PREPARED BY THE COURT

IN RE STRATTICE HERNIA MESH LITIGATION	SUPERIOR COURT OF NEW JERSEY LAW DIVISION ATLANTIC COUNTY MCL CASE NO. 636 MASTER DOCKET NO.: ATL-L-3857-21 **ORDER**

THIS MATTER having been opened to the Court upon application of Derek T. Braslow, Esq., attorney for Plaintiffs, for an Order granting Plaintiffs' Motion to Compel Discovery, and the Court having considered the moving papers and arguments, and for good cause being shown as stated in the accompanying Memorandum of Decision;

IT IS on this 29th day of November, 2023, **ORDERED**:

1. Plaintiffs' Motion to Compel Discovery is **GRANTED** without limitation.
2. All counsel shall meet and confer to address the production and exchange of all existing deposition transcripts and exhibits from the AlloDerm litigation as quickly and efficiently as possible.

IT IS FURTHER ORDERED that service of this Order shall be deemed effectuated upon all parties upon its upload to eCourts. Pursuant to R. 1:5-1(a), movant shall serve a copy of this Order on all parties not served electronically within seven (7) days of the date of this Order.

(x) Opposed

( ) Unopposed

HON JOHN C. PORTO, P.J.Cv.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

JOHN C. PORTO, P.J.Cv.

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MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

TO: Edward B. Mulligan, Esq.
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All other Counsel of record listed on eCourts.

RE: In Re Strattice Hernia Mesh Litigation **DOCKET NO.** ATL-L-3857-21

NATURE OF MOTION: Plaintiff's Motion to Compel Discovery-Deposition Transcripts

HAVING CAREFULLY REVIEWED THE MOVING PAPERS, OPPOSITION AND ARGUMENTS OF COUNSEL, I HAVE RULED ON THE ABOVE CAPTIONED MOTION AS FOLLOWS:

Nature of Motion and Procedural History

This is a multicounty litigation matter as designated by the New Jersey Supreme Court. Plaintiffs filed their Complaints against Defendants, LifeCell Corporation, Allergan USA, Inc., and Allergan, Inc., alleging negligence, strict

products liability for design defect, strict products liability for failure to warn, breach of express and implied warranties, negligent misrepresentation, fraud, consumer fraud act violations, and punitive damages against Defendants, due to Defendants' porcine (pig) skin tissue mesh product used for hernia surgery.

On December 2, 2021, the Supreme Court of New Jersey ordered all pending and future New Jersey state court lawsuits against LifeCell Corporation, Allergan USA, Inc., and Allergan, Inc. alleging injuries as a result of the use of Strattice hernia mesh products be designated as Multicounty Litigation (MCL) for centralized management purposes, and that all such complaints filed in the various counties and under or are awaiting case management and/or discovery shall be transferred from the county of venue to this court.

On December 23, 2021, this court entered its first case management order. Since that order, the court entered eleven (11) subsequent case management orders.

Plaintiffs filed this motion to compel AlloDerm deposition transcripts on October 18, 2023. Said depositions were conducted in a prior MCL litigation in another county. Defendants filed their opposition on October 26, 2023. Plaintiffs filed their reply brief on October 30, 2023. Oral argument was conducted on November 2, 2023.

Parties' Contentions[1]

Plaintiffs

Plaintiffs' counsel certifies their efforts to obtain the AlloDerm deposition transcripts without motion practice. To date, Defendants did not produce any deposition testimony or documents discovered during the AlloDerm MLC. According to Plaintiffs' counsel they noticed similarities between AlloDerm and

[1] The contentions are general summaries of counsel's positions derived from their briefs and arguments raised at oral argument.

Strattice and contend the discovery conducted in the AlloDerm MCL is relevant in this present litigation.

Counsel asserts the parties met via zoom to meet and confer on September 11, 2023, and September 25, 2023, to discuss those AlloDerm depositions. Counsel asserts the Defendants were in the process of confirming the identity of the deponents, but during their October 13, 2023 telephonic meeting Defendants' attorneys informed them the transcripts in their possession would not be produced. Counsel asserts the parties discussed the deposition transcripts another time on October 17, 2023, and did not come to an agreement regarding their production.

