UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: MIRAPEX PRODUCTS LIABILITY LITIGATION	MDL No. 07-1836 (JMR/FLN)
This Document Relates to All Actions	**DEFENDANTS' JOINT OBJECTIONS TO PRE-TRIAL ORDER NO. 3**

Pursuant to Federal Rule 72(a) and Local Rule 72.2(a), Defendants, by their undersigned counsel, hereby object to Pre-Trial Order Number 3 ("PTO 3") concerning Defendants' Fact Sheets ("DFS"), incorporated in PTO 3 as Attachment A.[1].

SUMMARY OF OBJECTIONS

Defendants object to PTO 3 for two reasons. First, DFS Section II(F) seeks information concerning non-cash remuneration or incentives such as food and entertainment provided to Plaintiffs' prescribing and treating physicians. Prior to August 2006, BIPI did not record sales representatives' expenses (such as meals for physicians) in a readily retrievable format; such expenses were recorded on paper. The burden and expense that BIPI would incur if it were required to search for such information before August 2006 would be enormous, and would far outweigh the (at best) marginal relevance of such information. Fed. R. Civ. P.

[1] Attachment A to PTO 3 is not the most current version of the DFS. After Plaintiffs' counsel submitted their proposed PTO 3 and DFS, the parties reached agreement on certain language in Section II(A) of the DFS. As a result, Plaintiffs' counsel submitted a revised DFS. However, at the time PTO 3 was issued, the Court attached the earlier version of the DFS Plaintiffs had submitted rather than the revised version Plaintiffs had submitted. At least with respect to Section II(A), Plaintiffs' and BIPI agree that the revised DFS Plaintiffs submitted should have been attached to PTO 3.

26(b)(2)(C)(iii). Pfizer has the same concern to the extent that Section II(F), as interpreted by Plaintiffs, would require a costly search for marginally relevant information that may (or may not) exist outside of the company's central accounting databases.

Second, Section IV(6) seeks "any document concerning contracts with Plaintiffs' Prescribers and Treaters including but not limited to, any 'sales call notes,' or key opinion agreements." The reference to "sales call notes" as among the "contracts" to be produced is a *non sequitur* that should be deleted. Moreover, to the extent that Plaintiffs seek production of sales representatives' files under the guise of "sales call notes," Section IV(6) is an improper attempt to circumvent the Court's July 5, 2007 Order denying Plaintiffs' motion to compel production of documents such as, among other things, sales call notes. *See* Exhibit D (Order (Document 266), *Gary Selinsky v. Boehringer Ingelheim Pharmaceuticals, Inc.*, Civil No. 06-873 (JMR/FLN), July 5, 2007), attached to Affidavit of Tracy J. Van Steenburgh.

ARGUMENT

Pursuant to the directive in PTO 1 regarding the creation of Plaintiffs' and Defendants' Fact Sheets ("DFS"), liaison counsel for the parties met and conferred. This resulted in an agreed upon Plaintiffs' Fact Sheet ("PFS") that was submitted to the Court, and adopted by the Court per PTO 2. Counsel was unable to agree on the terms of a DFS; so the parties submitted competing proposals to the Court. Pursuant to PTO 1, Magistrate Judge Noel indicated he would not

fashion a DFS from the competing proposals; he would adopt one or the other. On September 5, 2007, the Court issued PTO 3, with Plaintiffs' proposal adopted as Attachment A thereto.[2]

Because certain provisions in the DFS are unduly burdensome and inconsistent with previous orders that Magistrate Judge Noel had issued, on Thursday, September 13, liaison counsel for Defendants sought to meet and confer with Plaintiffs' liaison counsel to reach an accord on the scope of the DFS. Van Steenburgh Aff. Before agreeing to meet and confer, however, Plaintiffs' liaison counsel demanded that Defendants itemize their objections to PTO 3 in writing, which Defendants did on September 14, 2007. *See* Exhibit A to Van Steenburgh Aff. Plaintiffs' liaison counsel did not respond to the letter, stating it was too little too late and that Plaintiffs' counsel would not have time to meet and confer before the deadline to file objections to PTO 3. Defendants' liaison counsel again sought to meet and confer, but their efforts were rebuffed. *See* Ex. B to Van Steenburgh Aff. Defendants' liaison counsel tried, one more time, to resolve what are important, but not complex, issues in the DFS, only to meet further resistance and an instruction to take the matter to the Court. Van Steenburgh Aff. As a result, Defendants submit two specific objections to the DFS attached to PTO 3.

