IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ZOLOFT (SERTRALINE HYDROCHLORIDE) PRODUCTS LIABILITY LITIGATION	**MDL NO. 2342** **12-MD-2342** **HON. CYNTHIA M. RUFE**
THIS DOCUMENT RELATES TO ALL ACTIONS	

SPECIAL DISCOVERY MASTER'S REPORT AND RECOMMENDATION NO. 13 (REGARDING PSC's MOTION TO COMPEL PRODUCTION IN RESPONSE TO SECOND REQUEST FOR PRODUCTION OF DOCUMENTS)

February 19, 2015

The Plaintiffs' Steering Committee's Motion to Compel Production in Response to Plaintiffs' Second Request for Production of Documents (Dkt. Nos. 798, 799) has been referred to me by the Court in Pretrial Order No. 58. (Dkt. No. 857) Defendant Pfizer answered the motion (Dkt. No. 859), and the PSC filed a reply. (Dkt. No. 803).

I. THE SUBSTANCE OF THE DISPUTE

The PSC served its Second Request for Production of Documents (Dkt. No. 799-1) on defendant Pfizer on August 13, 2013. The Second Request included twelve definitions and eight instructions, and it listed 32 categories of documents which it called upon Pfizer to produce.

Pfizer served its Response to Plaintiffs' Second Set of Requests for Production on September 19, 2013. (Dkt. No. 799-2) The Response included: a twelve page Preliminary Statement describing, among other things, seventeen categories of documents that Pfizer had produced or was agreeable to producing; eight objections to the PSC's instructions (each corresponding to one instruction); nine objections applicable to more than one request (referred

to by the parties as "general objections"); and responses to the 32 requests that had been made by the PSC.

Each of Pfizer's 32 responses states that the request ". . . is overly broad, seeks documents neither relevant to any claim or defense in this action nor reasonably calculated to lead to the discovery of admissible evidence, and is unduly burdensome and oppressive." Each of the 32 responses also incorporated between four and eight of the general objections; some of the 32 responses stated further specific objections and stated, in almost all cases, that Pfizer was producing certain documents "subject to and without waiver of the foregoing objections."

In the cases where Pfizer had produced documents or was prepared to produce them, Pfizer enumerated some of the seventeen categories identified in its Preliminary Statement as containing documents responsive to a particular request. In a few cases (for example, in response to request No. 29, calling for documents describing or referring to any "Cash Flow Models performed for Zoloft"), Pfizer objected and did not state that it was producing any responsive documents.

The PSC's motion is presented in ten brief sections. Points raised in some of those ten sections are similar, and I will deal with the ten sections of the motions in four groups.

a. Complaints about, inter alia, "boilerplate" and general objections. In sections 1, 2 and 4 of its motion, the PSC attacks Pfizer's approach to responding to the 32 document requests. It states that the "boilerplate" objections should be stricken because the objections do not include any specific description of why they are made or why they are supportable. The PSC argues that Pfizer has, in essence, hidden behind its objections and its preliminary statement to avoid clearly describing what it is producing and what it is, by contrast, declining to produce. The combination of broad objections that are not specific and the lack of specific description of

what categories of documents are being produced creates a situation, argues the PSC, in which Pfizer's responses are evasive and incomplete. It is impossible, urges the PSC, for the PSC to know whether the document production is complete or even, in some respects, to know what the parameters of the production are.

The PSC urges, on this basis, that the objections should be deemed waived and that they should be stricken. (See sections 1, 2 and 4 of the PSC's motion)

b. Complaints about the organization of the production. In section 3 of its motion, the PSC urges that Pfizer's method of producing and identifying documents—by grouping them into seventeen categories (plus custodial files, as will be discussed further in this Report and Recommendation)—is not in compliance with the Federal Rules of Civil Procedure. The PSC calls upon Pfizer to state which particular documents correspond to each of the 32 categories of documents called for in the Second Set of Requests.

