

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: ZOFTRAN (ONDANESTRON))
PRODUCTS LIABILITY LITIGATION)
) MDL NO. 1:15-md-2657-FDS
This Document Relates To:)
)
All Cases)

**ORDER ON PLAINTIFFS' MOTION
TO COMPEL AND ON DEFENDANT'S
CROSS-MOTION FOR PROTECTIVE ORDER**

April 6, 2017

DEIN, U.S.M.J.

I. INTRODUCTION

This matter is before the court on the "Plaintiffs' Motion to Compel Production of Documents and Communications Related to the Department of Justice's Investigation of GlaxoSmithKline LLC's Off-Label Promotion of Zofran" (Docket No. 576) and on "GlaxoSmithKline LLC's Cross-Motion for Protective Order" (Docket No. 617). The fundamental issue raised by the parties' motions is whether the plaintiffs are entitled to the production of documents and communications between GlaxoSmithKline ("GSK") and the Department of Justice ("DOJ") relating to the investigation of GSK's off-label marketing and promotion of Zofran, even though GSK's motion to dismiss the plaintiffs' fraud-based claims is still pending before the District Judge. After consideration of the parties' written submissions and oral arguments, the plaintiffs' motion to compel is ALLOWED, and GSK's cross-motion for protective order is DENIED for the reasons that follow.

II. ANALYSIS

Pursuant to Fed. R. Civ. P. 26(b)(1),

[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Moreover, as long as the information sought falls "within this scope of discovery[,]" it "need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1).

In this case, the information sought by the plaintiffs in their motion to compel falls easily within the scope of the discovery permitted under Rule 26(b)(1). According to GSK, the DOJ investigation focused on whether the defendant's sales force had provided false information to physicians regarding the use of Zofran for morning sickness. There is no dispute that documents and communications relating to this investigation are directly relevant to the plaintiffs' claims for fraud and misrepresentation. Although GSK has moved to dismiss those claims, discovery on the issues raised by those claims has not been stayed. Rather, the operative scheduling order specifically authorized the discovery of "issues generally relevant to liability" to begin on February 1, 2017. (Docket No. 458). Thus, proceeding with discovery would be consistent with the overall scheduling of this matter.

This court also finds that the plaintiffs are entitled to the challenged discovery because it is relevant to claims that are not the subject of GSK's motion to dismiss. While the motion to dismiss addresses the claims set forth in Causes of Action II, VIII, and IX, it does not purport to address the plaintiffs' remaining claims, including their claim for negligence. By that claim, the

plaintiffs allege that GSK “failed to exercise reasonable care and failed to comply with existing standards of care” by, *inter alia*, “[f]ailing to adequately and correctly warn . . . the medical and healthcare communities of the dangers of Zofran for pregnant women and their children;” and “promoting the use of Zofran and providing kickbacks (payments and offers of payment of remuneration) to healthcare professionals to encourage prescribing Zofran for pregnancy-related nausea[.]” (*Id.* at Ex. 2 ¶ 66). Documents reflecting interactions between GSK’s sales personnel and the physicians who prescribed Zofran to pregnant women may not only shed light on the opportunities that GSK had to warn healthcare providers of any drug-related risks, but may also reveal the methods that GSK used, if any, to encourage physicians to prescribe the drug for the purpose of treating morning sickness. At a minimum, therefore, documents and communications relating to the DOJ’s investigation are relevant to the plaintiffs’ negligence claim.

In any event, a review of the plaintiffs’ complaint indicates that, as a general matter, all of their claims arise out of GSK’s conduct in allegedly carrying out the off-label marketing and promotion of Zofran to physicians and consumers for the purpose of treating morning sickness. (See Pl. Mem. (Docket No. 577) at Ex. 2). The DOJ investigation concerned the very issue at the heart of this litigation. For this reason as well, the documents and communications relating to the investigation are relevant and should be produced without delay.

Finally, this court finds that the burden of producing the requested discovery is minimal. The materials the plaintiffs are seeking have already been produced in connection with the DOJ investigation and GSK should have little difficulty producing copies in this case. To the extent GSK contends that the documents will require extensive redactions due to references to

unrelated drugs, the burden imposed on the defendant will not be excessive. The fact that GSK's documents contain references to multiple drugs was an issue in connection with GSK's production of its IND/NDA files, and GSK was able to sort and redact references to other drugs successfully in that production. There is no reason to believe that it would be unable to do so again. In any case, the plaintiffs should not be precluded from obtaining relevant information simply because GSK's documents include information on multiple drugs.

III. ORDER

For all the reasons described above, the "Plaintiffs' Motion to Compel Production of Documents and Communications Related to the Department of Justice's Investigation of GlaxoSmithKline LLC's Off-Label Promotion of Zofran" (Docket No. 576) is ALLOWED, and "GlaxoSmithKline LLC's Cross-Motion for Protective Order" (Docket No. 617) is DENIED

/s/ Judith Gail Dein
Judith Gail Dein
United States Magistrate Judge