

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

UNITED STATES OF AMERICA,

Plaintiff,

v.

BAYER CORPORATION,

Defendant.

Civil Action No. 07-01 (JLL) (JAD)

RIKOS,

Plaintiff,

v.

BAYER HEALTHCARE, LLC,

Defendant.

Civil Action No. 11-03017 (JLL) (JAD)

ORDER

JOSEPH A. DICKSON, U.S.M.J.

This matter comes before the Court upon the United States' request to compel Bayer to further respond to Interrogatory No. 4, (ECF No. 79),¹ and the United States' request for a protective order barring Bayer from conducting a Rule 30(b)(6) deposition. (ECF No. 96). The

¹ Unless otherwise noted, the citations in this Order refer to Civil Action No. 2:07-cv-00001 (JLL) (JAD).

Court considered the parties' submissions, (ECF Nos. 79, 86, 87, 90, 91, 92, 96, 98, and 99), held oral arguments on the record on March 12, 2015, where all counsel appeared by telephone. After having considered the parties' submissions and their arguments on the record, and for good cause shown; and

WHEREAS the United States submitted a letter to this Court on February 13, 2015, claiming that Bayer's response to Interrogatory No. 4 is inadequate. (ECF No. 79, at 2). "The United States' Interrogatory No. 4 seeks to discover what, if any, evidence Bayer relied upon to substantiate its claims regarding Phillips' Colon Health ("PCH") when those claims were made to consumers, and when it first became aware of such evidence." (Id. at 1). More specifically, Interrogatory No. 4 provides,

For any study, analysis, or other material that Bayer asserts substantiates claims that Bayer has made about the benefits, performance, efficacy, safety or side effects, of PCH or any of its ingredients relating to constipation, diarrhea, or gas and bloating, provide the date upon which Bayer first became aware of the study, analysis or material and identify the specific claim(s) that Bayer contends the study, analysis, or material substantiates.

(ECF No. 79, Attachment A, at 11). Bayer made multiple objections to this Interrogatory, first, for being "vague, overly broad, and unduly burdensome." (Id.). Bayer also objects stating that "it seeks substantiation for claims beyond those at issue in this case." (Id.). Next, Bayer objects to Interrogatory No. 4 "to the extent that this request implies that studies should be evaluated in isolation." (Id.). Bayer further objects "insofar as it requests that Bayer provide the date when it first became aware of a particular study, analysis, or material." (Id. at 12). Finally, Bayer objects to Interrogatory No. 4 "as irrelevant and unlikely to lead to admissible evidence." (Id.); and

WHEREAS the United States categorized Bayer's objections as "unsupportable," (ECF No. 79, at 2), and requested that Bayer be compelled to respond to Interrogatory No. 4. (Id. at 3); and

WHEREAS Bayer opposed the government's request on February 18, 2015. (ECF No. 86). Bayer categorizes the United States' request as needing to show precisely when Bayer's employees reviewed studies that are available in the public domain. (Id. at 2). Bayer argues that although it "has already explained to the government that Bayer regularly reviewed such public studies as they became available, the government is now demanding more, insisting that Bayer needs to report the specific dates that each of its employees reviewed each of these public studies." (Id.); and

WHEREAS Bayer contends that this discovery demand is not only "extraordinarily burdensome," but also "irrelevant to the only issue in this case – namely whether the government's novel multi-part test is valid and enforceable." (Id.); and

WHEREAS the United States responded on February 19, 2015, arguing, among other things, that Bayer fails to recognize another key issue in the case, "[w]hether Bayer had substantiation for its claims when they were made, as required by the Consent Decree." (ECF No. 87, at 1); and

WHEREAS Bayer responded on February 23, 2015 "to correct a misrepresentation made by the government." (ECF No. 90). Specifically, Bayer takes issue with the United States' statement that, "[t]hrough two rounds of briefing, Bayer has yet to provide evidence that it possessed and relied upon substantiation for its Phillips' Colon Health ("PCH") claims when these claims were being made to the public." (ECF No. 87, at 1). Bayer contends that "[t]his is false. Bayer has produced significant evidence that it possessed and relied upon substantiation when it launched PCH and thereafter." (ECF No. 90, at 1); and

WHEREAS furthermore, Bayer maintains that it has relied upon "the totality of scientific evidence in the public domain to substantiate its claims for PCH," and it still does. (Id. at 2).