Section 10 of the motion raises the question of whether Pfizer should be required to produce documents in what the PSC refers to as native format. Plaintiff acknowledges that its submission does not describe why this is important or why it should be required; the PSC states that it wishes to address that question separately in the event that further production is required.

c. Complaints about the timing of production. In section 9 of its motion, the PSC states that Pfizer should be given a time limit within which to produce all of the responsive documents that it is going to produce. The PSC objects to the "rolling production" that Pfizer has described in its preliminary statement and that has characterized its response to discovery to date.

d. Complaints about particular objections made by Pfizer. The PSC's motion confronts and deals with specific aspects of Pfizer's responses in sections 5 through 8 of its motion. The PSC states as follows:

- A substantial number of PSC's requests are based on terminology used by people who have testified as Pfizer's Rule 30(b)(6) witnesses. It appears that the PSC's document requests picked up on terminology used by those witnesses, and Pfizer has stated that the terminology is too vague to permit Pfizer to formulate a response. In other cases, the PSC has used terms about Pfizer's organization or activities that it has taken from written communications, and Pfizer has also stated that these terms are vague. The PSC challenges these objections. (PSC Motion, section 5)

- Pfizer objects to the document requests to the extent that the requests call for information about risks, reported adverse events and claims of injuries other than birth defects or congenital abnormalities. For example, Pfizer states that it is not searching for documents that discuss any risk of suicide associated or claimed to be associated with use of Zoloft. And it is not searching for documents that discuss use of Zoloft in geriatric patients, since geriatric patients do not, by definition, become pregnant and give birth to children with congenital abnormalities. The PSC seeks to have this objection stricken. (PSC motion, section 6)

- The PSC challenges Pfizer's objection stating that the PSC's request for documents and information from the 22 year period beginning December 30, 1991, is unreasonable and overbroad. The PSC states that the objection is unfounded and that it is also vague and undefined because it does not state the time period for which Pfizer is agreeing to search for and produce documents. (See PSC Instruction 1; Pfizer General Objection 6; PSC Motion, section 7)

- The PSC challenges Pfizer's objection to PSC's definition of Zoloft as "overly broad." It appears that Pfizer may be limiting its response to document requests by defining Zoloft as referring only to the product sold by Pfizer under the brand name Zoloft in the United States—not to any sales outside of the United States, any sales by any other company, and any sales under any generic or other name. (See PSC Definition No. 7, Dkt. 799-1, p. 4 of 15; Pfizer Objection to Definition 7, Dkt. 799-2, p. 13 of 43; Motion, section 8).

II. PROCEDURAL BACKGROUND

The procedural history of this motion is torturous, but it is important to the discussion in Section III.D, below.

The PSC first presented the substance of the motion to me pursuant to Pretrial Order No. 22 in a letter dated October 30, 2013. The PSC withdrew the motion within a few days. The

PSC informed me in a letter dated April 1, 2014, that it was resubmitting its request for relief. It did so by resubmitting a copy of the letter it had submitted five months earlier.

In March, 2014, the Court directed the parties to submit discovery motions to the Court so that the Court could decide whether to refer any of the motions to the Special Discovery Master. On April 21, 2014, the PSC filed the motion that is now before me. (Dkt. Nos. 798, 799(The motion made the same presentations that had been made in the letter of October 30, 2013 and in the resubmission of that letter on April 1, 2014. Having seen a letter from Pfizer's counsel to me that was responsive to the PSC's submission of April 1, 2014, the PSC filed a Reply Brief (Dkt No. 803) at the same time that it filed its motion, anticipating that Pfizer's answer to the motion would be similar to its letter. Pfizer then filed a response to the motion that was, as expected, similar to its letter of some months before. (Dkt. No. 859)

The parties discussed the motion in a long meeting with me on May 13, 2014. The meeting included efforts at reconciliation of the dispute pursuant to Pretrial Order No. 22 as well as presentations in the nature of oral argument. The parties exchanged letters related to the motion after that and informed me of plans to meet and confer on the topic of the motion as late as June 5, 2014.

