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. 6
(REGARDING DEFENDANT'S DETACHMENT OF DOCUMENTS FROM OTHERWISE DISCOVERABLE MATERIALS ON GROUNDS OF IRRELEVANCE OR NON-RESPONSIVENESS)

October 31, 2013

Before me is a request by the Plaintiffs' Steering Committee for an order compelling Pfizer to create and produce a log identifying documents that Pfizer withheld from production as non-responsive to discovery requests or as irrelevant to any claim or defense in the actions. Briefing was submitted in September, 2013, and I held oral argument on October 29, 2013.

BACKGROUND

In response to PSC requests that Pfizer produce documents, Pfizer has produced emails that show that they have attachments. Pfizer has withheld some of the attachments. When Pfizer withholds attachments, it includes a page or marker in its production. That page or marker lets PSC know that an attachment has been withheld. The page or marker lets PSC know what it was attached to.

Sometimes, the attachment is withheld because of Pfizer's view that the attachment does not fall within the scope of the subject matter of what is requested. Similarly, Pfizer may withhold the attachment because it views the subject matter of the attachment as irrelevant to any claim or defense in the action. When Pfizer withholds an attachment because of its view that the

attachment is irrelevant to any party's claims or defenses or is outside of the scope of any discovery request, it makes no entry on any log that it produces to PSC.

PSC has asked that I require Pfizer either to produce all of the materials that have been withheld or to make a log of items withheld. PSC does not state exactly what it wants in the log, but I understand that PSC is seeking information similar to what is provided in the case of a privilege log pursuant to Fed. R. Civ. P. 26(b)(5)—information that will enable PSC to assess the claim of irrelevance or non-responsiveness to a discovery request.

PSC states that the withholding at issue arises primarily when Pfizer withholds attachments to emails. It may also arise upon withholding of attachments to other communications or documents.

At various times, the parties have provided statistics related to the withholding of these attachments and other documents. When briefing was first submitted, about 61,000 documents other than the Zoloft's IND/NDA had been identified in response to discovery requests, and that around 25 percent of that number of documents had been withheld on the grounds discussed above. At oral argument, the parties informed me that about 90,000 documents other than the IND/NDA had been identified in response to production requests and that a bit less than 25 percent of that number had been withheld as non-responsive.

Upon review of the document production, PSC has questioned some of Pfizer's decisions to withhold attachments on the grounds that they were not responsive. Pfizer asked PSC to review about 134 of the attachments that had been withheld. Pfizer acknowledged that 19 of the attachments were, in fact, responsive to discovery requests. Pfizer produced them. About a quarter of those 134 attachments were duplicates of documents that had been produced in other contexts; while they had been removed from the custodial file of one Pfizer employee, they had

been produced from the custodial file of another employee.[1] Pfizer has been forthcoming in its responses to inquiries of this nature by PSC, and it has acknowledged errors.

PSC has argued that this shows that there is an error rate of about 40 percent in the decisions by Pfizer to withhold attachments. It does not. It shows nothing more than an error rate of 40 percent of documents that PSC has asked about. PSC's requests for review of withholding decisions is, as is entirely appropriate, based on its review of the document from which the attachment has been removed, the rest of the contents of the files in which the documents had been placed, and other circumstances.

DISCUSSION

It is telling that the Federal Rules of Civil Procedure require that withholding of documents or information on grounds of privilege be accompanied by disclosure of information that usually is organized into a privilege log, Fed. R. Civ. P. 26(b)(5), but that there is no similar rule that requires disclosure of information when a party responding to discovery withholds information on grounds of non-responsiveness or lack of relevance to any party's claims or defenses. It may be required that a party justify and explain its objection that a particular interrogatory or request for a category of documents is outside of the scope of permissible discovery, Josephs v. Harris Corp., 67 F.2d 985, 992 (3d Cir. 1982), but there is not a requirement in the rules that a party explain how it decided that a particular document fell outside of the scope of discovery. In general, there is no basis in the rules for requiring a party to disclose its thinking about why it did not produce a particular document.

