IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, *et al.* *ex rel.* YOASH GOHIL, Plaintiff/Relator, v. SANOFI U.S. SERVICES, INC., *et al.*, Defendants.	)	Civil Action No: 02-2964

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL

Defendants Sanofi U.S. Services Inc., Aventis, Inc. and Aventisub LLC, (collectively "Aventis") submit this Response in Opposition to Plaintiff/Relator Yoash Gohil's Motion to Compel Discovery (ECF 224) ("Motion to Compel"). Aventis respectfully requests that the Court deny this Motion because Relator's discovery request exceeds the bounds of permissible discovery under Fed. R. Civ. P. 26(b)(1). Relator's last-ditch efforts seek discovery beyond the claims and defenses pled in this case and any additional discovery relating to products other than Taxotere is disproportionate to the needs of this case.

I. RELATOR'S REQUEST FOR OTHER PRODUCT DISCOVERY IS DISPROPORTIONATE TO THE CASE.

More than eighteen months after service of Relator's initial requests for production and only one month prior to the close of document discovery, Relator now seeks to expand discovery to include products never mentioned in the Third Amended Complaint (TAC). Indeed, more than two years ago, Relator assured the Court at the motion to dismiss stage of this case that his claims only pertain to Taxotere. Transcript of Oral Argument at 44-45, *U.S. ex rel. Yoash Gohil v. Sanofi-Aventis, U.S. Inc.*, (2014) No. 02-cv-2964). Now, he contradicts these prior representations and demands discovery

regarding two unrelated products, Nasacort and Lovenox, baselessly asserting that these two drugs—Nasacort (an allergy medication) and Lovenox (an anticoagulant)—are somehow pertinent to proving Aventis had an "unpublished corporate policy and training program" to promote Taxotere (a chemotherapeutic agent) off-label. ECF 224, ¶3. Relator's allegations simply have no merit.

Federal Rule of Civil Procedure 26(b)(1) defines the scope of discovery as proportional and relevant to the claims and defenses of the case. Among the criteria for determining proportionality is the "importance of discovery in resolving the issues" and "whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Courts considering the proportionality analysis of FRCP 26(b)(1) have limited discovery to the **products at issue in the underlying litigation**. *In re Takata Prods. Liab. Litig.*, MDL No. 5-2599, 2016 WL 1460143 (S.D. Fla. Mar. 1, 2016) (permitting redaction of certain categories of irrelevant information, including "other makes and models"); *In re Zofran (Ondansetron) Prods. Liab. Litig.,* MDL 2657, (Dkt. No. 597) (D. Mass. Feb. 21, 2017) (denying plaintiff's motion to amend prior order permitting redactions of information about products and compounds not the subject of the litigation).[1] Here, Relator's broad-based other product discovery fails to meet the Rule's proportionality criteria and should be denied.

To respond to Relator's discovery requests related to Taxotere alone, Aventis has already collected over two million documents from thirty various custodians, expended more than twelve thousand hours in review time, responded to more than 350 individual discovery requests, and made

[1] Relator's reliance on the *In re Pradaxa* case (ECF 224, ¶6) is misplaced as *In re Pradaxa* was decided under the outdated "reasonably calculated to lead to discovery of admissible evidence" test. Since the 2015 Amendment to Fed. R. Civ. P. 26(b)(1), courts have routinely rejected such outdated references and have gone as far as sanctioning lawyers for references to the old rule. *See Fulton v. Livingston Fin. LLC,* 2016 WL 3976558 (sanctioning an attorney for citing to the old rule, finding the attorney's conduct as "inexcusable" and "unpersuasive").

twelve productions, totaling nearly 1.7 million pages with additional productions being finalized.[2] Specifically in response to this request, Aventis has been reasonable, cooperated in good-faith, and offered to review documents from all thirty custodians specifically requested by Relator and make document productions of all materials responsive to Nasacort and/or Lovenox and remove any previously-contained redactions. Relator unilaterally rejected Aventis' offer and instead insists upon Aventis conducting a wholesale search of additional archives and custodial files to try to find the evidentiary straw to break the proverbial camel's back. With a written discovery deadline looming in just 31 days, Relator's non-Taxotere discovery request would necessitate a lengthy many-months long extension in the document discovery period, and impose an undue monetary burden on Aventis, which has already spent countless man hours and hundreds of thousands of dollars in responding to Relator's discovery requests. This demand is not proportional to meet the discovery needs of this case and as the parties near the document discovery finish line, Relator's Hail Mary effort to expand discovery to include two drugs outside the scope of this *qui tam* litigation undoubtedly violates the Rules.