Bayer also states that not only is it unaware of the precise date and time its employees reviewed each study, but that such information is also irrelevant. (*Id.*) Bayer, again, requests that the Court deny the United States' discovery demand. (*Id.*); and

WHEREAS the United States responded on February 23, 2015. (ECF No. 91). The government continues to maintain that "Bayer has not, during its two rounds of briefing, provided the Court with evidence that it was in possession of and relied upon competent and reliable scientific information when making the specific claims at issue." (*Id.* at 1). The government further contends that the document Bayer references in its submissions was in fact offered to the Court by the United States, not Bayer, "as evidence that Bayer did not possess substantiation for the specific claims about PCH at issue."² (*Id.*); and

WHEREAS Bayer submitted its reply on the same day arguing that the "government's most recent letter confirms that the government's discovery objection is meritless." (ECF No. 92, at 2). Bayer continues to contend that the United States' statement that Bayer failed "to provide evidence" is false. Specifically, Bayer posits that "the government seeks to defend its statement by drawing a distinction between claims of 'gut . . . health' and claims regarding occasional constipation, diarrhea, gas, and bloating. The government apparently agrees that Bayer has substantiation for its claims regarding gut health, but still contends that Bayer lacks substantiation for its claims regarding the *symptoms* pertaining to gut health." (*Id.*) (emphasis in original) (internal citation omitted); and

² The Court notes that the government's arguments appear to support the merits of its claim and do not, in fact, support a need to know the precise date(s) that Bayer "was aware" of substantiating materials. In any event, Bayer sets forth that it was aware of such materials "at or around the time of publication." (ECF No. 86, at 4).

WHEREAS after having considered the parties' submissions and their oral argument, the Court finds that Bayer has sufficiently answered Interrogatory No. 4. The United States' need to know the specific date(s) that each Bayer employee reviewed public information, which allegedly substantiates its claims, is outweighed by the burdensomeness that will result in the obtaining of such information; and

WHEREAS on March 3, 2015, the United States submitted a letter to the Court seeking a protective Order pursuant to Federal Rule of Civil Procedure 26, barring Bayer from conducting a Rule 30(b)(6) deposition. (ECF No. 96). The government argues that the deposition is "improper as it seeks testimony that would invade attorney thought processes, strategy, and other work product." (Id. at 1). The United States contends that "[i]n the most favorable reading to Bayer, the notice seeks testimony duplicating information already in Bayer's possession or covered by Bayer's other discovery requests." (ECF No. 96-1, at 1). The government alleges that the testimony would reveal protected work product and, therefore, should be quashed "as it does not address any legitimate discovery purpose." (Id.). The United States goes on to list the specifications sought by Bayer, and argues that each is either irrelevant, or already in Bayer's possession. (Id. at 2-4); and

WHEREAS Bayer responded on March 4, 2015, arguing that the Court should deny the government's request for a protective order, as they should not be allowed to "have it both ways." (ECF No. 98). Bayer alleges that in seeking contempt, "the government has voluntarily introduced its correspondence with Bayer and third parties, expressly relied on such correspondence, and left open the possibility that a government witness will testify at trial about these documents and others cited by the government." (Id. at 1). Bayer also states, "the government introduced . . . a selection of its own investigatory communications . . . [and] also produced and relied upon a cherry-picked

subset of its communications and documents from third parties.” (Id. at 2) (internal citations omitted); and

WHEREAS Bayer also argues that because “the government has inserted new factual issues into this case, re-opened old issues, and informed Bayer it may present a government witness at trial to testify about these issues, Bayer has a right to a 30(b)(6) deposition.” (Id. at 3). Bayer argues that if the deposition does in fact serve no purpose, and if it is “burdensome to prepare and produce such a witness”, then the government should be amenable to not introducing testimony at trial from the witness. (Id. at 4). Next, Bayer alleges that it is not seeking work product, as argued by the government. (Id.). Bayer argues that the United States is not prohibited from raising privilege objections during the deposition, and that the potential of such objections should not bar the deposition in its entirety. (Id.). Finally, Bayer emphasizes that it is “simply trying to take discovery of facts known to plaintiff in this litigation, a right that is provided under the Federal Rules.” (Id.); and

WHEREAS the government responded on March 5, 2015, rebutting Bayer’s position and maintaining that the discovery Bayer seeks is counsel’s work product. (ECF No. 99, at 1-2); and

WHEREAS as represented to the Court during held oral arguments on the record March 12, 2015, Bayer seeks to take the deposition of Mike Davis; and

WHEREAS the Court has carefully considered all the issues raised in the parties’ submissions and the arguments made on the record;

IT IS on this 13th day of March, 2015,

ORDERED that the United States’ request for a protective order, (ECF No. 96), is **GRANTED in part and DENIED in part**; and it is further

ORDERED that the deposition of Mr. Davis must be taken before March 20, 2015 and shall be limited to five (5) hours; and it is further

ORDERED that Bayer may inquire into Mr. Davis' conversations with third parties, specifically regarding the issues raised on the record during the March 12, 2015 conference; and it is further

ORDERED that during the deposition, Bayer may not inquire into why the United States selected certain documents for review by their experts; and it is further

ORDERED that the United States' request to compel Bayer to further respond to Interrogatory No. 4, (ECF No. 79), is **DENIED**. The Court finds that Bayer has sufficiently responded to the government's Interrogatory; and it is further

ORDERED that, as discussed during the conference held on March 12, 2015, the date by which Bayer's reply brief in the Order to Show Cause briefing schedule set as March 17, 2015, (ECF No. 53), is now March 30, 2015.

SO ORDERED



JOSEPH A. DICKSON, U.S.M.J.

cc: Hon. Jose L. Linares, U.S.D.J.