When the parties first submitted this dispute, they did so pursuant to Pretrial Order No. 22, which anticipated that submissions on discovery disputes would be no longer than seven pages. (Pretrial Order No. 13, ¶ 11) Presentation of the issues inherent in this motion within seven pages is like playing soccer in an elevator. I encourage the parties to seek agreement and permission to dispense with any seven page limit in the future when the issues in dispute are complex and the questions are varied. While it is possible that the parties could have expanded their submissions once their dispute became subject to Pretrial Order No. 58, they chose not to.

They did, however, reveal much more information and more elaborate concerns to me during the meeting of May 13, 2013 and in subsequent letters and discussions. If there is a degree to which this Report and Recommendation touches on more than the submissions of record that are cited above, it is because the conferences and correspondence called for it and allowed it.

While this motion was pending, all proceedings in this Multidistrict Litigation were stayed on July 1, 2014. (Dkt. No. 982) The stay was lifted on January 7, 2015 (Dkt. No. 1107), and the matter is now ripe for decision.

III. THE MERITS

A. Legal standards

The PSC states that preliminary statements in discovery responses are of no effect. Citing, *Anglin v. Village of Washington Park,* 2006 U.S. Dist. LEXIS 28606, at *2-3 (S.D. Ill., May 10, 2006). The PSC also states that a party responding to discovery has no authority to state a general objection and then to answer the discovery request "subject to and without waiver of the objection;" a response such as this, the PSC argues, renders the objection meaningless and requires that the general objection be stricken. Citing, *Jones v. Forrest City Grocery, Inc.*, 2007 U.S. Dist. LEXIS 19482, at *3 (E.D. Ark., Mar. 16, 2007), and citing *Norton v. Assisted Living Concepts, Inc.,* 786 F.Supp.2d 1173, 1178 (E.D. Tex. 2011).

Cases such as this state the propositions advanced by the PSC in categorical terms, but they do not go so far as to require the responding party to answer the discovery requests as if no objections were cognizable. In *Athridge v. Aetna Cas. & Sur. Co.,* 184 F.R. D. 181, 190 (D.D.C. 1998), which was cited by the PSC, the court stated that "general objections are disfavored." *Id.*, at 190. But that did not end the inquiry. The court examined all of the objections and all of the responses with the question of whether the responses did or did not "hide the ball." *Id.*

As the court stated in *Athridge*, if responses to document requests state general objections and do not further state what actually is being produced, then there is no way for the requesting party or the court to review the responding party's determinations about relevance or burden and to assess whether the discovery responses were adequate. *Id.*, at 190-91. With this in mind, the court did examine each specific objection, and it did give weight to some of the responding party's specific objections when they stated the correct parameters of what was relevant. Rather than striking the general objections and ruling that the responding party had to respond without the benefit of any objections, the court turned to the merits of the discovery disputes to the extent that the responses permitted it to do so.

Similarly, in *Jones v. Forrest City Grocery, Inc, supra*, the court considered the specific objections even though the general objections were given no weight. In that way, the court reached the merits of the discovery dispute without reliance on the idea that the responding party had to produce documents without regard to any objections at all. In *Norton v. Assisted Living Concepts, Inc.*, 786 F.Supp.2d 1173 (E.D. Tex. 2011), a motion to strike general objections was denied as moot because the answers to the interrogatories had been provided. It was not necessary to decide on general objections where the party taking discovery had received adequate responses. Similarly, Report and Recommendation No. 3 in *In re: Avandia Marketing, Sales Practices and Products Liability Litigation*, MDL No. 1871, expressed disapproval of "pointless" objections regarded as boilerplate, but this did not prevent the Special Discovery Master from reaching the substance of the discovery disputes that were presented. The Special Discovery Master called for defendant GSK to answer those portions of discovery requests that were not objectionable.

The cases cited by plaintiffs do not prohibit a party that is responding to discovery from making objections for the purpose of preserving them, or from objecting in part and responding in part. Fed. R. Civ. P. 34, Advisory Committee Notes (1993); *Kinetic Concepts, Inc. v. ConvaTec, Inc.*, 268 F.R.D. 226, 240 (M.D.N.C. 2010). If the objections do not obscure the issue of whether the responses are appropriate, and if the responses are in fact appropriate, then the objections need not be stricken.