In Plaintiff's brief, counsel requests, pursuant to R. 4:18(b)(4) and R. 4:23-5(c), this court "compel the Defendants to produce all sworn testimony from the MCL litigation involving LifeCell's AlloDerm biologic hernia mesh product." Counsel provides their analysis pertaining to discoverability of the deposition testimony from other cases, and factors such as availability of deposition transcripts and similarity of the litigations.[2]

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[2] R. 4:10-2(a); Pfenninger v. Hunterdon Cent. Reg'l High Sch., 167 N.J. 230, 237 (2001); Capital Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 446 N.J. Super. 96, 114-15 (App. Div. 2016); Piniero v. Div. of State of Police, 404 N.J. Super. 194, 204 (App. Div. 2008); Blumberg v. Dornbusch, 139 N.J. Super. 433, 437-38 (App. Div. 1976); ConsumerInfo.com, Inc. v. One Techs. LP, No. CV 09-3783-VBF(MANX), 2010 WL 11507581, at *3, 7 (C.D. Cal. May 4, 2010); Lillibridge v. Nautilus Ins. Co., No. CIV. 10-4105- KES, 2013 WL 1896825, at *8 (D.S.D. May 3, 2013); Carter-Wallace, Inc. v. Hartz Mountain Indus., Inc., 92 F.R.D. 67, 69-70 (S. D. N. Y. 1981); Repka v. Arctic Cat, Inc., 300 A.D.2d 1019, 1020 (N.Y.S.2d 2002); Burks v. Abbott Lab'ys, No. CV 08-3414 (JRT/JSM), 2011 WL 13314927, at *9 (D. Minn. July 8, 2011), aff'd, No. CIV. 08-3414 JRT/JSM, 2011 WL 5176903 (D. Minn. Oct. 31, 2011); Rounds v. Hartford, No. 4:20- CV-04010-KES, 2021 WL 4150838, at *10 (D.S.D. Sept. 13, 2021); United States v. Abbott Lab'ys, No. 09-CV-4264, 2016 WL 4247429, at *5 (E.D. Pa. Aug. 11, 2016); Brown Bear v. Cuna Mut. Grp., 266 F.R.D. 310, 326 (D.S.D. 2009); see also BMW of North America v.

Counsel argues "[they] properly and explicitly requested the transcripts via written requests for production of documents and the objections raised in Defendants' responses are without merit." Counsel states the Defendants initially objected on the grounds the request was overbroad, and the deposition transcripts were protected by the attorney-client privilege and work-product doctrines. Counsel argues their request was not overbroad as the Defendants no longer assert that objection, but rather focus on relevance and lack of possession and control. Further, counsel argues although Defendants did not provide Plaintiffs with a list of those witnesses deposed in the AlloDerm litigation, one recent deponent, Jay Stramaglia, a corporate representative in this Strattice litigation admitted to also testifying in the AlloDerm litigation.

Second, counsel argues "sworn testimony from the AlloDerm MCL is clearly discoverable in light of the significant similarities between the litigations." Counsel asserts both litigations involve the same primary defendant, LifeCell, and same attorney, David Field, Esquire. Plaintiffs' counsel contends the claims in both MCL's were primarily based upon design defects and failure to warn under the New Jersey Products Liability Act. According to counsel, the personal injuries arose out of the implantation of either AlloDerm or Strattice in "challenging hernia repair surgeries."

Counsel provides examples of potentially relevant and discoverable evidence if Defendants' were to produce the depositions from the AlloDerm litigation. Counsel asserts "Plaintiffs should be permitted to discover prior sworn deposition testimony of both LifeCell and its officers and employees that could touch on any of the issues in this case including notice, causation, and punitive damages." Moreover,

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Gore, 517 U.S. 559 (1996); Lyon v. Bankers Life and Cas. Co., No. CIV. 09-5070-JLV, 2011 WL 124629, at *11-13 (D.S.D. Jan. 14, 2011).

counsel contends "[p]rior sworn testimony of LifeCell and its officers and employees, particularly when it is so related to the issues in this case, is also discoverable impeachment evidence," and Defendants acknowledged as much when they "indicated during a meet and confer that they would likely produce the Stramaglia[3] deposition transcript from the AlloDerm MCL."

Lastly, counsel argues there is no burden in the production of the deposition testimony, as it is in the possession and control of Defendants' attorney, David Field, and by producing this deposition testimony, there is a likelihood to "further streamline" discovery in this case and ultimately reduce the burden of discovery on all parties.

