

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: BAYCOL PRODUCTS LITIGATION

MDL No. 1431
(MJD/JGL)

This Document Relates to:

Pretrial Order No. 77

In re Application of Kim Coleman and
all other Canadian Plaintiffs to Intervene

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Fred T. Magaziner, Dechert Price & Rhoads, for and on behalf of SmithKline Beecham Corporation d/b/a GlaxoSmithKline.

Before the Court is the motion of Canadian Plaintiffs to intervene for the limited purpose of participating in and obtaining discovery that has been produced in this case pursuant to 28 U.S.C. § 1782(a). The Canadian Plaintiffs also seek modification to the Protective Order, PTO No. 24, in order to obtain access to discovery materials for use in the action in Superior Court, Ontario, Canada and to participate in the Verilaw program. Defendants oppose the Canadian Plaintiffs' requests.

Background

Applicant Kim Coleman is the representative of the estate of Pearl Imwood. Ms. Imwood died on July 25, 2001 after taking Baycol. Her daughter, Ms. Coleman, filed an

action in Ontario under the Class Proceedings Act, seeking to represent Ms. Imwood and all other similarly situated Canadian residents, except residents of Quebec, that have been injured by Baycol. In the claim, Ms. Coleman also seeks medical monitoring, screening and treatment costs. Similar to the cases filed in the United States, Ms. Coleman seeks recovery from Bayer Corporation, Bayer AG and GlaxoSmithKline¹ for their wrongful conduct in the manufacture and sale of Baycol, and that these Defendants breached their duties to Ms. Imwood and those similarly situated by failing to ensure that Baycol was safe. The Coleman action has not yet been certified as a class action by the Ontario court.

In this multidistrict action, this Court entered protective orders, Pretrial Order Nos. 5 and 24, pursuant to the stipulation of the parties. The protective orders cover all products of discovery and the parties agreed that discovery material disclosed in this action would be used only for this action. PTO No. 24, ¶ 3(a). The protective orders further provide that prior to access to confidential discovery material, such person must execute a copy of the “Endorsement of Stipulation and Protective Order” attached to such order as Exhibit A. Id., ¶ 3(b).

The Canadian Plaintiffs seek access to all discovery produced in this litigation and the right to participate in discovery in this action. Granting this request would require modification of the protective order, however. Thus, permissive intervention is necessary for the limited purpose of modifying the protective order. The Canadian Plaintiffs have

¹The Canadian Plaintiffs have also included claims against Fournier Pharma as co-marketers with GlaxoSmithKline.

also filed an application pursuant to 28 U.S.C. § 1782, for the purpose of participating in the discovery taking place in the United States.

Motion for Intervention

Rule 24(b) of the Federal Rules of Civil Procedure provides:

[u]pon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Whether to grant or deny a motion for permissive intervention is wholly discretionary, and is reviewed under an abuse of discretion standard. South Dakota v. United States; Dept. of Interior, 317 F.3d 783, 787 (8th Cir. 2003). Although not yet addressed in the Eighth Circuit, most other circuits have held that permissive intervention is the appropriate procedural course for third party challenges to confidentiality orders. Equal Employment Opportunity Commission v. National Children's Center, Inc., 146 F.3d 1042, 1046 (D.C.Cir. 1998)(listing cases).

Applying the Rule 24(b)(2) factors to the current motion, the Court notes that the Coleman action clearly has common questions of law and fact with this MDL proceeding. Both actions involve individuals that have allegedly been injured as a result of ingesting Baycol, and assert claims of product liability. The motion is also timely, as the MDL proceeding is ongoing.

The remaining and principle consideration for the Court is whether the requested intervention of the Canadian Plaintiffs will cause undue delay or prejudice to the Defendants. Id.

In conjunction with the motion to intervene, the Canadian Plaintiffs have filed an application for discovery pursuant to 28 U.S.C. § 1782. Defendants oppose the Canadian Plaintiffs' requests for two reasons. First, Defendants argue that the objectives sought are not permissible pursuant to 28 U.S.C. § 1782. Therefore, intervention would be improper and futile. Second, Defendants argue that access to discovery produced in this case would not assist the Canadian Plaintiffs in their bid for class certification, yet it would impose significant and unnecessary burdens and risks on Defendants. The Court will first address whether the Canadian Plaintiffs are entitled to the discovery and documents sought under 28 U.S.C. § 1782.

Title 28 U.S.C. § 1782 provides:

a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

A district court has broad discretion in reviewing a request under this provision.

