

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
THIS DOCUMENT RELATES TO ALL ACTIONS	:	HON. CYNTHIA M. RUFÉ

SPECIAL DISCOVERY MASTER’S REPORT AND RECOMMENDATION NO. 7
(Regarding Production of Documents Sought by Individual Plaintiffs)

This dispute concerning the content of discovery comes before me, as Special Discovery Master, pursuant to Pretrial Order No. 22. The Plaintiffs’ Steering Committee (“PSC”) seeks a ruling compelling defendant Pfizer and other defendants to respond to certain discovery served by individual plaintiffs whose cases are in the Initial Discovery Pool. PSC has not provided copies of all of the discovery requests at issue. It has submitted a copy of document requests served by plaintiff B¹ on Pfizer Inc., Pfizer International LLC, J.B. Roerig & Company and Greenstone LLC on January 22, 2014. These requests are said to be exemplary of other discovery requests that are at issue in this dispute.

The dispute turns in large part on the application or interpretation of Pretrial Order No. 13. This Order was submitted by consent of the PSC and Defendants’ Lead Counsel on October 15, 2012, and approved by the Court on October 17, 2012. By its terms, it set forth a Preliminary Discovery Plan. Pretrial Order No. 13 describes certain information that will be provided by each plaintiff (see ¶ 7) and certain discovery that may be taken of Pfizer. (See ¶ 8) The Order left certain discovery issues open; it stated, “The parties will continue to meet and confer

¹ The individual plaintiff is identified by initial in order to preserve anonymity.

regarding the form and timing of any abbreviated Defendant Fact Sheet (“DFS”) to be provided by Pfizer.” (See ¶ 7)

PTO 13 was intended by the parties and the Court to limit discovery in many respects. Paragraph 2 of the Order states: “No party may conduct any initial discovery of another party not expressly authorized by the Plan [i.e., the terms of Pretrial Order No. 13] absent further Order of this Court or express agreement of the parties.”

A month later, on November 15, 2012, the Court entered a Joint Discovery and Scheduling Plan as Pretrial Order No. 15. This Joint Discovery and Scheduling Plan described discovery that had been requested of Pfizer and that Pfizer had responded to with a combination of agreements to produce, actual production (in the form of a “rolling production” that had begun when the Order was entered), and objections. (See Pretrial Order No. 15, ¶ 2) Pretrial Order No. 15 authorized plaintiffs, without further consent by Pfizer or Court order, to serve 50 additional requests for production (¶ 2), to take 30 fact witness depositions of Pfizer employees or former employees (¶ 3), and to serve 50 interrogatories and 50 requests for admission. (¶ 4) The completion of the Defendant Fact Sheet discussed in paragraph 7 of Pretrial Order No. 13 is not discussed in Pretrial Order No. 15.

The parties continued to negotiate the content of fact sheets into April, 2013. Pursuant to Pretrial Order No. 22, I participated as Special Discovery Master in negotiations about and may have facilitated agreement on the contents of the Plaintiffs’ Extended Fact Sheets. I provided the facilities for at least one session in April, 2013, at which the content of the Defendant Fact Sheets was discussed, but I did not participate in the discussions or negotiations. There is nothing in the record that states when the parties reached agreement on the content of the Defendant Fact Sheets, but they did reach agreement.

Pfizer is required to give information called for by a Defendant Fact Sheet with respect to each plaintiff whose case is in the Initial Discovery Pool. Where applicable, defendant Greenstone LLC is also required to give information. The Defendant Fact Sheet (a blank of which is attached as Exhibit A) calls for the defendants to provide certain information about communications between Pfizer (and Greenstone, if applicable) and each individual plaintiff's physicians. For example, the Defendant Fact Sheet calls for disclosure of information about communications whereby a plaintiff's treating healthcare provider initiated an information request related to Zoloft. The Defendant Fact Sheet calls for disclosure of the identity of sales representatives and medical liaisons for Pfizer who came into contact with any of an individual plaintiff's treating physicians "in connection with Zoloft." Pfizer is to produce "call notes" for each such contact relating to "Zoloft . . . or any other antidepressant medication and potential risks associated with maternal use in pregnancy or birth defects in children born to mothers who used antidepressants while pregnant." (Exhibit A, page 4) The Defendant Fact Sheet calls for disclosure of any arrangement by which Pfizer or Greenstone has retained or compensated any of the individual plaintiff's treating physicians. (Exhibit A, page 5) A representative of the answering defendant is required to certify under penalty of perjury that the responses provide "all reasonably accessible responsive information and documents unless otherwise specified above." (Exhibit A, page 8).

The PSC has not stated that Pfizer's responses to the Defendant Fact Sheets are incomplete.

