Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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ROBERT JOHN O'MAHONY,

Plaintiff(s),

-against-

AXCAN SCANDIPHARM, INC., WYETH (F/K/A AMERICAN HOME PRODUCTS CORP.), SCIENTIFIC PROTEIN LABORATORIES, LLC (F/K/A VIOBIN), EURAND, S.p.A., EURAND INTERNATIONAL, S.p.A., AND EURAND, INC.,

Defendant(s).

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Index No. 17444/06

Motion Submitted: 4/2/08
Motion Sequence: 003, 004

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....X
Reply.....XX
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendants Wyeth, Scientific Protein Laboratories, LLC ("Scientific"), Eurand, S.p.A., Eurand International, S.p.A. (now Eurand Real Estate S.r.l.) and Eurand, Inc. move pursuant to Civil Practice Law and Rules § 3103 for a Order precluding the Plaintiff from discovery of documents dated after April 14, 1994, the date when the aforementioned products were removed from the market, from discovery of all documents relating to products other than Ultrase MT 24 and Ultrase MT 30, and limiting the documents the moving Defendants are required to produce in response to items numbered "1", "3", "4" and "22" of the Plaintiff's Notices for Discovery and Inspection. These Defendants also request

an Order limiting the Plaintiff's Notices to Take Depositions Upon Oral Examination by requiring the Plaintiff to set forth with particularity the topics to be addressed, and preventing the Defendants from being required to produce a witness at a great distance from their headquarters.

Defendant Axcan Scandipharm, Inc. ("Axcan") moves pursuant to Civil Practice Law and Rules § 3103 for an Order limiting discovery of documents to those that predate the April 1994 removal of the products from the market, and excluding documents, which discuss other than Ultrase MT 24 and Ultrase MT 30. They also seek to limit the documents to be produced under the Plaintiff's Notice of Discovery and Inspection items "2", "3", "4" and "22", and a stay of their obligation to produce a privilege log until the Court's determination of the proper scope of the Plaintiff's discovery requests.

This is a product liability action wherein the Plaintiff alleges serious personal injuries as a result of the ingestion of Ultrase MT 24 and MT 30, high-lipase pancreatic enzymes. These products were designed to assist victims of cystic fibrosis to absorb food in order to maintain adequate nutrition.

The Plaintiff suffers from cystic fibrosis. As a young child, because of pancreatic enzyme insufficiency, a frequent complication of this disease, he ingested Ultrase MT 24 and MT 30, high lipase microencapsulated pancreatic enzyme products. The Defendants are alleged to be the manufacturers and distributors of these products.

The Plaintiff alleges in his complaint that as a result of taking MT 24 and MT 30, he developed fibrosing colonopathy, requiring surgery when he was six years of age, and as a consequence of which he is now, among other things, required to wear an external colostomy bag. The products were removed from the market on April 14, 1994, allegedly because of concern about the same injuries, which the Plaintiff in this action sustained.

The controversy concerning the product has not so much to do with its chemical composition, as its dosage. The same product, marketed in lower dosages, appears to have been on the market before the higher dose MT 24 and MT 30, and continues to be sold in lower dosages to the present time.

The Plaintiff served a Notice For Discovery and Inspection dated May 10, 2007. They served a contemporaneous Notice to Take Deposition Upon Oral Examination. By document dated June 3, 2007, Defendant Wyeth served its Response to the Notice for Discovery and Inspection. Defendant objects to requests 1 — 16, and 22 on the grounds,

inter alia, that they are " . . . vague, overbroad in time and scope, burdensome, oppressive, and not reasonably calculated to lead to the discovery of admissible evidence." The stated objections, *inter alia*, to requests 17 — 22 are that they " . . . seek materials that are irrelevant, immaterial, and not calculated to lead to the discovery of admissible evidence", and that they are " . . . objectionable to the extent it seeks the production of confidential and/or proprietary information and documents protected by the joint defense privilege, the work product doctrine, and the attorney client privilege."

The Plaintiff served the identical Demand for Production of Documents on Defendant Axcan. Axcan similarly objects to each and every demand on the grounds, *inter alia*, that they are " . . . overbroad, vague, ambiguous, harassing and unduly burdensome". They also object because the requested material is "not relevant to any issue in the case and not reasonably calculated to lead to the discovery of admissible evidence", that the demands are "not limited to any relevant time period", that they fail "to describe the requested documents with reasonable particularity", they violate "contractual confidentiality agreements", will require the production of information of a "proprietary, trade secret, or otherwise confidential in nature." With respect to documents produced in connection with four specific cases, they object because these individuals claims or conditions "were not sufficiently similar to those of the Plaintiff in this action" and the information sought "seeks protected health information regarding individuals not a party to this suit, in violation of state and federal law and privileges, including HIPAA". They further object to the extent the demanded documents contain "trade secrets, proprietary, confidential, commercial, research or development information and confidential material subject to the Food and Drug Administration Rules and Regulations" and that the demands seek information or material that is "subject to attorney client privilege, attorney work product exception to discovery, witness statement exception, party communications privilege, joint defense privilege, and any other applicable privilege."

