *MedComp* case is "smoking gun" evidence of Plaintiffs' alleged tax avoidance and transfer pricing scheme. (*Id.* at 1) Specifically, Defendant suggests that nearly all of Plaintiffs' profits are attributed to foreign affiliates so that they will be taxed at a much lower corporate tax rate. (*Id.* at 2) Defendant's arguments read like a summary judgment brief attacking Plaintiffs' lost

¹ This is the third time Plaintiffs have sought an order compelling Defendant to produce customer level sales data. (D.I. 350; D.I. 407) At least since the ruling made on August 23, Plaintiffs have been aware of the court's position that Defendant should not be compelled to retain a third-party developer to develop custom source code or tools to retrieve data prior to 2019. (D.I. 407 at ¶¶ 7-8) The court's ruling is based on Defendant's proposed compromise offer, which is reasonable under the circumstances.

² Although the production of the Miles deposition transcript was delayed, there is no dispute that the exhibits marked during that deposition were timely produced. (D.I. 432 at 2)

profits theory based on Plaintiffs' relationship with a foreign affiliate, Bard Shannon, in an alleged "low-tax jurisdiction." (*Id.*)

4. The relief requested by Defendant is overbroad and vague. Defendant has not defined the time period, scope, or description of the document categories for each of the named Plaintiffs, nor has Defendant made any attempt to relate the requested relief to specific document requests. (*Id.* at 1-3) There is no evidence that Plaintiffs did not comply with their obligation to produce sales, revenue, cost, and profit data for Bard Peripheral Vascular, Inc. ("BPV"), the entity that has sold the PowerPort products for the entire damages period dating back to 2012, as that information is kept in the ordinary course of business.³ And witness testimony confirms that the financial information from BPV represents all port sales globally, and that data is then consolidated at the corporate level and "roll[ed] up to" C.R. Bard, Inc. for the pre-2017 period and Becton Dickinson & Co. after the 2017 acquisition, which maintain BPV's financial records. (D.I. 432, Ex. 1 at 47:13-48:22, 132:1-133:5; *see also* Exs. 5-6) ("So BPV is the business unit in charge of, you know, selling ports globally, but all things roll up to Becton, Dickinson, Inc. and everything's consolidated at the corporate level[.]"). Defendant presumes that each Bard entity maintains its own financials, but the record contradicts this presumption and supports Plaintiffs' "one company" concept. (D.I. 427, Ex. H at 76:1-13)

5. Plaintiffs further represent that they produced the transfer pricing analyses performed by Pricewaterhouse Coopers, as well as "the transfer pricing documents that show intercompany transfers between BPV and the other Bard entities, [REDACTED]"

³ Defendant maintains that Plaintiffs' production represents a "hodgepodge of information pulled from different sources," thereby obscuring Plaintiffs' true costs, revenues, and profits. (D.I. 427 at 2) But Plaintiffs plausibly explain that they have used different systems to track their sales data over the course of the eleven-year damages period. (D.I. 432 at 1 n.1)

[REDACTED]

(D.I. 432 at 2-3) In sum, Plaintiffs have already produced the information Defendant seeks, and Plaintiffs have confirmed that there is nothing more to produce.

6. Defendant's motion to compel the 30(b)(6) deposition of a prepared witness on Topics 25 and 30 is DENIED. The transcript of Corey Neureuther's 30(b)(6) deposition confirms that he was adequately prepared to testify on these topics. Topic 25 seeks information about revenue and profits from Plaintiffs' sales of conventional access ports and also on products allegedly practicing the asserted patents. (D.I. 427, Ex. O) The record before the court demonstrates that Neureuther provided testimony about BPV's financial information, explaining how BPV's profits were "rolled up" to C.R. Bard and Becton Dickinson. (D.I. 432, Ex. 1 at 47:13-48:22, 131:5-133:1)

7. Topic 30 was not attached as an exhibit to Defendant's moving submission, in contravention of the court's discovery dispute procedures. (D.I. 427, Ex. O) (ending at Topic 27). Exhibit 7 to Plaintiffs' responsive submissions shows that Topic 30 sought testimony on "[t]he facts underlying any 'tax inversion' in which Bard participated[.]" (D.I. 432, Ex. 7 at 18) The deposition transcript confirms that Neureuther spoke with an individual from the tax department in preparation for the deposition topic and represented that Plaintiffs never participated in a tax inversion. (*Id.*, Ex. 1 at 31:19-33:18, 156:7-13)

8. Defendant argues that Topic 30 was not limited to "tax inversions" but also sought testimony about any "similar" transactions, such as transfer pricing. (D.I. 427 at 4) The deposition notice itself lacks any definition suggesting a more expansive view of the topic. Regardless, Neureuther also testified about transfer pricing between and among Bard entities.

