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Appointed Special Master

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE: ALLERGAN BIOCELL TEXTURED BREAST IMPLANT PRODUCTS LIABILITY LITIGATION	MDL No. 2921 Civil Action No.: 2:19-md-2921 (BRM)(ESK)
This Order Relates to All Actions: ***In re Allergan Biocell Textured Breast Implant Product Liability Litigation*, MCL No. 634**	**SPECIAL MASTER CASE MANAGEMENT ORDER NO. 33**

THIS MATTER having come before the Special Master on November 27, 2023, via Zoom, wherein the Special Master heard oral argument with respect to Plaintiffs' October 27, 2023 application regarding Allergan's validation sample document production and Allergan's November 3, 2023 response.

I. INTRODUCTION

The parties are familiar with the facts surrounding the underlying action and claims. Accordingly, I will recite only the relevant procedural and factual background necessary to address the disputes at hand, namely whether Allergan should be ordered to re-review documents that it has previously coded as non-responsive and produce further validation samples.

On September 7, 2023, we entered CMO 31, which ordered Allergan to produce a random sampling of 750 documents from the universe of custodial document search term hits where Allergan completed its review and determined that the documents were non-responsive. (ECF No. 436, para 1) [1]. On September 27, 2023, Allergan produced the random sampling directly to Plaintiffs. The parties had several meet and confers about the classification of documents in the random sampling. Ultimately, the parties were unable to resolve their disputes, and Plaintiffs filed a 15-page letter to the Special Master and MCL court on October 27, 2023 wherein Plaintiffs requested that Allergan be ordered to (1) re-review the documents it previously reviewed and found to be non-responsive, and produce all documents that were misclassified as non-responsive, (2) produce a more robust validation sample containing an additional 5,000 documents, and (3) produce all attachments to emails contained in the initial 750 document sampling. On November 3, 2023, Allergan submitted its reply. The Special Master held oral argument on November 27, 2023. For the foregoing reasons, Plaintiffs' application is **DENIED**.

II. THE PARTIES' ARGUMENTS

Plaintiffs argue that the validation documents contain a "significant number" of relevant/responsive documents that Allergan failed to produce. (Pl. letter at 1). Plaintiffs submit that the validation documents demonstrate that Allergan is not adhering to its obligation to produce all relevant/responsive documents. *See* Pls. October 27, 2023 Letter to the Special Master at 4. In their review of the validation documents, Plaintiffs identified 60 documents that they submit are

[1] I entered this order, in part, because Allergan represented that it withheld at least 77% of the documents identified by the search terms. I understand and recognize that high percentage of withheld documents is based, in part, upon the broad search terms that include "implant," "explant," and "Natrelle." Natrelle is the brand name of textured and smooth implants, and smooth implants are not at issue in this litigation. *See* Tr. May 23, 2023 Case Management Conference at 63:9-65:2. Understandably, the broad search terms are going to yield a higher volume of non-responsive documents. While not suggesting any nefarious conduct by Allergan, I ordered Allergan to produce a random sampling of documents. (ECF No. 436).

relevant and should have been produced. Of the 60, Allergan agreed that 32 were relevant and will be produced. *See* Pls. October 27, 2023 Letter to the Special Master at 4; Allergan's November 3, 2023 Letter to the Special Master at 2. According to Plaintiffs, Allergan's concession further demonstrates that are likely additional responsive documents that have not been produced.

In response, Allergan argues that its validation process demonstrated a review accuracy over 91% which is indicative of a high-quality, adequate linear document review. *See* Allergan's November 3, 2023 Letter to the Special Master at 1, 5. Relying on cases that evaluate technology assisted review ("TAR") recall rates, not linear review recall rates, Allergan submits that the accepted recall rate is generally between 70% and 80%. *Id.* at 3. According to Allergan, reasonableness in the standard for discovery, not perfection.

III. DISCUSSION

Pursuant to CMO 31, Allergan produced a random sampling of 750 documents directly to Plaintiffs. Of the 750 documents, Plaintiffs suggest that 60 documents were improperly coded as "non-responsive." If Allergan were to agree (which they do not) that those 60 documents were improperly coded, that would yield a review accuracy rate of more than 91%. According to Allergan, 91% is an accepted recall rate and an indicator of a high-quality adequate review.

To reach that conclusion, Allergan relies upon several cases that discuss TAR processes. However, it is important to note that the document review procedure in this litigation does not utilize TAR; instead, Allergan has proceeded with a manual, linear review of documents. But because no party in this case provided any authority addressing comparable circumstances (i.e. an acceptable recall or reclassification rate resulting from a manual, linear review), and so far our research revealed no appropriate cases. Therefore, I turn to the TAR line of cases cited in Allergan's November 3, 2023 letter at pages 2-3, which offer guidance.