[2] As stated in footnote 1 above, the DFS attached to PTO 3 is not the most current version that Plaintiffs had submitted and does not contain agreed upon language for Section II(A) that should have been part of the DFS attached to PTO 3.

1. DFS Section II(F)

DFS Section II(F) seeks information concerning non-cash remuneration or incentives such as food and entertainment provided to Plaintiffs' prescribing and treating physicians. Plaintiffs interpret Section II(F) to impose an unlimited obligation on Defendants to identify and produce *all* data concerning such "non-cash remuneration," wherever it may reside. Plaintiffs have dismissed Defendants' repeated requests to reach an understanding on the reasonable limits of Section II(F), and in fact have refused to agree to *any* limits on Defendants' obligation to seek out that information. Plaintiffs' persistent demand for marginal information that can be obtained only at extraordinary cost to Defendants contravenes both the spirit and the letter of the new F.R.C.P. 26. Defendants therefore object to this portion of PTO 3.

BIPI did not maintain information regarding "non-cash remuneration" in a database or in any other readily accessible location before August 2006. In order to retrieve such information, it would be necessary for BIPI to search the paper expense records for each of its sales representatives dealing with Plaintiffs' prescribing and treating physicians—this, to obtain evidence that BIPI may have entertained or provided perquisites to treaters and prescribers.

This is at root a failure-to-warn case. Plaintiffs do not contend that Defendants co-opted their treating and prescribing physicians by lavishing gifts upon them; they claim that Defendants withheld from them, their doctors, and the general public the alleged dangers of Mirapex.

The relevance of the information sought under DFS Section II(F) to Plaintiffs' claims is marginal at best, and pales in comparison to the significant burden and expense BIPI would be required to incur to sift through sales representatives' files for such information. As Plaintiffs' counsel has been informed, BIPI would be required to search for such information in over 4,000 boxes of expense reports, which because of the existence of the PhRMA Code since July 2002, BIPI reasonably believes will yield little to none of the information that Plaintiffs seem to think exists. The PhRMA Code expressly prohibits pharmaceutical company's representatives from giving certain types of gifts and gifts of certain value to health care providers. (Minnesota has enacted its own gift law as well.) As a result, the expense reports Plaintiffs demand BIPI search for will reveal, at most, minimal or modest gift expenses. Such modest gifts are not, according to Plaintiffs, the object of their interest. Van Steenburgh Aff. The burden of hand-searching thousands of boxes of expense reports completely outweighs the marginal relevance of the information that might be gleaned.

Pfizer, for its part, has electronically stored information on "non-cash remuneration" going back farther than BIPI does, but Plaintiffs are not satisfied with Pfizer's commitment to pull responsive information from this source. Instead, Plaintiffs read Section II(F) to require an *unlimited* search for data regarding "non-cash remuneration," including any data that may (or may not) exist outside of the company's central accounting databases. If Plaintiffs hope by this

means to discover any "smoking guns," they will be disappointed. Any significant "non-cash" expenditure would be captured in the central financial systems that Pfizer has already promised to search; the only items not captured would be those that representatives deemed too *de minimis* for reimbursement. Therefore, the most that could be gleaned from a "door-to-door" sweep of individual representatives' files would be receipts for things like box lunches and company-branded notepads, highlighters, and coffee mugs – hardly compelling evidence of undue influence or bias.

Moreover, the cost to Defendants of carrying the search to this level would be substantial, to say the least. Defendants' respective sales forces would lose time to retrieving, reviewing, and reconstructing old expense account data and email chains. The law departments would be forced to bring in additional temporary staff, presumably for the duration of the litigation, in order to gather the information from the individual sales representatives, screen it for responsiveness, and attempt to cull the inevitable duplication.