[1] The withholding in one context and the production in another does not mean that the withholding was an error of judgment or a clerical error. It could mean that the document or attachment was not responsive to a discovery request, but that it was produced in error. The withholding of duplicates is not the product of a decision to withhold duplicates on grounds of economy; it is a product of inconsistent decisions or actions in the review of different files.

Usually, there is no call or occasion for a producing party to identify documents that it did not produce. For example, if a defendant in a personal injury case asks for all of plaintiff's medical records, the plaintiff will produce them (or will object to producing some or all of them), and the plaintiff will not have to say, "Okay, but I'm not producing my tax returns." There would be no reason to do that, since there was not a request for them in the first place. In a different example, though, a producing party might redact or detach documents from what is produced. If a plaintiff in a business dispute asks the defendant to produce her calendar, the defendant might produce it and say, "I am producing my calendar as it is kept in the normal course of affairs, but I am removing entries and attachments that are not relevant to any claim or defense." In substance, this is what Pfizer has done by removing attachments from emails and other documents upon making the judgment that the attachments are not within the scope of discovery.

When a party withholds a document that is an attachment to another document, it raises the interesting question: Is it withholding part of a document or is it withholding a separate document? The question is the subject of only a few judicial decisions, which were canvassed in an interesting and comprehensive discussion by Special Master Jonathan M. Redgrave in Abu Dhabi Commercial Bank v. Morgan Stanley & Co, Inc., 2011 WL 3738979 (S.D.N.Y., Aug. 18, 2011), *adopted without objection,* 2011 WL 3734236 (S.D.N.Y. Aug. 24, 2011). I cannot do better than the Special Master did in that case, and I will not repeat the discussion here. There is authority stating that withholding of attachments is inappropriate where the party producing the documents is purporting to produce the documents as they are maintained in the ordinary course of business, but there is countervailing authority. There is also a basis to say that materials that are stapled or otherwise attached to one another form a single document.

If an email and its attachments were considered together to be one document, then Pfizer would have no right to withhold the attachment. Pfizer would, instead, have to go through the attachments and redact certain materials—such as those that cannot be disclosed because of medical confidentiality requirements or privileged communications within the documents—from attachments that have nothing to do with the litigation in the first place. Pfizer urges that this exercise would be quite burdensome. (The requirement of a log would not create this burden; it would impose burdens that are not as great.) After some 90,000 documents have been produced, it would require Pfizer to change its system with respect to documents that are yet to be produced, and it would also require Pfizer to revisit all of the withholding decisions it has already made.

The question of whether an email and the attachment are one document or two is an abstract question, and the issue of what should be produced or withheld should not be decided on the basis of an abstraction. It is better to decide the question of whether withholding of attachments is permitted on the basis of the practical impact that it will have.

What is most telling in Abu Dhabi Commercial Bank v. Morgan Stanley & Co, Inc., 2011 WL 3738979 (S.D.N.Y., Aug. 18, 2011), *adopted without objection,* 2011 WL 3734236 (S.D.N.Y. Aug. 24, 2011), is why the withholding party was required to provide information about what was withheld after the withholding was challenged by the requesting party.

First, in Abu Dhabi Commercial Bank, supra, the withholding party had imposed a definition of relevance that was disputed. The withholding party had placed temporal parameters on the production of documents without justification. It was, therefore, sensible and fair to require the withholding party to go through its withheld documents and provide a list of what was withheld on temporal grounds (and presumably to produce those documents upon

identification). This is because the withholding was not, in fact, justified, and there was a systematic failure to produce attachments that should have been produced. PSC has not argued that there is a systematic refusal by Pfizer to produce documents that are discoverable on substantive grounds with which PSC disagrees. Rather, PSC argues that Pfizer is withholding too many documents because of errors.