Defendants' Opposition

In opposing the motion, counsel distinguishes the two products. Defendants' counsel argues AlloDerm is not Strattice, as AlloDerm is made of human tissue and Strattice is made of porcine (pig) tissue. AlloDerm is regulated by the FDA as a human tissue product; Strattice is regulated by the FDA as a Class II medical device. Moreover, the AlloDerm MLC litigation was formed over a decade ago, and this Strattice MCL was formed two years ago. Counsel asserts no AlloDerm plaintiffs claimed injuries due to Strattice, while no Strattice plaintiffs claim injury due to AlloDerm.

Counsel argues the parties have nearly completed fact discovery in the present MCL, and Plaintiffs did not provide an explanation for why the prior deposition materials are needed. Counsel first argues "Plaintiffs have failed to demonstrate that the deposition transcripts and exhibits are relevant or proportional to the needs of this case to justify their production." Defendants' counsel also provided their

[3] The use of the individual's last name is for ease of reference only; no familiarity or disrespect is intended.

analysis of the legal standard and case law supporting their objection regarding the production of the deposition transcripts[4]. Counsel argues that even though the causes of action alleged against LifeCell in the AlloDerm litigation may be the same as those alleged here, there are no other similarities between the litigations. Counsel provides there are differences in material, design, and manufacture of the products, as well as being subject to different regulatory schemes, impacting the labeling and failure to warn considerations. Counsel argues "[e]ven if the marketing for the two products were similar, as Plaintiffs insist, any testimony on AlloDerm marketing would have no logical connection to determining whether LifeCell adequately warned of the risks associated with Strattice" since the AlloDerm litigation focused on the defects and failure to warn by AlloDerm.

Counsel also distinguished the cases cited by the Plaintiffs' attorney, arguing "Plaintiffs are also wrong that testimony in the AlloDerm litigation 'could touch on any of the issues in this case, including notice, causation, and punitive damages.'" Moreover, counsel argues the "lone witness who has been deposed in both litigations, Jay Stramaglia, testified that his previous AlloDerm testimony had nothing to do with Strattice." Counsel provided an excerpt from that exchange, Stramaglia was asked: "Q: Were you asked any questions in that deposition about Strattice, the product that we're here to talk about today? A: I don't think Strattice came up in that deposition."

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[4] Rule 4:10-2; Horizon Blue Cross Blue Shield of New Jersey v. State, 425 N.J. Super. 1, 29 (App. Div. 2012); Depomed, Inc. v. Purdue Pharma L.P., No. CV 13-571 (MLC), 2016 WL 6089699, at *4 (D.N.J. Oct. 14, 2016); Reckitt Benckiser Inc. v. Tris Pharma, Inc., No. CIV.A. 09-3125 FLW, 2011 WL 4916337, at *4 (D.N.J. Oct. 17, 2011); Johs. De Kuyper & Zoon B. V. v. Phillips Prod. Co., No. 92 C 4996, 1992 WL 372988, at *1 (N.D. Ill. Dec. 9, 1992); Bolinger v. Graham-Rogers, Inc., No. 08-CV-2011-JWLDJW, 2008 WL 4758605, at *4 (D. Kan. Oct. 30, 2008).

Second, counsel argues even though they assert the irrelevancy of the transcripts, "if this Court were to determine that the AlloDerm transcripts were relevant, compelling their production now is not proportional to the needs of this case." Counsel asserts Rule 4:10-2(g)[5] is an appropriate basis to demonstrate the limitation of discovery. Counsel argues "the sought-after discovery is cumulative and duplicative of already-produced documents, and the burden and expense to produce it outweighs its benefits." Counsel asserts due to extensive discovery over the past two years, Plaintiffs already possess the substantive information they seek in the deposition transcripts.

Further, counsel contends Plaintiffs' argument minimizes the burden to produce as it does not consider the time and effort it would take for Defendants to review the transcripts before producing them. Additionally, counsel asserts some of the exhibits to the depositions were marked confidential by the plaintiffs to the AlloDerm litigation and are subject to a protective order[6] in that case. Counsel also asserts LifeCell's counsel would therefore need to review and assess each exhibit to determine whether its production would violate the protective order. According to counsel, Plaintiffs' deposition transcript request "feels more like a fishing expedition

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[5] That Rule provision states: "The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act pursuant to a motion or on its own initiative after reasonable notice to the parties."