Some of what is sought by way of the requests served by plaintiff B is called for by the Defendant Fact Sheets. For example, document request 16 calls for copies of any "Dear Doctor" letters to three of the plaintiff B's physicians. As described above, section II.A of the Defendant

Fact Sheet (Exhibit A) calls for identification of “Dear Doctor” letters sent to an individual plaintiff’s treating physicians, at least insofar as the letters concerned Zolofit. The Defendant Fact Sheet’s call for identification of the bates numbers of any such letters implies that copies of the letters are being produced as well.

By the same token, some of what is sought by way of the requests served by plaintiff B is not called for in the Defendant Fact Sheet. For example, plaintiff B asks in request number 4 for all of the “prescription information” obtained for all antidepressants prescribed or distributed by the plaintiff B’s treating physicians.

The PSC urges that the information it seeks will be useful and informative as the cases to be in the Initial Trial Pool are selected from the cases in the Initial Discovery Pool. There is no doubt that it would be useful, and there is no doubt that most (and perhaps all) of what has been requested by plaintiff B is likely to be “relevant to [a] party’s claim or defense.” Fed. R. Civ. P. 26(b). The question is whether it is precluded by the provision of Pretrial Order No. 13 that states: “No party may conduct any initial discovery of another party not expressly authorized by the Plan [i.e., the terms of Pretrial Order No. 13] absent further Order of this Court or express agreement of the parties.”

If there is a request in plaintiff B’s materials that is not in the 50 document requests authorized by Pretrial Order No. 15 or in the agreed upon Defendant Fact Sheets, then Pfizer is required to answer it only if it agrees to or if there is further Order of the Court. (Pretrial Order No. 13, ¶ 2) Pfizer has not agreed to answer the requests posed by plaintiff B. (Presumably, it is answering the requests by other means to the extent that they ask for materials already called for by the Defendant Fact Sheets or by the 50 document requests authorized by the Court in Pretrial Order No. 15.)

In the absence of Pfizer's agreement to respond, the question becomes whether there should be an Order of the Court requiring a response. I recommend that there should not be such an Order.

The requests served by plaintiff B are not simple. They are weighed down by seventeen definitions that cover six pages. According to these definitions, at least five databases must be searched. The fourteen instructions that come with the requests also cover six pages, and set out technical and carefully drafted specifications about which native or near-native formats are acceptable to plaintiffs in connection with any production. They specify twelve fields that must be filled in with each email provided, including the path of the message from the root of the mail folder as well as the Microsoft MAPI or similar unique message identifier. Pfizer will be required to provide the MD5 hash value of each item as produced, "as applicable." And then there are 31 actual requests.

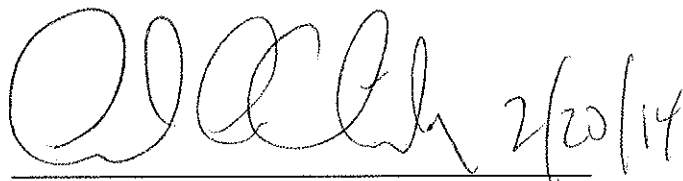
If taken at face value, the requests could generate months of argument just over the technical aspects of production (similar to debate that has already been presented to the Special Discovery Master in connection with other productions). That would be in addition to arguments about how extensive a search is adequate, how much time should be allowed for production, and which requests should be stricken for any of the reasons authorized by the Federal Rules of Civil Procedure.

The thirty days for a response to plaintiff B's discovery request have not yet passed; the responses would not even be due yet if the discovery were deemed to have been authorized. The date when the parties have to designate cases for the Trial Pool is only 85 days away. (See Pretrial Order No. 44) The prospect that responses to requests like those served by plaintiff B will actually lead in a comprehensive and organized way to a more informed and representative

selection of trial pool cases is not high, in part because there is not a highly realistic prospect of getting and digesting complete answers according to the instructions and definitions before the 85 days have run.

If there were a specific type of document or information that PSC could not have foreseen would be important or available when PSC negotiated the right to make 50 document requests, serve 50 interrogatories, take 30 depositions, or have specific questions answered in the Defendant Fact Sheets, then I would consider Ordering that defendants' discovery obligations be expanded to include disclosure of those documents or information. At this stage of the case, the scope of discovery is the product of agreements, and those agreements may be reformed when fairness and justice require it. Here, however, the PSC appears to be asking for some things that it already has a right to get and other things that it might now say would be better to have than what it negotiated for as part of Pretrial Order No. 15 and the Defendant Fact Sheets.

For these reasons, I decline to recommend that the defendants be required to respond to discovery requests like those served by plaintiff B or to provide information not already agreed to or ordered. This recommendation is not a prejudgment as to what discovery will be appropriate for trial pool cases. Nor is it license for any defendant to limit its responses or avoid its obligations to respond to discovery that is not the subject of the PSC request that is before me.



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