B. Aspects of the Motion That Are Not Supported

With this in mind, there are certain aspects of the PSC's motion which may be considered and decided without much analysis.

Complaints About the Organization of the Production

Section 3 of the motion calls into question Pfizer's production of documents under certain headings and within certain groupings without specifying which documents are responsive to which specific requests made by the PSC. The PSC has not described why this is prejudicial, and it has not described why it cannot tell, upon looking at the documents, why the documents are being produced and what issues or requests the documents relate to. Insofar as the motion turns on section 3 thereof, I recommend that it be denied.

The PSC acknowledges in its motion that it has not presented any argument to support the relief sought in section 10 of its motion relating to the technological characteristics and format of production. Despite this, I have heard much discussion in our conferences about the question of whether Pfizer's form of production is permissible, and Pfizer's arguments have seemed sensible and compelling. I recommend denial of the motion to the extent that it relies on and seeks any relief in section 10 of the motion.

Complaints About Specific Objections

As is discussed in section 5 of the PSC's motion, Pfizer objects to the document requests insofar as they include: (1) terminology that does not have readily ascertainable meaning; or (2) definitions that are derived from terms that various witnesses used in deposition testimony or in various written communications in Pfizer's internal documents. The PSC has not provided any specific references to the terminology employed to show why it is important that the document requests turn on the use of that terminology. A particular witness or a particular email writer may have used a term colloquially. If that term is not in general use within Pfizer's organization and if it has no generally accepted meaning within Pfizer's organization, there is no reason why Pfizer should have to organize a document search around that term. Presumably, there are other ways to get the information sought. The PSC has given no examples of how it developed the terminology that it used in the document requests that are the subject of the objections stated by Pfizer, and I therefore have no basis for striking Pfizer's objection.

Section 6 of the PSC's motion states that Pfizer should be required to produce documents about risks other than the risks of congenital abnormalities, even though the complaints in this litigation are limited to injuries arising from those abnormalities. Cases on which the PSC relies do not support the PSC's position on this score. *Brooks-Bey v. Reid*, 1992 U.S. Dist. LEXIS 7052 (E.D. Pa. Jan. 21, 1992), for example, was a prisoner's civil rights action. As a *pro se* party, the plaintiff who was seeking discovery was given much indulgence when the court decided that the scope of discovery need not be limited by the parameters of what was within the complaint. Further, the discovery sought by the plaintiff in *Brooks-Bey* did not call for nearly as burdensome a search as what is called for by asking Pfizer to produce all documents related to risks that are not the subject of the complaints. In *Roesberg v. Johns-Manville Corp*, 85 F.R.D.

292 (E.D. Pa. 1980), the court granted discovery that fell within quite a large time frame, but the court did make a specific finding that the matters sought were within the scope of what was alleged in the complaint. Here, the PSC did not articulate on this motion in a compelling way how Pfizer's awareness (or lack of awareness) of risks other than those that fall within the scope of the complaints might be relevant. I recommend denial of the motion insofar as it relies on and seeks relief in section 6.

C. **Aspects of Pfizer's Responses That Are Insufficient**

Upon recommending denial of the motion with respect to sections 3, 5, 6 and 10, I turn to sections 1, 2, 4, 7, 8 and 9 of the PSC's motion.

Pfizer's objections state in some cases what Pfizer will *not* do more clearly than what it *will* do.