(D.I. 432, Ex. 1 at 78:17-80:8, 158:1-11, 173:9-25) Moreover, Defendant admits that Neureuther was prepared to testify “on the two contracts that establish the supplier/distributor relationship between Bard Shannon and the Bard Plaintiffs[.]” (D.I. 427 at 4 (citing Ex. H at 163:17-164:16, 192:22-193:8)) Thus, Defendant has not shown that Neureuther was unprepared to testify under either side’s interpretation of the scope of the challenged topics.

9. Defendant’s motion to compel a supplemental deposition of Kelly Powers is DENIED. Defendant’s argument in support of its request for an additional 3.5 hours of deposition testimony from Kelly Powers is a thin attempt to urge the court to reconsider the denial of a supplemental 3.5 hours of testimony in the September 8 Memorandum Order. (D.I. 435 at 3-4; D.I. 418) Defendant has not demonstrated that Powers used the lot history to refresh his recollection before testifying, and Plaintiffs produced the lot history which is largely written in Spanish. This lot history does not provide a reasonable foundation for continuing Powers’ deposition for an additional 3.5 hours.

10. Defendant also asks the court to compel the production of manufacturing records for lot numbers 2465529 and 2616837, pertaining to Adult Titanium Ports (“ATPs”) used in power injection feasibility and qualification testing, respectively. (D.I. 427 at 4) But Defendant has not established that these lot history files are responsive to Request for Production Nos. 15, 16, 90, or any other document request. (*Id.*, Ex. R; Ex. S at 7-8) Also, these lot history files were not discussed during the Powers deposition and were not the subject of a meet and confer between the parties. Consequently, the court is not inclined to entertain reargument on the September 8 ruling denying a supplemental deposition of this witness for up to 3.5 hours.

11. Conclusion. For the foregoing reasons, IT IS ORDERED that:

- i. Plaintiffs' motion to compel the production of high-level financial data from June 2017 to the present is GRANTED-IN-PART. On or before September 19, 2023, Defendant shall produce: (a) documents containing its standard costs for the accused products from 2019 to present; and (b) documents containing its U.S. sales of non-power port products, including net sales, units, and standard costs from 2019 to present. The motion is DENIED in all other respects.
- ii. Defendant's motion to compel Plaintiffs to produce financial information individually for each named plaintiff is DENIED.
- iii. Defendant's motion to compel the 30(b)(6) deposition of a prepared witness on Topics 25 and 30 is DENIED.
- iv. Defendant's motion to compel a supplemental deposition of Kelly Powers is DENIED.

IT IS FURTHER ORDERED that the discovery dispute hearing scheduled for September 13, 2023 at 3:00 p.m. is CANCELLED.

12. Given that the court has relied upon material that technically remains under seal, the court is releasing this Memorandum Order under seal, pending review by the parties. In the unlikely event that the parties believe that certain material in this Memorandum Order should be redacted, the parties shall jointly submit a proposed redacted version by no later than **September 19, 2023**, for review by the court, along with a motion supported by a declaration that includes a clear, factually detailed explanation as to why disclosure of any proposed redacted material would "work a clearly defined and serious injury to the party seeking closure." *See In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019) (quoting

Miller v. Ind. Hosp., 16 F.3d 549, 551 (3d Cir. 1994) (internal quotation marks omitted)). If the parties do not file a proposed redacted version and corresponding motion, or if the court determines the motion lacks a meritorious basis, the documents will be unsealed within fourteen (14) days of the date the Memorandum Order issued.

13. This Memorandum Order is filed pursuant to 28 U.S.C. § 636(b)(1)(A), Fed. R. Civ. P. 72(a), and D. Del. LR 72.1(a)(2). The parties may serve and file specific written objections within fourteen (14) days after being served with a copy of this Memorandum Order. Fed. R. Civ. P. 72(a). The objections and responses to the objections are limited to four (4) pages each.

14. The parties are directed to the court's Standing Order For Objections Filed Under Fed. R. Civ. P. 72, dated March 7, 2022, a copy of which is available on the court's website, www.ded.uscourts.gov.



Sherry R. Fallon
United States Magistrate Judge