Second, the number of documents withheld and at issue in the Abu Dhabi Commercial Bank case was small. There were 126 documents that had been detached and withheld; the court required the plaintiff to produce those documents if, and only if, they could be "located and produced without undue burden or expense." Additional attachments were withheld, but the number of them was not shown to be high. The burden of having the withholding party go through the body of withheld documents and describe the grounds for withholding them was not as high as it would be in this case.[2]

If PSC were to show that there was a systematic failure in Pfizer's document review, there might be justification for requiring Pfizer to justify all of the withholdings it has already made. Similarly, if the failures in Pfizer's document review were on a large scale or were the product of an unjustified decision, review of the withholdings already made on a comprehensive basis might be called for. But PSC has not made that showing. PSC has demonstrated that Pfizer has mistakenly withheld about 40 percent of the attachments out of the 134 attachments that PSC asked about. But this comes from a larger pool of more than 16,000 withheld

[2] The Special Master in Abu Dhabi Commercial Bank noted that it is best for the parties to come up with a rule about whether there will be a log generated by the withholding of non-responsive or irrelevant attachments to otherwise discoverable documents. Sometimes, there is such a discussion, the results of the discussion make their way into an order governing how discovery will be conducted, and there is an agreement that a "withholding log" will be provided. That did not happen here. The imposition of a requirement that there be a "withholding log" or a "non-responsiveness and irrelevance log" in this case would put the withholding party to the expense of going back over its documents after it had been through them at least once.

attachments. This showing is not enough to require a comprehensive review of all of the documents already withheld and the making of a log describing them. It is also not enough to require production, after redaction, of all of the withheld documents.[3]

Federal Rule of Civil Procedure 26(b)(5)(B) allows a party to "claw back" material produced in discovery by mistake, and this is because it is inevitable that mistakes will be made in production of documents on a large scale. Some documents will be produced by mistake, and some will be withheld by mistake. The possibility of mistakes, along with the fact that some of them are caught and rectified, does not justify retrospectively adding a "withholding log" requirement where none exists in the rules.

While there is not a sufficient showing to require Pfizer to go back over the withholdings already made, the benefits of requiring a log or other justification as to withholdings to be made in the future might be greater, and the burden would not be as high. The burden would not be as high because the justification for the withholding can be communicated as the production is made. Pfizer has argued that it is burdensome to add this requirement to its document review process, but it has not quantified the burden. A generalized reference to the burden of a discovery activity is far less convincing that specific affidavits or other evidence that would quantify the cost or delay that the activity would impose. See, for example, Josephs v. Harris Corp., 677 F.2d 985, 991 (3d Cir. 1982); Roesberg v. Johns-Manville Corp., 85 F.R.D. 292, 297 (E.D. Pa. 1980).

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[3] Some of the materials that Pfizer detached and withheld were produced elsewhere. In some cases, it is important to know how documents were duplicated and distributed. It may be important to know which people saw the same documents. PSC has not shown how that may be important in that case, and has therefore not shown that it is prejudiced by the "deduping" (whether accidental or purposeful) of the document production.

A log similar to a privilege log will simplify PSC's review of the nature of what is being withheld, and will not require PSC to engage in a guessing game before it exercises a focused effort to find out whether a particular document really should have been withheld. It will speed communications between the two sides in their good faith efforts to make sure that the document productions are complete. There is no doubt that it will rectify inevitable errors in withholding decisions, which I understand to have been made entirely in good faith. It will also assist in the development of a sense that the parties can trust each other's decisions to withhold documents. Imposition of the requirement on a prospective basis, relating to documents not yet produced, will not be as burdensome as imposing it on a retrospective basis.

I am not in a position to state exactly what information the log should include. I direct the parties to confer on this issue and report to me on their progress in coming to an agreement by the close of business on November 8, 2013. If they disagree on what the log should include, I will exercise my authority under Pretrial Order 22 to assist the parties in coming to an agreement, or I will make a recommendation about what information should be disclosed when an attachment is withheld.

CONCLUSION

With respects to attachments already withheld, I recommend that PSC's request that Pfizer be required to produce a "withholding log" or to produce documents previously detached from documents that it has produced in discovery be denied. The parties are to continue to cooperate in review of one party's decision to withhold an attachment from a document that has been produced.

PSC's review of Pfizer's decisions to withhold documents can be facilitated by Pfizer's disclosure of the basis for its future decisions to detach documents. I direct that the parties,

confer and report to me by November 8, 2013, on how documents detached from discovery productions in the future may be identified or described in order to ease the evaluation and understanding of the grounds for detachment.

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