For example, Pfizer says that it objects to a request for a search that encompasses documents going back to 1991, when the FDA first authorized Pfizer to market Zoloft. Presumably, Pfizer has *not* systematically included 1991 as the early parameter of its search for and production of documents. Aside from not stating with any specificity why this objection is appropriate, Pfizer does not say what time period it actually *will* apply as the parameter for its search. (See PSC Motion, section 7)

Section 8 of the PSC's motion deals with a shortcoming of Pfizer's response that is not quite as obviously insufficient, but it is insufficient. Pfizer objects to having to produce information about the chemical that makes up Zoloft if the chemical was sold outside of the United States or under a brand name other than Zoloft. It appears that Pfizer may be limiting its response to documents by defining Zoloft as referring only to the product sold by Pfizer under the brand name Zoloft in the United States—not to any sales outside of the United States, any

sales by any other company, and any sales under any generic or other name. If the case is about Pfizer's knowledge of risks of birth defects, or about the risks themselves, it is hard to understand why an objection to a request calling for information about Zoloft by another name in a foreign country is appropriate.

What is harder to understand, though, is what the practical impact of the objection really is. Pfizer has produced some information about Zoloft, its risks, and the reporting and tracking thereof in other countries; Pfizer acknowledges that it has not produced all of it. It is impossible to tell whether Pfizer's objection is applied in a systematic way. And it is impossible to tell if Pfizer has employed a system based on its objection that allows it to withhold damaging information but reveal information that it does not find damaging. When this is a clear possibility that arises because the consequences of objections are not clearly and specifically stated—when they are "general objections" without more—then the court should not accept the objection. It gives the responding party the opportunity to "hide the ball" without oversight from the court and without the possibility of the other side gaining insight into what has been produced. (See Section III.A, above)

The problem of the court's and the PSC's inability to determine just what Pfizer *is* producing is compounded by the issue raised in section 9 of the PSC's motion. Pfizer states that it is engaged in a "rolling production," and for good reason. But what Pfizer has not done is state when, if at all, the production ball that is rolling will come to its resting place. It has not stated with respect to most categories of production that it has found and produced everything that it reasonably believes is findable and subject to the production requirement. In this case, that means that neither the court nor the PSC can tell whether production is complete or adequately

responsive to the request. On the basis of the objection under discussion, the question is left solely to Pfizer's judgment.

The so-called "boilerplate objections" that Pfizer states, followed by responses that are made "subject to and without waiver" thereof, are not themselves improper. But when held up against what Pfizer has actually produced, they give rise to issues that require further responses. Pfizer has stated that it has produced a large number of categories of documents plus more than 70 custodial files. (Custodial files are documents authored by a particular person, "owned by" or attributed to that person in the document creation and retention systems, or sent to or received by that person. Pfizer's production of the contents of a particular person's custodial file is limited by what Pfizer finds relevant, which is defined by, among other things, Pfizer's own general objections.) Because the custodial file productions are limited by what Pfizer finds to be relevant, the statement that 70 or more custodial files have been produced does not answer the question of whether the production of them was completely responsive. If the objections were accompanied by completely responsive answers to the documents requests, they would be entirely acceptable. But they are not. What is called for is not so much a striking of the general or "boilerplate" objections as an elucidation of what is actually being produced. (See Section III.A, above, and cases cited therein)

There is a series of cases on electronically stored information ("ESI") that is particularly instructive. I turn to them for this reason and because Pfizer has argued that it is impermissible to require Pfizer to state what it did to identify and search for documents. Pfizer has argued that requiring Pfizer to do so runs afoul of the doctrines that protect attorney work product and the mental impressions of attorneys from discovery. Pfizer argues, as well, that it is inappropriate to permit "discovery about discovery." The cases discussed below deal with those points.

The attorney work product privilege is intended to protect the mental impressions, conclusions, opinions and legal theories of counsel, and would seemingly protect the particular methods and processes that lawyers use to find documents responsive to a request for production by opposing counsel. See *Hickman v. Taylor*, 329 U.S. 495 (1947). Yet, there has been a growing judicial trend, particularly in complex cases, away from the protection of these processes under the work product doctrine, requiring that lawyers responding to document requests reveal the search terms or "keywords" used to find non-privileged and responsive information during discovery. See *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96, 109-10 (E.D. Pa. 2010) (reasoning that information relating to document production, including search terms, is not protected by the work product privilege because such information relates only to facts) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 395–96 (1981) ("Protection of the privilege extends only to communications and not to facts. The fact is one thing and a communication concerning that fact is entirely different.")); *Doe v. District of Columbia*, 230 F.R.D. 47, 55-56 (D.D.C. 2005) (ruling that that Rule 26(b)(1) of the Federal Rules of Civil Procedure allows for the discovery of an attorney's document production policies and procedures).