In sum, any information regarding "non-cash remuneration" beyond what has been stored electronically can only be obtained at a cost wholly out of proportion to its evidentiary value. Plaintiffs' persistence in demanding marginal information that can be obtained only at extraordinary cost contravenes both the spirit and the letter of the new F.R.C.P. 26(b)(2)(B) and (C). Defendants seek only a reasonable interpretation of what must be searched in order to provide the preliminary information called for by the DFS; as Paragraph 4 of PTO 3 provides,

"Plaintiff's use of the Defendants' Fact Sheets shall be without prejudice to the right of plaintiffs in a specific case to serve additional discovery." Because plaintiffs have an unlimited right to pursue additional discovery later, it hardly seems necessary for Defendants to undergo a "door-to-door" document sweep now. Accordingly, the Court should modify PTO 3 by deleting DFS Section II(F). *See* Fed. R. Civ. P. 26(b)(2)(C)(iii); *Miller v. Praxair, Inc.*, 2007 WL 14243,16 at *3 (D.Conn. May 10, 2007) (in retaliation case, denying discovery of "tangentially relevant" affirmative action plans because the burden of complying with the request significantly outweighed its likely benefit); *see also, Lawrence E. Jaffee Pension Plan v. Household Int'l, Inc.*, No. 02 C 58, 2006 WL 3445742, at *4 (N.D.Ill. Nov. 22, 2006) (finding that the burden of having to produce documents was "immense" and the information sought was only "marginally probative"); *Perry v. Best Lock Corp.*, No. IP 98-C-0936-H/G, 1999 WL 33494858, at *3 (S.D.Ind. Jan. 21, 1999) (weighing the "substantial" burden against the "marginal and attenuated" relevance of the proposed discovery).

2. DFS Section IV(6)

Section IV(6) of the DFS seeks "any document concerning contracts with Plaintiffs' Prescribers and Treaters including but not limited to, any 'sales call notes,' or key opinion agreements." A basic reading of this provision suggests that the reference to "sales call notes" is misplaced—perhaps a typographical error—since sales call notes obviously are not a species of "contracts." Sales call notes are, however, a species of information sought under DFS Section II(A). *See*

DFS Section II(A) (seeking sales representatives' "interaction notes"). Such information is maintained in BIPI's Seibel/Vista database, and, as detailed below, has already been produced for the former "Group 1" cases. Accordingly, the Court should modify PTO 3 by deleting the "sales call notes" reference from Section IV(6).

Moreover, to the extent that Plaintiffs in fact seek the individual files of sales representatives, Section IV(6) is an improper attempt to circumvent this Court's July 5, 2007 Order denying Plaintiffs' motion to compel production of, among other things, sales representatives' files. *See* (in relevant part, Memorandum in Support of Plaintiffs' Motion for Sanctions and to Compel Further Production of Documents) at 11 (concerning, among other things, BIPI's "failure to interview and search the documents of sales representatives"); Exhibit D to Van Steenburgh Aff. (Order (Document 266), *Gary Selinsky v. Boehringer Ingelheim Pharmaceuticals, Inc.*, Civil No. 06-873 (JMR/FLN), July 5, 2007) at 3 (denying motion).

As BIPI explained in its opposition to Plaintiffs' motion to compel further production of documents, its former employee Jessica Loh testified that BIPI's Siebel/Vista database houses sales representative call activity reports reflecting sales representatives' meetings with physicians. Ex. A to Affidavit of Scott A. Smith filed in opposition to Plaintiff's Motion to Compel (Loh Dep.) at 148; *see also* (Rose Decl.) at ¶ 25 ("BIPI sales representatives record information concerning their sales calls with physicians in the Seibel/Vista database.") filed in

opposition to Plaintiff's Motion to Compel. On December 22, 2006, BIPI in fact produced sales contact information concerning Plaintiffs' prescribing physicians obtained from the Seibel/Vista database. (Rose Decl.) at ¶ 5.

This is undoubtedly why the Court rejected, as unreasonable and duplicative, Plaintiffs' attempt to compel BIPI to search its sales representatives' individual files for, among other things, physician call activity reports. The same reasoning ought to apply with equal force to Pfizer. Thus, Plaintiffs' most recent effort to circumvent the Court's July ruling by requesting the very same information in DFS Section IV(6) should be similarly rejected.

CONCLUSION

For these reasons, the Court should sustain the three objections set forth above and should modify PTO 3 accordingly.

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