[6] Plaintiffs' counsel later indicated they were not seeking any documents under any protective order.

designed to make the Defendants' counsel expend significant time and resources on an unnecessary review of transcripts and confidential exhibits that have nothing to do with Strattice."

Counsel concludes "the AlloDerm deposition transcripts are irrelevant to the issues presented in this Strattice litigation and the requested production is not proportional to the needs of the case."

Plaintiffs' Reply Brief

In reply, Plaintiffs' counsel asserts the Defendants' opposition is contradictory, and the only uncontradicted argument made is that it would be too burdensome to produce AlloDerm testimony. Counsel asserts that argument is unsupported, as Defendants do not identify what witnesses were deposed, how many depositions would be responsive, how long those depositions are, and the cost associated with this review.

Counsel argues they made a timely request for said transcripts, and it is reasonably calculated to lead to the discovery of admissible evidence. Counsel avers the Defendants assert the depositions are irrelevant, but Defendants also say they do not know what is contained in the transcripts, and so their argument rests on the fact that AlloDerm is not Strattice and Strattice is not AlloDerm. Counsel argues that even though they are different products, "sought-after discovery need not involve the same product to be discoverable in a subsequent litigation." Counsel contends Defendants produced discovery regarding other products in this litigation, and notes Defendants cross-examined Plaintiffs' regulatory expert, Dr. Laura Plunkett, as an example. During that deposition, Dr. Laura Plunkett was cross-examined with a document regarding an FDA inspection regarding Strattice BPS, "a product LifeCell promotes for use in a different part of the body and for a different purpose: breast reconstruction." Counsel points to the potential relevance of Strattice BPS compared to AlloDerm and that "lead counsel nevertheless made the choice to use it in his

cross-examination of Plaintiffs' expert." Counsel also reiterates examples of what they believe the depositions will include that is relevant to this MCL litigation.

Counsel also argues since "Defendants' claim that the AlloDerm testimony is 'duplicative and cumulative' of the Strattice production simply reinforces that it is discoverable." Counsel asserts, "[i]n other words, it cannot be 'duplicative and cumulative' of evidence that was discovered in this litigation and also 'not relevant.'" Further, counsel argues "although it may bear upon similar topics and issues, sworn testimony cannot be duplicative and cumulative of documents produced in this litigation; documents are no substitute for sworn testimony or the admissions of a party opponent."

Additionally, counsel argues "Defendants fail to substantiate or verify their claim that producing the AlloDerm testimony would be too burdensome. Counsel argues that the Defendants' attorneys simply state they have "dozens" of responsive depositions is not enough to block the production of discoverable information with a claim of "burden." Counsel asserts to date, neither LifeCell or their attorneys disclosed the names of the witnesses deposed, the number of responsive transcripts they possess, or the length of those depositions. Further, counsel asserts Defendants would not need to review the depositions to produce them, rather LifeCell's lawyers would do so. Counsel argues "pre-production review of deposition transcripts is not the type of 'burden' that should warrant blocking Plaintiffs' reasonable and targeted discovery request."

Lastly, counsel addresses several other of Defendants' arguments. First, counsel asserts Plaintiffs' motion was timely and proper, there is no rule requiring that a motion to compel be brought within a certain time-period, discovery is open and ongoing, and none of the case management orders include a fact discovery deadline for general liability discovery. Second, counsel asserts "Plaintiffs do not seek any testimony given by any case-specific witnesses in AlloDerm. Only the

depositions LifeCell and any of its employees or third-parties that bear on general liability." Finally, counsel asserts "Defendants' concern about the AlloDerm protective order is misplaced."[7]

Discussion

As noted, this motion seeks the production of deposition transcripts from an earlier MCL litigation.

In New Jersey, the rules of discovery are to "be construed liberally in favor of broad pretrial discovery." Payton v. New Jersey Turnpike, 148 N.J. 524, 535 (1997). This policy is based upon the principle that "[o]ur court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts." Jenkins v. Rainner, 69 N.J. 50, 56-57 (1976). R. 4:10-2(a) states:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. *It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence*; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought. [Emphasis added.]

Additionally,

> Prior to moving to dismiss pursuant to [R. 4:23-5(a)(1)], a party may move for an order compelling discovery

[7] The protective order was addressed earlier in this Memorandum of Decision.