First and foremost, the party against whom a discovery motion has been filed bears the burden of establishing that its methodologies for the search and review of ESI is reasonable. In *Smith v. Life Investors Ins. Co. of Am.*, for instance, plaintiff filed a motion to compel discovery responses, including a list of term terms used to identify responsive documents. 2009 U.S. Dist. LEXIS 58261, at *20 (W.D. Pa. July 9, 2009). The parties initially planned to confer regarding the terms and keywords to be used in their search for responsive documents, but defendants moved ahead to perform the ESI search without plaintiff's input. *Id.*, at *20. The United States District Court for the Western District of Pennsylvania reasoned that, "the party performing the

search [has] a duty to demonstrate that its methodology was reasonable." Id. (citing *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008)).[1] The court ruled that defendants had not met their burden of demonstrating that their search was reasonable because theyfailed to provide a "thorough explanation of the search terms and procedures used." Smith, 2009 U.S. Dist. LEXIS 58261, at *20. For this reason, defendants were ordered to reveal the search terms and keywords utilized in the production of responsive documents to plaintiff.

In *Romero v. Allstate Ins. Co.*, this Court heard a motion to compel filed by the plaintiff class representative in an employment case. 271 F.R.D. 96 (E.D. Pa. 2010). The motion sought, among other things, to compel disclosure of the prior and current search methodology utilized by the defendant-employesr to search for responsive ESI materials. *Id.*,. at 109. The court reasoned that, because "electronic discovery should be a party-driven process," it was reasonable to compel the parties to confer and come to some agreement on the search terms that Defendants intend to use." *Id.* (citing 10 Sedona Conf. 339, 334-45 (2009)). The court refused to find that "such information is subject to any work product protection, as it goes to the underlying facts of what documents are responsive to Plaintiffs' requests and does not delve into the thought process of Defendants' counsel." *Romero*, 271 F.R.D at 110. With respect to plaintiff's request for "a retroactive view of the searches Defendants have already conducted . . . over the past eight and a half years," the court refused to compel such disclosures. Id. Instead, the Court ruled that "the Court is confident that the parties can coordinate their efforts on a forward-going basis to share

---

[1] The case of *Victor Stanley, Inc. v. Creative Pipe, Inc.* case is highly persuasive authority on the contours of an effective electronic search methodology and is regularly cited for the proposition that "the party performing the search [has] a duty to demonstrate that its methodology was reasonable." *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 262 (D. Md. 2008)).

information about what has already been completed and what needs to be done in order to avoid duplicative discovery." *Id.*

Several other cases from federal courts across the country concur with the result that ESI search terms and keywords are not privileged and must be disclosed in response to a request for production if not jointly created through a cooperative process between the litigants. See, *e.g.*, *Apple Inc. v. Samsung Elecs. Co.*, 2013 U.S. Dist. LEXIS 67085, *43 (N.D. Cal. May 9, 2013) (finding that non-litigant was required to produce search terms and a list of custodians that it used in responding to plaintiff's subpoena and request for production); *In re: Porsche Cars N. Am., Inc.*, 2012 U.S. Dist. LEXIS 136954, *25 (S.D. Ohio Sept. 25, 2012) ("Defendants assert that they have not hidden anything from Plaintiffs based on their objections to vague and ambiguous terms; full disclosure of the way in which Defendants applied these terms to their searches will either verify or refute this assertion."); *FormFactor, Inc. v. Micro-Probe, Inc.*, 2012 U.S. Dist. LEXIS 62233, *18 (N.D. Cal. May 3, 2012) (ordering the plaintiff to produce a list of search terms that were used for all of plaintiff's electronic searches, the names of the databases searched, and the precise searches undertaken to respond to defendants' document requests).