II. RELATOR'S *QUI TAM* CLAIMS ARE TAXOTERE-SPECIFIC, THUS MAKING OTHER PRODUCT DISCOVERY IRRELEVANT.

To prevail in this False Claims Act ("FCA") litigation, Relator must prove the supposed fraudulent Taxotere-specific marketing scheme alleged in the TAC. Specifically, the *qui tam* statute limits a relator's claims to those where relator is an "original source" with knowledge of his FCA allegations that is "independent of and materially adds to the publicly disclosed allegations or

[2] Pursuant to the Court's October 17, 2016 Order, Relator selected thirty custodians from which to review responsive documents and records. Moreover, Aventis voluntarily allowed Relator to select alternative custodians when his initially-selected custodians yielded no files. This Court has explicitly held that any additional expansion of this Order can only be allowed upon a showing of good cause. *See* ECF 223.

transactions."[3] In addition, the FCA first-to-file requirement is designed to eliminate parasitic *qui tam* claims and allegations, discouraging "opportunistic plaintiffs who have no significant information to contribute of their own."[4] *U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Labs, Inc.*, 149 F.3d 227, 234 (3d Cir. 1998). Consistent with the FCA's original source and first-to-file requirements, the FCA claims and allegations contained in Relator's TAC are limited to Taxotere and Taxotere alone. Respectfully, the Court should not accept Relator's eleventh hour invitation to dramatically expand the scope of permissible discovery to include two wholly unrelated products, from two entirely different therapeutic classes of drugs, that were promoted by different personnel, in different departments, using completely different promotional materials. This is a quintessential fishing expedition, and one that this Court rejected at the pleading stage when it required Relator to plead the specific indications of Taxotere underlying the allegedly false claims.[5] Even under the most generous interpretation, the other product discovery Relator seeks to compel cannot have any relevance to his Taxotere-specific *qui tam* claims. Moreover, contrary to Relator's assertions, the requested other-product discovery has no relevance to Aventis' defenses because those defenses are Taxotere-specific, as those were the only allegations contained in the TAC.

In an effort to break-open the permissible scope of discovery, Relator erroneously relies on the Court's September 29, 2016 "Decembrino Order" to justify the expansive other product discovery that he now seeks. The Court, however, carefully tailored the scope of Aventis' in-camera submission and supplemental document production there to enable the Court to more fully assess Relator's generalized crime-fraud allegations while not imposing an undue discovery burden on Aventis. The Court unambiguously reasoned that because of the "narrow scope of this topic," the Decembrino

[3] 31 U.S.C. § 3730(e)(4)(B)(2).
[4] 31 U.S.C. 3730(b)(5).
[5] "[R]equiring Mr. Gohil to plead the unaccepted medical indications comports with Rule 9(b)'s objective of preventing plaintiffs from filing baseless claims then attempting to discover unknown wrongs." ECF 125, p. 26.

discovery "would not be so burdensome to prevent its production" and opined that a small production would more than likely satisfy those requests. ECF 212, n.4. Any other interpretation of the Decembrino Order contradicts this Court's prior rulings that limited the case to Taxotere claims alone.[6] The narrow discovery produced in response to the Decembrino Order is far from the very broad discovery Relator now seeks here which includes "all documents and data showing management's knowledge of the off-label marketing of Nasacort [and Lovenox]." (ECF 224, ¶4.) As such, Relator's request should be denied.

III. CONCLUSION

For the foregoing reasons, Aventis respectfully requests that the Court deny Relator's Motion to Compel.

Respectfully submitted,

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[6] ECF 125, pp. 25-26 (requiring Mr. Gohil to plead specific unaccepted Taxotere indications "in order to properly limit the scope of this complaint").

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of April, 2017, I served on all parties of record Defendants' Response in Opposition to Plaintiff's Motion to Compel Discovery.

/s/Robert J. McCully
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