

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

COLLEEN MacDONALD :
 :
 v. : C.A. No. 10-415S
 :
 ADRIENNE J. PERRY, M.D. and :
 OB-GYN ASSOCIATES, INC. :

MEMORANDUM AND ORDER

Pending before me for determination (28 U.S.C. § 636(b)(1)(A); LR 72(a)) is Defendant OB-GYN Associates, Inc.'s Motion for Protective Order regarding Plaintiff's Rule 30(b)(6) Deposition Notice. (Document No. 30). Plaintiff opposes the Motion. (Document No. 31). On January 27, 2012, I ruled on the Motion. (Document No. 32). However, Defendant successfully moved to vacate that ruling due to ongoing efforts by the parties to reach agreement on the scope of the Rule 30(b)(6) deposition notice in issue of which I was unaware at the time. (Document No. 33).

After the parties were unable to reach an agreement, the Motion was heard by the Court on May 7, 2012. (See Document No. 37, Hearing Transcript). At the hearing, Defendant OB-GYN's counsel represented that the matter was complicated by a pending criminal investigation of Defendant Perry and other shareholders of Defendant OB-GYN. Thus, he indicated that Defendant OB-GYN was in the difficult position of either designating a Rule 30(b)(6) deponent(s) who would assert the right against self-incrimination or an alternative deponent(s) who would be unable to effectively testify as to the designated topics. Additionally, Defendant OB-GYN objects to the relevancy of topics seeking information that goes beyond Plaintiff and the particular IUD she received in 2009.

While I can appreciate the difficult position that the pending criminal investigation has put Defendant OB-GYN in, Judge Smith has not stayed this case or suspended discovery until the completion of the investigation.¹ As a corporation, Defendant OB-GYN does not have a Fifth Amendment privilege and presumably has other agents or employees who are not under criminal investigation. See Louis Vuitton Malletier S.A. v. LY USA, Inc., 676 F.3d 83, 92 n.5 (2nd Cir. 2012). Thus, Defendant OB-GYN should be able to utilize the company's records and other sources to make a reasonable attempt to prepare a Rule 30(b)(6) designee(s). See Foster-Miller, Inc. V. Babcock & Wilcox Canada, 210 F.3d 1, 17 (1st Cir. 2000) (the burden to determine who is best able to speak for the responding party rests with it). Although a Rule 30(b)(6) designee need not have personal knowledge, an organization must reasonably prepare its designee(s) to testify as to the designated topics based on information "known or reasonably available to the organization." See Sanofi-Aventis v. Sandoz, Inc., 272 F.R.D. 391, 393-394 (D.N.J. 2011). Obviously, since the Company's shareholders are its primary decision makers and such shareholders are under criminal investigation and asserting Fifth Amendment privileges, this significantly limits the information "reasonably available" to the Company and may well result in Plaintiff's counsel receiving incomplete information at this time.

Here, Plaintiff has chosen Rule 30(b)(6) as her discovery mechanism of this corporate Defendant and Defendant OB-GYN has not shown good cause under Rule 26(c), Fed. R. Civ. P., for the issuance of a protective order to preclude the deposition in order to protect it from "annoyance, embarrassment, oppression, or undue burden or expense." Further, Defendant OB-GYN has not shown that it is completely unable to produce a designee(s) who has some knowledge

¹ Plaintiff's counsel has apparently agreed, at least at this juncture, not to notice Defendant Perry's deposition due to the likelihood that she will assert her right against self-incrimination.

or could reasonably obtain some knowledge as to some or all of Plaintiff's topics and would not exercise his or her Fifth Amendment privilege against self-incrimination. Finally, Defendant OB-GYN's general scope and relevance objections are unsupported and overruled.

Defendant OB-GYN's original Motion for Protective Order was directed only at Topics 3, 4, 8, 9 and 10 of Plaintiff's Rule 30(b)(6) Notice. However, a subsequent status report dated April 3, 2012 includes argument as to all ten topics. As to Topics 1, 2 and 3, Defendant OB-GYN argues that no one has a memory or recollection of the events in question and that it could only respond based on generic information and custom or practice. While Defendant may well be correct, it has a duty under Rule 30(b)(6) to make a reasonable attempt to prepare a designee based on its records and practices, and Plaintiff is entitled to make inquiry under Rule 30(b)(6). As with any discovery request, Plaintiff runs the risk here that its choice to use Rule 30(b)(6) to inquire on these topics will not be a fruitful or productive exercise under these circumstances but it is not the Court's role to micromanage or second-guess those strategic decisions. As to Topic 4, the Court granted Defendant's request for protective order as to that Topic in the earlier decision and stands by that decision for the same reasons. (See Document No. 32). As to Topics 6, 7, 8 and 9, Defendant OB-GYN objects to them as overly broad and directed at irrelevant information. However, these topics generally go to Defendant OB-GYN's business practices and the issues of knowledge, motive and intent which are reasonably relevant to Plaintiff's fraud and misrepresentation claims.

Finally, as to Topic 10, Defendant's position is a moving target. In its initial Motion, it raised only relevancy objections to this topic. However, in its status report, it stated that "we will certainly indicate when OB-GYN Associates was notified by the Rhode Island Department of Health, to no longer purchase the devices, but we object to any further response as protected by

statute for responding to the Department of Health as privileged communications.” First, Defendant appears to abandon its relevancy objection which, in any event, is unsupported and overruled. Second, Defendant appears to read Topic 10 as only addressing notice from the Department of Health and its response to the Department of Health. However, the Topic is not so narrowly limited in scope. Finally, Defendant does not cite or otherwise particularly identify the statute upon which its bases its privilege claim and does not describe the general nature and form of the allegedly privileged communication. See Rule 26(b)(5)(A), Fed. R. Civ. P. Thus, I have no legal and factual basis upon which to evaluate the privilege claim.²

Conclusion

For the foregoing reasons, Defendant OB-GYN’s Motion for Protective Order (Document No. 30) is GRANTED solely as to Topic 4 and otherwise DENIED. Defendant OB-GYN shall, within twenty (20) days, designate one or more persons to testify on its behalf as to Topics 1 through 3 and 5 through 10, and cooperate with Plaintiff to promptly schedule such deposition at a mutually agreeable date and time.

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
July 26, 2012

² Defendant OB-GYN’s privilege claim is, however, denied without prejudice to renewal with citation to the claimed statutory authority and a more particularized description of the allegedly privileged communication if Defendant wishes to press the claim.