The scope of disclosure under Civil Practice Law and Rules § 3101 has been interpreted to be generous, broad and it is to be interpreted liberally (***Allen v. Crowell-Collier Publ. Co.,*** 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 499 [1968]).

Civil Practice Law and Rules § 3101(a) provides for the scope of disclosure in civil proceedings:

> **(a) Generally.** There shall be full disclosure of all matters material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

(1) a party, or the officer, director, member, agent or employee of a party;

(2) a person who possessed a cause of action or defense asserted in the action;

(3) a person about to depart from the state, or without the state, or residing at a greater distance from the place of trial than one hundred miles, or so sick or infirm as to afford reasonable grounds of belief that he or she will not be able to attend the trial, or a person authorized to practice medicine, dentistry or podiatry who has provided medical, dental or podiatric care or diagnosis to the party demanding disclosure, or who has been retained by such party as an expert witness; and

(4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.

Civil Practice Law and Rules § 3103 authorizes protective orders to prevent abuse in the discovery process.

§ 3103. Protective orders.

(a) Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom the discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

(b) Suspension of disclosure pending application for protective order. Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute.

(c) Suppression of information improperly obtained. If any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is

> prejudiced, the court, on motion, may make an appropriate order, including that the information be suppressed.

The words "material and necessary", have long been held to connote "needful and not indispensable". (***Id.***) Moreover, demands which are overbroad, lack specificity or seek irrelevant or confidential information are palpably improper. (***Bell v. Cobble Hill Health Center, Inc.***, 22 A.D.3d 620, 804 N.Y.S.2d 362 [2d Dept., 2005]).

Request 2

Paragraph 2 calls for the production of "(a)ll documents produced, and all depositions transcripts, in court filed matters in which you were a party to an action that concerned a plaintiff alleging injury relating in any way to the colon, or alleging colonic strictures or fibrosing colonopathy, allegedly due to the ingestion of pancreatic enzyme drugs, including but not limited to the following matters."

The Defendants are directed to produce copies of transcripts of pre-trial or trial testimony by any employee or former employee given in connection with prior actions in which the Plaintiff claimed injuries in the form of fibrosing colonopathy, colonic strictures, or other injuries to the colon, as a result of the ingestion of Ultrase MT 24, Ultrase MT 30, or the same chemical compound known by any other product name, whether it be in greater or lesser dosages. The Plaintiff shall bear the reasonable cost of retrieval and reproduction of these transcripts.

Request 3

The Plaintiff requests "(a)ll documents including but not limited to all transcripts and all documents served, filed and/or produced pertaining to the matter ***Eurand Int'l and American Home Products v. Scandipharm, Inc., et al***No. 98-0300943, Philadelphia Court of Common Pleas, including but not limited to documents relating to Ultrase MT and/or to indemnity claims between Wyeth and Scandipharm or Axcan." According to the Wyeth Defendants, this proceeding was submitted to binding arbitration by the parties, and involved the question of whether allegations by Plaintiffs in various actions constituted claims of "manufacturing defect", thus removing them from the indemnity provisions of the Supply Agreements between the parties.

It does not appear that the discovery of the requested arbitration material would likely lead to admissible evidence. The issue before the arbitrator was an interpretation of the

language of the agreement between the parties as it relates to indemnification. While arbitration documents are discoverable when the issue before the arbitrator is the same as that in the pending action, such does not appear to be the case here. (See, ***Galleon Syndicate Corp. v. Pan Atlantic Group, Inc.,*** 223 A.D.2d 510, 637 N.Y.S.2d 104 [1st Dept., 1996]). For the same reason, it does not appear reasonable to expect that the Defendants would have taken contrary positions to those taken in the instant proceeding, thus making the arbitration documents discoverable. (***Kamyr Inc. v. Combustion Eng'g., Inc.***, 161 A.D.2d 233, 554 N.Y.S.2d 619 [1st Dept., 1990]).

The material produced at the arbitration proceeding involving the applicability of an indemnity provision depending upon the language of various complaints does not appear to be relevant or likely to lead to relevant information with respect to the issues in the present case. The Defendants' motion with respect to Demand 3 is granted.

Request 4

The Plaintiff's Request 4 states as follows:

> For each lawsuit or claim in which you were a defendant and the matter related to injury to the colon, colonic strictures and/or fibrosis of the colon, that was allegedly caused by the ingestion of Ultrase MT and/or any other pancreatic enzyme drug, produce as follows:
>
> (a) the identity of the parties and their counsel;
>
> (b) the identity of the Court in which the lawsuit is/was pending, and the Court case number;
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> (c) the complaint or claim filed or received by you, and
>
> (d) documents relating to the resolution of the case, if it is no longer pending.