> demanded pursuant to R. 4:14, R. 4:18 or R. 4:19. An order granting a motion to compel shall specify the date by which compliance is required. If the delinquent party fails to comply by said date, the aggrieved party may apply for dismissal or suppression pursuant to subparagraph (a)(1) of this rule by promptly filing a motion to which the order to compel shall be annexed, supported by a certification asserting the delinquent party's failure to comply therewith.
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> [R. 4:23-5(c).]

Generally, compelling the demand for the production of documents is a discovery tool routinely utilized in civil litigation and is specifically permissible pursuant to the New Jersey discovery rules. See R. 4:18-1. Plaintiffs' counsel also cites to Rule 4:18-1(b)(4) in support of their motion which provides:

> Objections; Failure to Respond; Motions. General objections to the request as a whole are not permitted and shall be disregarded by the court and adverse parties. The party upon whom the request is served may, however, object to a request on specific grounds and, if on the ground of privilege or accessibility of electronically stored information, the objection shall be made in accordance with R. 4:10-2(e) and (f) respectively. The requesting party may move for an order of dismissal or suppression or an order to compel pursuant to R. 4:23-5 with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested. The provisions of R. 4:23-1(c) apply to the award of expenses incurred in relation to motions made pursuant to this rule.

In their opposition to this deposition transcript request, Defendants' counsel asserts: the AlloDerm transcripts are not relevant to this litigation and are not proportional to the needs of this case. Defendant argue the Plaintiffs' request "feels more like a fishing expedition" and cite to Rule 4:10-2(g), which states:

> Limitation on Frequency of Discovery. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act pursuant to a motion or on its own initiative after reasonable notice to the parties.

This court found, in its research, there was no specific precedent in New Jersey cases that was dispositive to the issue before it—i.e., compelling the production of deposition transcripts from an earlier litigation pertaining to either alleged similar/dissimilar claims and products. Therefore, the court canvassed case law from other jurisdictions and carefully reviewed all of the submissions of counsel to determine whether the sought after deposition transcripts appears reasonably calculated to lead to the discovery of admissible evidence. As discussed below, the court answers that question in the affirmative.

Here, Plaintiffs seek the production of deposition transcripts from prior litigation involving human tissue surgical mesh; this litigation involves porcine (pig) tissue surgical mesh. This court also notes the Defendants argue, "[i]n this case, the sought-after discovery is cumulative and duplicative of already-produced documents, and the burden and expense to produce it outweighs its benefits. These factors counsel against production." Accordingly, there is no way for the Plaintiffs or this court to verify that statement absent production of the sought after transcripts.

While there are no specific cases covering this issue, a New Jersey court did address whether deposition testimony taken in a prior action is "admissible" in a subsequent action. See Starch v. Joseph Zohn, 211 N.J. Super. 75 (Law Div. 1985).[8] The trial court in Starch held "there must be a substantial identity of issues, parties and interests in order for such deposition testimony to be admissible in a subsequent action." Id. at 79.

Additionally, in its research, this court discovered in the MCL section of "NJ Courts," a prior written decision in the AlloDerm MCL. The trial court in the AlloDerm[9] MCL issued a decision denying the AlloDerm defendant's motion to bar Strattice related medical literature, emails, or other documents at trial. In denying the motion without prejudice, Judge Jessica Mayer determined there was no way for the court to determine which Strattice documents were or were not relevant to plaintiffs' claim. Instead of making a broad ruling, the court determined the issue of admissibility for each piece of evidence would be determined at trial. While unrelated to the issue before this court, that determination is instructive as the issue of Strattice was addressed, in a limited manner, in the AlloDerm MCL and whether that evidence was/was not admissible.

Courts in other jurisdictions have ordered production of deposition transcripts in separate litigation involving substantially similar claims and issues. See e.g., Transamerica Life Ins. Co. v. Moore, 274 F.R.D. 602 (E.D. Ky. 2011) (granting a motion to compel production of deposition transcripts of plaintiff's employees who testified in similar litigation); Carter-Wallace, Inc. v. Hartz Mountain Indus., Inc.,

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[8] The court also notes the existence of published case law holding that depositions taken in a separate action may be used by or against a party on summary judgement. See e.g., Gulf USA Corp. v. Fed. Ins. Co., 259 F.3d 1049, 1056 (9th Cir. 2001).

