

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ARBUTUS BIOPHARMA CORPORATION)
and GENEVANT SCIENCES GmbH,)
)
Plaintiffs,)

v.)

MODERNA, INC. and MODERNATX, INC.)
)
Defendants.)

C.A. No. 22-252 (MSG)

**HIGHLY CONFIDENTIAL –
OUTSIDE COUNSEL’S EYES ONLY -
FILED UNDER SEAL**

MODERNA, INC. and MODERNATX, INC.,)
)
Counterclaim-Plaintiffs,)

v.)

ARBUTUS BIOPHARMA CORPORATION)
and GENEVANT SCIENCES GmbH,)
)
Counterclaim-Defendants.)

**LETTER TO THE HONORABLE MITCHELL S. GOLDBERG IN OPPOSITION
TO PLAINTIFFS’ MOTION TO COMPEL
SEARCH OF STÉPHANE BANCEL’S DOCUMENTS**

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Dear Judge Goldberg:

Plaintiffs' motion to compel discovery from Moderna's CEO, Stéphane Bancel, is unwarranted. D.I. 285. The scope of discovery includes material "relevant to any party's claim or defense and proportional to the needs of the case" considering "whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Although Plaintiffs' renewed motion does not reference their original discovery requests, Moderna objected to production of documents from Mr. Bancel as overbroad, unduly burdensome, calling for information not relevant to claims or defenses, not proportional to the needs of the case, and duplicative of other requests. D.I. 133, Ex. A at 2. Moderna stands by its objections. Further, Plaintiffs have failed to provide "particularized information which demonstrates the need for an expanded search" to include an additional ESI custodian. *Frontier Commc 'ns Corp. v. Google Inc.*, No. CV 10-545-GMS, 2014 WL 12606321, at *4 (D. Del. Feb. 3, 2014). Plaintiffs filed this motion claiming to be missing discovery, but they either already have that information or have not demonstrated Mr. Bancel's documents would yield unique, relevant substantive information. As CEO, Mr. Bancel oversees company operations, but, as with any leader, delegates responsibility. Moderna has collected, searched for, and produced documents from his delegates. That Mr. Bancel appears in a fraction of produced emails—emails that hit on **Plaintiffs'** search terms—confirms Moderna's identified custodians were the most involved in relevant issues, rather than Mr. Bancel.

To date, Plaintiffs have filed five motions to compel. D.I. 133, 161, 184, 285, 287. Moderna's efforts to compromise only lead to increasing discovery demands from Plaintiffs. By the end of next week, Moderna will have produced over **2.4 million pages** of documents. This includes ESI from 10 custodians in this litigation, numerous non-custodial files, and documents produced in other litigations.¹ In contrast, Plaintiffs have only produced just over 960,000 pages of documents.² Plaintiffs' newly proposed searches include entirely new terms, not found in the search strings agreed upon after five months of ESI search term negotiations. *See* Ex. S (Apr. 10, 2024 Dean E-mail) at 1. Plaintiffs' motion should be denied, and in the alternative if it is granted, it should be at Plaintiffs' expense, given the disproportionate burden Moderna will incur over the process Moderna has already undergone in producing three times as many documents as Plaintiffs.

Government Negotiations Concerning the Sale of the Accused Product

As CEO, Mr. Bancel's involvement in occasional high-level talks with the U.S. Government is unsurprising. This is not sufficient to show that Mr. Bancel has unique knowledge that is relevant to specific claims or defenses such that his documents should be searched, reviewed, and produced. *See* D.I. 134, Exs. N, O, *Sprint Commc 'ns Co. v. Cequel Commc 'ns, LLC*, No. 18-1752-RGA, D.I. 100, (D. Del. Jan. 2, 2020) (overruling objections to Special Master order (D.I. 85) denying motion to compel production of executive's ESI, finding her attendance at an important meeting was not sufficient to show she should be an ESI custodian and have her email searched). Documents Plaintiffs cite demonstrate that Mr. Bancel passed initial communications

¹ Moderna's production of documents from the *Moderna v. Pfizer* litigation provides Plaintiffs documents searched from custodians above the 10 set out in the Delaware Default Standard.

² Notably, Plaintiffs have withheld over 18,000 documents or document families as privileged, while producing fewer than 100,000 documents.

to others at Moderna to provide substantive responses (Ex. C) or reached out to others to get necessary information (Ex. D). *See also* Ex. T (Apr. 5, 2024 McLennan Letter) at 4–8.

Plaintiffs claim to be missing negotiations with the Government on price and timing, citing Mr. Bancel’s prior testimony about a letter he wrote to the Government. D.I. 285 at 2. Contrary to Plaintiffs’ assertion, in December 2023, Moderna produced a copy of Mr. Bancel’s letter written to individuals at the Government proposing pricing strategy. Notably, Mr. Bancel’s letter directs recipients to contact Hamilton Bennett to discuss the details of Moderna’s offer. Moderna also previously pointed Plaintiffs to other exemplary documents about pricing. Ex. T at 3–4.³ Plaintiffs also subpoenaed the U.S. Government, filling any gap that might exist in Moderna’s production. D.I. 70, 73. Further, Plaintiffs have failed to explain how pricing proposals are specifically relevant to any claims or defenses, especially where a contract includes the agreed-upon price.