For example, *In re Broiler Chicken Antitrust Litig.*, No. 1:16-cv-08637, 2018 WL 1146371 at *1 (N.D. Ill. Jan. 3, 2018), the parties presented an Order Regarding Search Methodology for Electronically Stored Information Order to the court for review and approval. The court entered the order which contained a "Method of Recall Estimation" section wherein the parties agreed that "…a recall estimate on the order of 70% to 80% is consistent with, but not the sole indicator of, an adequate (i.e. high-quality) review." *Id.* at *6. Similarly, in *In Re Bair Hugger Forced Air Warming Prod. Liab. Litig.*, 2016 WL 3702959, at *2 (D. Minn. July 8, 2016) the parties set an 80% recall rate.

Allergan also points to *Lawson v. Spirit AeroSystems*, No. 18-1100-EFM-ADM, 2020 WL 1813395 (D. Kan. Apr. 9, 2020). In *Lawson*, plaintiff moved to compel the production 1,850 potentially responsive documents that remained after the TAR process reached an 85% recall rate. *Id.* at *1. In denying plaintiff's motion, the court observed that it could not find "any instance in which a court has required a party engaging in TAR to reach a 100% recall rate." *Id.* at *7. Instead, the authority supported a 75% recall rate as appropriate so achieving an 85% recall rate was "reasonable under the circumstances of th[e] case." *Id.* at *8. The court observed that to order the defendant to engage in a second-level review and to produce the 1,850 documents would not be proportional to the needs of the case, and the court declined to order the defendant to incur additional review costs for the production of documents "that would appear to have marginal or duplicative benefit to the parties, if any benefit at all." *Id.*

The cases Allergan relies upon demonstrate that a recall rate between 70-85% has either been accepted by the court or agreed to by the parties. Here, based upon the misclassifications that Plaintiffs and Allergan have agreed upon, (i.e. 32 documents), Allergan's review accuracy rate is

at least 91% in the 750-document random sampling which is above or within the accepted recall rate in the TAR context.

Further, of the 31 documents Plaintiffs identified as relevant but Allergan disputes their relevance, I find that the documents likely fall into a gray area "where reasonable minds could differ" as to whether the documents should be deemed responsive, or not. *See* Allergan's November 3, 2023 Letter to the Special Master at 2. To a certain degree, inconsistency in responsiveness determinations are expected during manual, document review with a large document review team. Allergan's document review team consists of at least 80 full-time reviewers between Consolio and counsel's e-discovery teams. *See* Tr. May 23, 2023 Case Management Conference at 41:9-13. Therefore, it does not strike me as inappropriate or odd that an 80-member team of independent reviewers may not identify precisely the same set of documents as responsive. Notwithstanding expected inconsistencies, Allergan's random sampling establishes that Allergan has managed to achieve at minimum a 91% accuracy rate in its review.

Like the court in *Lawson*, I have yet to find or be presented with authority where a party was required to achieve a 100% accuracy rate in its review. Put differently, I am not aware of any instance where a party was ordered to achieve perfection in its document review process. The reason for that is clear. Perfection is not the standard, reasonableness is the standard. *Sandoz, Inc. v. United Therapeutics Corp.*, No. 19-CV-10170, 2021 WL 5125750, at *3 (D.N.J. Nov. 2, 2021)("The rules of discovery do not require perfection, especially when it comes to electronic discovery…"); "[W]hile parties must impose a reasonable construction on discovery requests and conduct a reasonable search when responding to the requests, the Federal Rules do not demand perfection." *Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 615 (C.D. Cal. 2013); *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 374 (S.D.N.Y. 2006) ("[T]here is no obligation on the

part of a responding party to examine every scrap of paper in its potentially voluminous files in order to comply with its discovery obligations."); *Radiologix, Inc. v. Radiology & Nuclear Med., LLC*, No. 15-4927-DDC-KGS, 2019 WL 354972, at *11 (D. Kan. Jan. 29, 2019) (explaining that courts do not require perfection, rather a party must conduct a reasonable search for responsive information pursuant to a reasonably comprehensive search strategy); *see also Winfield v. City of New York*, No. 15CV05236LTSKHP, 2017 WL 5664852, at *9 (S.D.N.Y. Nov. 27, 2017) ("[P]erfection in ESI discovery is not required....").

As of November 3, 2023, Allergan had produced to Plaintiffs 3,002,493 documents comprising approximately 14,290,686 pages. *See* Allergan's November 3, 2023 Letter to the Special Master at Fn. 3. Its validation sample establishes that its review is reasonable. Plaintiffs have likely received and will continue to receive significant volumes of documents bearing on the issues in this litigation as discovery is still ongoing. I do not find it necessary or appropriate at this time to order Allergan to incur additional costs and to spend significant time re-reviewing documents that have already been classified as non-responsive. At best, those documents **may** have a marginal or duplicative benefit to the parties. *See* Allergan's November 3, 2023 Letter to the Special Master, Exhibit A. However, nothing suggests to me that Allergan's responsiveness review is unreasonable nor does anything in this exercise persuade me that significant, game changing documents have been missed or withheld.

For those reasons, Plaintiffs' application is **DENIED.**

SO ORDERED.

/s/ *Joseph A. Dickson*
Hon. Joseph A. Dickson, U.S.M.J. (Ret.)
Special Master

/s/ *Gregg A. Padovano*
Hon. Gregg A. Padovano, J.S.C.

Date: January 16, 2024