[9] See In Re: Alloderm Litigation, Case No. 295, Memorandum of Decision on Defendant's Motion In Limine to Bar Plaintiff's from Introducing Evidence or Argument Regarding Strattice, November 20, 2015.

92 F.R.D. 67, 70 (S.D.N.Y. 1981) (ordering production of deposition transcripts from litigation "involv[ing] substantially similar allegations" that "occurred during overlapping periods of time."); Repka v. Artic Cat, Inc., 300 A.D.2d 1019, 1020 (N.Y.S.2d 2002) (ordering production of deposition transcripts of manufacturer's employees from another lawsuit).

Regarding the necessary degree of relevance, the court notes in Transamerica, a Federal District Court in Kentucky ordered plaintiff to produce deposition transcripts of plaintiff's employees who testified in similar litigation. There, defendants argued all depositions—along with exhibits attached—previously taken are relevant, or could lead to relevant information, because they were taken in actions involving nearly identical legal issues. Plaintiff argued the request was unduly burdensome. The court ordered plaintiff to produce deposition transcripts taken in actions involving similar claims and policies. In doing so, the court found "the fact that the depositions sought were given in substantially similar litigation and discuss substantially similar insurance policies, these materials could 'reasonably… lead to other matters that could bear upon, any issue that is or likely to be raised in the case.'" Transamerica Life Ins. Co., 274 F.R.D. at 608 (quoting Invesco Institutional (N.A.), Inc. v. Paas, 244 F.R.D. 374, 380 (W.D. Ky. 2007)).

Therefore, the court finds, under R. 4:10-2(a) deposition testimony is discoverable in a separate litigation if the case where the depositions were taken is substantially similar to the case where the depositions are sought. While not an exhaustive list, the court may also consider other factors such as similarity of parties, presence and identity of attorneys, claims, issues, and subject matter.

Substantial Similarity

The court begins by looking at the parties, both in this case and the prior MCL. Here, the depositions in question were taken in the AlloDerm MCL. As in the AlloDerm MCL, LifeCell is the named defendant in this case. Moreover, in the

earlier MCL, counsel was present and David W. Field, Esquire represents the Defendant here and did so in the prior litigation.

Regarding claims, Defendants concede the claims brought against LifeCell in this case are the same as the claims in AlloDerm. Specifically, claims of products liability for failure to warn and design defects were brought in both this case and the AlloDerm MCL.

Looking next at similarity of issues, Plaintiffs argue there are "stark similarities" between AlloDerm and Strattice and the only difference being AlloDerm is human derived while Strattice is derived from porcine. Central to their opposition, Defendants argued the human/porcine distinction between the two products is material and that even if the marketing for the two products were similar, any testimony on AlloDerm marketing would have no logical connection to determining whether LifeCell adequately warned of risks associated with Strattice.

Notwithstanding the Defendants opposition, the court here finds, despite the human/porcine tissue distinction, AlloDerm and Strattice are substantially similar for purposes of this discovery issue.

First, the court notes, regarding the competitive market of hernia repairs, Defendants' internal presentation, "Project Safari Commercial Information." See Plaintiffs' Ex. 9. It is notable that this document does not distinguish the various biologics on whether they are animal or human derived, but rather classify biologics by mechanism of action. Id. at p. 20. Here, both AlloDerm and Strattice were classified under the "regeneration"[10] mechanism of action. Additionally, under the heading, "Project Strategic Direction," the internal plan for Strattice was to "[d]evelop a product that is clinically equivalent to AlloDerm with improved ease

[10] Regeneration is defined as the "body accepts and integrates the intact tissue matrix as part of the host through rapid revascularization, white cell migration and cell repopulation.

of use." Id. at p. 46. Furthermore, LifeCell sought to brand Strattice as "deliver[ing] all the clinical benefits of AlloDerm . . . ." Id. at p. 54. Despite the human/porcine distinction, Strattice was designed to perform mechanically and biologically similar to Alloderm. See Plaintiffs' Ex. 10, p. 9. Indeed, AlloDerm and Strattice both "demonstrated rapid revascularization and cell reproduction as early as two weeks post-implantation and mature vascular structure at six months post-implantation." Id. at p. 10.

Next, the court looked to material outside of what was filed in connection with this discovery motion and what is publicly available on the internet. Specifically, the court notes a study comparing the difference of histological structure and biocompatibility between human and porcine acellular dermal matrix ("ADM"). See Liangpeng Ge, Shuquan Zhen & Hong Wei, Comparison histological structure and biocompatibility between human acellular dermal matrix (ADM) and porcine ADM, 35 Burns 46 (2009). This study concluded a strong homology between the main proteins and no significant difference between the biocompatibility of human and porcine derived ADM(s). Ibid.