D. **Timeliness**

Pfizer has argued that plaintiffs' complaints should be discounted or rejected because the PSC cannot point to a specific category of documents that appears to be missing from Pfizer's production. The PSC's statement that the production in this case is smaller in volume than in other pharmaceutical MDLs is not persuasive. What may be persuasive, however, is the concern that plaintiffs are not in a position to know what might be missing as a result of the inappropriate truncation of a search on the basis of general objections. Pfizer argues—and is supported by

some case law—that the timing of PSC's motion weighs against acceptance of PSC's concerns on this score.

As is described in Section I, above, the PSC first raised the issues presented by this motion in October 2013. The PSC then raised the issues in identical terms in April 2014, appearing not to have made any progress in resolving the concerns raised five months before. By the time the motion was ready to be heard, trial pool designations were due; discovery aimed at the ability of the parties to file case-specific *Daubert* motions was to be completed in the following four months. (See Pretrial Order No. 63, Dkt. No. 949, setting deadlines which are soon to be reset.) It is not clear why the lapse of time occurred, and more seasonable presentation of the motion might have avoided prejudice.

While the abundance of jurisprudence exempting ESI search terms/keywords and processes from the attorney work product privilege, as discussed above, supports the PSC's right to such information, issues of timeliness and waiver weigh against the PSC's efforts to obtain this information from Pfizer. Several recent cases illuminate the principle that, in the context of electronic discovery disputes, a party is "required to alert the court within a reasonable period of time" if the parties cannot reach an agreement. *Ford Motor Co. v. Edgewood Props.*, 257 F.R.D. 418, 426 (D.N.J. 2009).

At issue in *Ford Motor Co.* was a two-fold discovery dispute over the form of ESI produced by Ford and the search processes utilized by Ford to search for responsive documents. *Ford Motor Co.*, 257 F.R.D. at 424. In its original document requests, Edgewood sought production of ESI in native format and containing metadata. *Id.* However, Ford's responsive documents failed to include ESI in native format, and Edgewood waited nearly seven months to object. *Id.* Referring to the Sedona Principles (which both sides in this case recognize to be a

highly persuasive source on how to approach disputes like this),[2] the court found that Edgewood did not object within a "reasonable period of time" and thus waived its right to compel the production of documents in native format, as is customarily required in the process of electronic discovery. *Id.* at 425-426 ("The Court finds Edgewood's objection to be out of time."); see also *The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production* (Sedona Conference Working Group Series 2005)).

The *Ford Motor Co.* case also addressed Edgewood's objection to the search processes used by Ford to search for responsive documents. According to Edgewood, Ford's production evinced a "noticeable absence" of certain documents and suggested that "the document collection method employed by Ford was flawed." *Id.* at 427. Edgewood effectively sought a "substantial reconstitution of the document collection process by trying to *add* to the existing repository of ESI that Ford collected over a year ago," but offered no proof for its supposition that production was incomplete. *Id.* Ultimately, the court held that "Edgewood's complaint" that "is has not received all of the documents to which it is entitled" is "premised on nefarious speculation" and does not warrant "burdensome discovery requests late in the game." *Id.,* at 428.

The Sedona Principles similarly recognize that where a party fails to timely object to aspects an adversary's ESI discovery, the moving party waives the right to compel production absent a showing of actual prejudice:

---

[2] See *Aguilar v. Immigration & Customs Enforcement Div.*, 255 F.R.D. 350, 355-356 (S.D.N.Y. 2008) ("The Sedona Conference . . . a nonprofit legal policy research and education organization, has a working group comprised of judges, attorneys, and electronic discovery experts dedicated to resolving electronic document production issues. Since 2003, the Conference has published a number of documents concerning ESI, including the Sedona Principles. Courts have found the Sedona Principles instructive with respect to electronic discovery issues.").