The Plaintiff is entitled to information with respect to other litigation that involves similar injuries as alleged in the complaint, and that were allegedly caused by the ingestion of the same drug or other pancreatic enzyme drugs, if any, manufactured or distributed by the Defendant. (See, ***Galioto v. Sears, Roebuck Company***, 262 A.D.2d 1035, 691 N.Y.S.2d 838, 840 [4th Dept., 1999]). While the Plaintiffs in this case have specified the injury as fibrosing colonopathy, others may have been less sophisticated in their pleadings, but

sustained the same injury. Thus, prior actions alleging "injury to the colon", "colonic strictures" and/or "fibrosis of the colon" are adequately specific to avoid the production of information about matters with injuries significantly distinct from those of the Plaintiff.

For this reason the Defendants are directed to provide the information requested in sub-paragraphs (a), (b), (c) of Demand 4. With respect to subparagraph (d) it does not appear that information regarding settlements or dismissals is either material and necessary or likely to lead to admissible evidence. The Defendants are not required to produce documentation as requested in subdivision (d).

Request 22

The Plaintiff seeks "(a)ll documents relating to government regulations concerning Ultrase MT." This demand is overly broad and calls upon the Defendants to effectively research Food and Drug Administration and other federal regulations, a task, which can be done by the Plaintiff as well. The material is independently available from sources other than the Defendants.

Post-Accident Discovery

The Defendants seek to preclude the Plaintiff from discovery subsequent to April 1994, the time when Ultrase MT 24 and Ultrase MT 30 were removed from the market. Such a restriction would be particularly inappropriate under the circumstances of this case, in which it appears that the chemical composition of the medication continues to be produced and distributed up to the present time, but only the dosage has been restricted. While perhaps not admissible, information gleaned by the Defendants in conjunction with dosage modifications may lead to admissible evidence of considerations that may have been available or appropriate before the placement of MT 24 and MT 30 on the market. (***Lamey v. Foley, et al.***, 151 A.D.2d 998, 542 N.Y.S.2d 437 [4th Dept., 1989]).

To the extent that there are documents that relate to studies and determinations of dosages for the production and dissemination of high-lipase pancreatic enzymes subsequent to April 14, 1994, they are considered to be material and necessary, and they may result in the discovery of admissible evidence. They are therefore discoverable.

Confidential and Proprietary Information

While the language of a number of the objections to Interrogatories is couched in terms of protection of proprietary information, it does not appear that the Plaintiff is concerned about the chemical formula, which goes into the manufacture of Ultrase, but,

rather, the consideration given to dosage amounts and the potential for damage as a result of an excess amount in a single capsule. Thus it does not appear that there is a real issue as to proprietary information. (***Mann v. Cooper Tire Co.***, 33 A.D.3d 24, 33, 816 N.Y.S.2d 45, 53 [1st Dept., 2006]). Even if there were such an issue, the Defendants have the obligation to establish that material sought by the Plaintiff is, in fact, secret. At that point, it would be for the Court to determine, whether, even if the information is secret, if it is indispensable to the Plaintiff's proof. (***Id.***)

Matters Subject to Attorney-Client Privilege

Documents that qualify as products of the attorney-client privilege, joint defense, or attorney work product, are absolutely privileged. As the Defendants suggest, they are to prepare a privilege log, identifying specifically those documents that they contend are subject to the absolute privilege.

Deposition Issues

The Wyeth Defendants seek to require the Plaintiff to "set forth more specifically the topics to be addressed at the depositions; and preventing Eurand, S.p.A., and Eurand Real Estate, S.r.l. from having to produce a witness thousands of miles from their corporate headquarters". Counsel correctly states that Civil Practice Law and Rules § 3107 does not require what is requested and, in fact, states that "(t)he notice need not enumerate the matters upon which the person is to be examined". Despite their protestations to the contrary, these moving Defendants surely know which among them are manufacturers and which are distributors.

The corporate Defendants may designate, in the first instance, whomever they choose from among its officers, directors or employees, to appear for pre-trial depositions. (***Rosner v. Maimonides Hosp.***, 89 A.D.2d 847, 848, 453 N.Y.S.2d 30, 36 (2d Dept., 1982). The Wyeth Defendants seek to have the deposition of Eurand, S.p.A., and Eurand Real Estate, S.r.l. in Italy, the country in which their corporate headquarters are located. Courts have generally been pragmatic on this issue, balancing cost, relevancy of the witness, and the respective resources of the parties. While there are decisions that require the Plaintiffs to travel to a foreign country to conduct oral depositions, ***Marsh v. Central Datsun, Ltd.***, 168 A.D.2d 724, 565 N.Y.S.2d 735 (3d Dept., 1990), the better rule would require the Defendant to appear within the State of New York in the absence of a showing of substantial hardship. (***Swiss Bank Corp. v. Geecee Exportaciones, Ltda., et al.***, 260 A.D.2d 254, 688 N.Y.S.2d 539 [1st Dept., 1999]). While travel to New York may be inconvenient for these Defendants,

they have not made a showing of substantial hardship. The depositions are to be scheduled in New York, in accordance with Civil Practice Law and Rules § 3110. Counsel are to cooperate in an effort to coordinate the depositions with other trips by the foreign Defendants' representative to New York, if at all possible.

The foregoing constitutes the decision and order of the Court.

Dated: June 18, 2008
Mineola, N.Y.

Karen V. Murphy
J. S. C.