The court also notes that Allergan's website indicates both AlloDerm and Strattice share the same patent.[11] Specifically, the patent encompasses a "tissue-derived structure that is made from any of a wide range of collagen-containing tissues by removing all, or substantially all, viable cells and all detectable subcellular components and/or debris generated by killing or lysing cells." Moreso, the patent specifically provides that porcine tissue can be implanted in a human patient. While Strattice is porcine derived and AlloDerm is human derived, both undergo the similar process of "remov[ing] all, or substantially all, of the DNA in the tissue."

[11] U.S. Patent No. 8,735,054 (filed Jan. 2, 2009) (found on "allergan.com/patents").

The question of both products' similarity was also addressed in Laurel Upton, Jr.'s deposition on April 28, 2023. Upton was asked:

> Q. And just very briefly, because we're here to talk about Strattice, but can you just tell us very briefly what AlloDerm was and how it's different from Strattice?

The response was:

> A. Sure. AlloDerm is human derived, so it's donated human tissue, or dermis, skin, as you might refer to it. And so we work with tissue banks across the country and, of course, process it, remove the cells, and then we process it in a non-damaging way so that you have cell incorporation, cell migration, revascularization, very similar to Strattice. And so that's the use of AlloDerm. *Strattice is different in that it's very similar to AlloDerm. The primary difference, it's porcine derived. So it comes from pigs and processed in a very similar manner.* We remove all the cells. We do -- there's minimal manipulation of the tissue so that we don't damage it, which just allows for the natural incorporation, revascularization into surrounding tissue. So very similar in terms of the processing. One is human; one is porcine.
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> [(Transcript pages 24: line 10 to pg. 25 line 7. (Emphasis added.)]

From that limited deposition excerpt and other referenced materials, the court can accept, for purposes of this motion, the tissue is different but the process to prepare/process the tissue is the same.

Accordingly, although AlloDerm is a predecessor product to Strattice, based on the aforesaid, the court finds there is substantial similarity existing between Strattice and AlloDerm to meet the requisite degree of "relevance" under R. 4:10-2(a).

Rule 4:10-2(g)

In the event the court finds the requisite degree of relevance, Defendants argue compelling production of depositions taken in the AlloDerm MCL is not proportional to the needs of this case and should be limited under R. 4:10-2(g). Specifically, Defendants argue over the last two years there was extensive discovery exchanged. Additionally, Defendants argues this would be duplicative because Plaintiffs already possesses the substantive information contained in the depositions, and there is a burden associated with production of these depositions because Defendants did not review the depositions to confirm its contents.

Plaintiffs argue Defendants' claim that AlloDerm deposition testimony are duplicative simply reinforces that it is discoverable, and that Defendants have failed to substantiate the claim that production would be too burdensome.

Here, as noted earlier, although Defendants assert the sought-after discovery is cumulative and duplicative of already-produced documents, and its burden and expense for production outweighs its benefits, there is no way for the Plaintiffs or this court to verify that assertion absent production of the sought after transcripts. Again, for purposes of this motion, the court may accept Defendants position, in part, and while accepting it, find "cumulative" and "duplicative" equals relevance under our broad and liberal discovery rules. If it is, indeed, cumulative and duplicative, counsel may raise that issue in any subsequent motion(s).

There is no basis to limit or preclude the sought after discovery as there is no way to determine their importance without their production. It is necessary for the Plaintiffs' attorneys to review the contents of said transcripts as there appears to be no other manner for Plaintiffs to obtain any of the information contained therein.

Conclusion

Accordingly, Plaintiffs' Motion to compel AlloDerm deposition transcripts is **GRANTED** without limitation. All counsel shall meet and confer to address the production and exchange of all existing deposition transcripts and exhibits from the AlloDerm MCL as quickly and efficiently as possible.

Although this court grants the Plaintiffs' motion, it does not make any determination on any issue of admissibility or of any factual conclusions regarding any future trial.

An appropriate Order is entered on eCourts. Conformed copies accompany this Memorandum of Decision.

JOHN C. PORTO, P.J.Cv. Date: November 29, 2023