> An award of sanctions without a showing of prejudice is particularly inappropriate in the context of the discovery of electronically stored information, which often involves large volumes of complex data, in which it can be difficult to identify, preserve, and produce all relevant information with complete accuracy. . . **The timeliness of a challenge to production failures may indicate prejudice, or the lack of it.** The amended Federal Rules of Civil Procedure, as well as *The Sedona Principles,* since their inception, have urged an early constructive dialogue . . . .

The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Second Edition, 72, Cmt. 14.c. (The Sedona Conference Working Group Series, 2007) (emphasis added).

Consistent with this, a requesting party's failure to raise timely objections to discovery may result in waiver unless the objecting party can prove that the producing party is "purposefully (or even negligently) withholding" information previously requested during discovery. *Ford Motor Co.*, 257 F.R.D. at 428; see also *Margel v. E.G.L. Gem Lab Ltd.*, 2008 U.S. Dist. LEXIS 41754, 8-9 (S.D.N.Y. May 29, 2008) ("Under ordinary circumstances, a party's good faith averment that the items sought simply do not exist, or are not in his possession, custody or control, should resolve the issue of failure of production . . . .); *Autotech Tech. Ltd. Partnership v. Automationdirect.com, Inc.*, 248 F.R.D. 556, 559 (N.D. Ill. 2008) ("[i]t seems a little late to ask for metadata after documents responsive to a request have been produced in both paper and electronic format."); *Golden Trade S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 525 n.7 (S.D.N.Y. 1992) ("In the face of a denial by a party that it has possession, custody or control of documents, the discovering party must make an adequate showing to overcome this assertion.").

While the PSC has not cited a large category of documents that it believes should have been included in the production it received, I do not find this dispositive. It is difficult to prove a negative—the absence of certain materials—when Pfizer has not averred that the production is

complete and when Pfizer will not state what the parameters of its production are. Moreover, the timing of the motion should not be weighed against the PSC on the basis of how much time *passed* before the motion was brought; what is more important is how much time is *left* to engage in discovery. Somewhat paradoxically, more time is left to do discovery now than was left when the motion was being argued in the summer of 2014. It is better to begin the process of determining whether the document production is in compliance with Rule 34 than to leave the question as open as it is. If the process is not complete as trial approaches, then the PSC and Pfizer will be free to argue about whether the lack of completion is important, how it can be completed, and what should be done about the pendency of trial dates.

IV. CONCLUSION

I recommend that Pfizer be required to disclose the parameters of its searches for documents. Particularly (but not exclusively), Pfizer's disclosure of its ESI search terms, keywords and processes will assuage some of the concerns expressed above about whether the disclosures made by Pfizer are in compliance with its obligations. Given the magnitude of cases in the Zoloft MDL, it would be inappropriate to rule as the Ford Motor Co. court did and effectively leave to Pfizer unreviewable judgment as to the sufficiency of its searches and production. From this disclosure, the PSC will be in a better position to come to a view on whether important aspects of document production are complete, and the Court will be in a position to judge whether PSC is correct on this point.

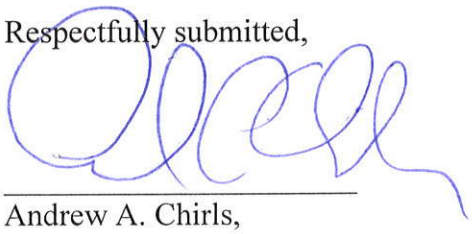
I recommend, as well, that Pfizer's disclosure be required to include a statement of what it views as the tasks necessary to enable it to state that its production is complete, and how long this will take. Pfizer's statement that its production is in sequence should include a statement

about when the sequence will get to the point of a completely responsive search for and production of documents.

I recommend that the above be required within three weeks.

I recommend that the PSC's motion, to the extent it relies on sections 1, 2, 4, 7, 8 and 9 thereof, be granted to the extent set forth above. With respect to the relief requested in sections 3, 5, 6 and 10 of the PSC's motion , the motion should be denied.

Respectfully submitted,



Andrew A. Chirls,
Special Discovery Master

Fineman Krekstein & Harris P.C.
1735 Market Street, Suite 600
Philadelphia, PA 19103