Moderna produced over 4,000 communications with the Government, including many from ESI custodian Ms. Bennett, the COVID-19 Global Product Development Lead for mRNA-1273 in 2020. Plaintiffs dismissively refer to her as a “lower-level custodian,” but, as Moderna’s document production shows, Ms. Bennett negotiated directly with the Government over the C-0100 Contract, on which she was named as representing Moderna, and executed versions of Moderna’s Government contracts are addressed to Ms. Bennett—not to Mr. Bancel. Ex. T at 7.

Negotiations with Plaintiffs and Their Predecessors

Moderna produced documents involving communications with Plaintiffs and predecessors, including documents involving Plaintiffs’ employees whom Plaintiffs did not select as ESI custodians. Ex. T at 15–18. Further, Plaintiffs acknowledge that they do not lack communications between Moderna and Plaintiffs because such information should already be in Plaintiffs’ possession, custody, or control. D.I. 285 at 2. Instead, Plaintiffs appear to be seeking Moderna’s internal communications about discussions with Plaintiffs. *Id.* However, during the parties’ meet-and-confer, when asked why Plaintiffs had not produced certain emails about negotiations with Moderna, Plaintiffs claimed that internal communications about the other would be privileged. Ex. T at 17. It should come as no surprise that Moderna’s documents likewise implicate privilege.

Negotiations with Licensing Counterparties

Plaintiffs claim to be missing emails concerning patent licensing negotiations. Yet, Moderna produced ESI from two custodians most knowledgeable about patent licensing—Said Francis, Moderna’s Chief Business Officer, and Stephen Hoge, Moderna’s President. Plaintiffs point to an email exchange between two CEOs to argue that Mr. Bancel must have relevant, unique knowledge. D.I. 285 at 3; Ex. K. On the contrary, this email exchange, which did not lead to a patent license agreement or collaboration, shows that other individuals were involved in discussions, including Mr. Hoge. Ex. K; Ex. T at 10–15. Plaintiffs’ other support—that Mr. Bancel signed agreements—does not indicate that he was “personally engaged in discussions with licensing partners.” Instead, it confirms the unsurprising fact that, as CEO, Mr. Bancel has authority to sign contracts as a Moderna officer. Plaintiffs have failed to articulate what discovery

³ Plaintiffs also point to an email about Moderna’s contract for their Zika virus program, which would have limited relevance to issues in this case. Ex. F.

they actually seek and have failed to show that a search of Mr. Bancel's documents would include any relevant information that go to disputed issues in this case.

Plaintiffs Trivialize the Burden Additional Discovery Places on Moderna

Plaintiffs discredit the burden of collecting, searching, reviewing, and producing ESI from an additional custodian, particularly when the parties are beginning depositions of almost 30 individuals in the five weeks before close of fact discovery. Parties in cases cited by Plaintiffs ordering production from additional custodians sought significantly more particularized information than Plaintiffs have articulated or demonstrated specific individuals had unique, relevant information months prior to the deadline for substantial document production. Ex. R, Oral Order D.I. 247, *United States v. Gilead Scis., Inc.*, No. 19-CV-2103 (D. Del. Dec. 21, 2021) (granting limited search of additional custodian, an assistant to another custodian (but not a requested C-suite executive), as to one RFP); *In re Facebook, Inc. Consumer Priv. User Profile Litig.*, No. 3:18-MD-02843-VC-JSC, 2021 WL 10282213, at *3 (N.D. Cal. Nov. 14, 2021) (finding the benefit of discovery from additional custodians outweighed a burden on defendant where there "remain[ed] ample time . . . to complete this targeted collection and review with an appropriate protocol"). Plaintiffs' letter does not point to any specific document requests or responses, and until running to the Court, Plaintiffs pressed Moderna for materials that neither party agreed to produce. Ex. T at 10–15. Additionally, as noted, fact discovery closes in less than five weeks.

Plaintiffs have already received a disproportionately high volume of document discovery. In addition to custodial files from 10 custodians for this case (including the President of Moderna), Moderna has produced or will produce numerous non-custodial files, regulatory documents from unaccused products, thousands of product samples, documents produced in other litigations, and Moderna board materials. The Federal Rules do not provide for unlimited discovery. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("[D]iscovery, like all matters of procedure, has ultimate and necessary boundaries."); *see also* Fed. R. Civ. P. 26(b)(1). Any relevance of Mr. Bancel's documents at this point is not proportional, where the burden and expense of his documents outweighs their likely benefit. Plaintiffs argue that their inflated damages ask supports their endless discovery demands. D.I. 285 at 3. But Plaintiffs refused to produce the discovery they demand from Moderna, including material from former CEOs involved in licensing. Ex. T at 10–15.

Should the Court nonetheless order search of Mr. Bancel's documents, Moderna respectfully requests that costs and fees be shifted to Plaintiffs, as contemplated by the Court for Plaintiffs' other requests. Ex. U (Feb. 22, 2024 Hr'g Tr.) at 84:19–85:1; Ex. V (Feb. 22, 2024 Sealed Hr'g Tr.) at 17:9–20. For efficiency, any searches should be limited to a targeted subset of the search terms the parties originally negotiated. The attorney time to supervise collection, review for responsiveness and privilege, and analyze for third-party confidentiality is considerable. Given the burdensome discovery that Moderna has already undertaken to produce 2.4 million pages, Plaintiffs should bear expenses associated with discovery sought from an additional custodian.

* * *

For the foregoing reasons, Moderna respectfully requests the Court deny Plaintiffs' motion to compel discovery from Mr. Bancel, or in the alternative shift costs of any ordered discovery to Plaintiffs.

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