In the matter of the Application of Euromepa v. Esmerian, Inc., 51 F.3d 1095, 1097 (2nd

Cir. 1995). In exercising its discretion, the Court should evaluate the discovery request in light of § 1782 goals, which is to provide “efficient means of assistance to participants in international litigation in our federal courts and encourag[e] foreign countries by example to provide similar means of assistance to our courts. . . .” Id. (citing In re Maiev Hungarian Airlines, 964 F.2d 97, 100 (2nd Cir.) cert. denied 506 U.S. 861 (1992)).

Whether or not to grant the requested discovery should not be influenced by the fact that the foreign jurisdiction does not have reciprocal discovery procedures, nor should the court impose an exhaustion requirement through the foreign tribunal. Id. at 1098. The discovery should not be granted, however, if to do so would “trench[] upon the clearly established procedures of a foreign tribunal.” John Deere Limited v. Sperry Corporation, 754 F.2d 132, 135 (3rd Cir. 1985).

The scope of the inquiry into whether granting the requested discovery will offend a foreign tribunal is somewhat varied among the circuits. In Euromepa, the Second Circuit held that “an extensive examination of foreign law regarding the existence and extent of discovery in a foreign country” is not desirable. Id. at 1099. It acknowledged, however, that in appropriate cases “a determination of discoverability under the laws of the foreign jurisdiction is a useful tool.” Id. at 1098. If such an inquiry is made, however, the court should “consider only authoritative proof that a foreign tribunal would reject evidence obtained through the aid of § 1782.” Id. at 1100.

Similarly, the standard adopted by the Third Circuit provides:

Consistent with the statutes modest prima facie elements and Congress’s goal of providing equitable and efficacious discovery procedures, district courts should treat relevant discovery sought pursuant to § 1782 as discoverable unless the

party opposing the application can demonstrate facts sufficient to justify the denial of the application. In determining whether the foreign tribunal would take offense, the district court would be free, in the exercise of its discretion, to consider any materials, typically statutes or case law from the foreign jurisdiction, that may be presented by the parties.

In re Application of Bayer AG, 146 F.3d 188, 197 (3rd Cir. 1998). See also, Advanced Micro Devices, Inc. v. Intel Corporation, 292 F.3d 664 (9th Cir. 2002)(finding nothing in the language or legislative history of Section 1782 to require a threshold showing on the party seeking discovery that what is sought is discoverable.)

By contrast, other jurisdictions have held that in order to avoid offending the foreign tribunal, the applicant must make a threshold showing that the material would be discoverable under the foreign tribunal. In re Application of Asta Medica, S.A., 981 F.2d 1, 7 (1st Cir. 1992); In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151, 1154 (11th Cir. 1988) cert. denied, 488 U.S. 1005 (1989).

The Eighth Circuit has yet to address the proper scope of the district court's inquiry into whether the requested discovery would offend the foreign tribunal. However, this Court finds that the decisions of the Second, Third and Ninth Circuits are more persuasive. Those decisions recognize that allowance of liberal discovery is consistent with the goals of § 1782. Advanced Micro Devices, 292 F.3d at 669. In addition, these cases recognize that had Congress intended to impose a requirement on district courts to analyze foreign law and make a discoverability determination, it could have done so. Id. See also, Euromepa, 51 F.3d at 1099 (§ 1782 intended to avoid a battle by affidavit among international legal analysts). Thus this Court will not require

a threshold showing prior to granting the discovery request, but will consider any clear or authoritative evidence that the allowance of discovery will offend the foreign tribunal in making its determination.

In this case, Defendants argue that the Canadian Plaintiffs' request should be denied because the applicable procedural rules generally do not provide for discovery prior to the close of pleadings. Because the Coleman action at issue here has not yet been certified, the Canadian Plaintiffs right to discovery is limited pursuant to Ontario R. Civ. P. 30.03. In a letter previously submitted to the Court, counsel for the Canadian Plaintiffs acknowledged that "Canadian law does not generally allow discovery of defendants prior to class certification." Defendants' Ex. A (Letter from Rochon to Cabraser of May 27, 2002, at 2). As there does not appear to be a dispute on this issue, the Court finds that discovery is generally prohibited by the applicable procedural rules prior to class certification.

The Canadian Plaintiffs argue that their request should nonetheless be granted, because to do so would not offend the Canadian tribunal. In support, the Canadian Plaintiffs cite to Vitapharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd. [2001] O.J. No. 237 (Ont.SCJ)(affirmed on appeal, [2002] O.J. No. 1400 (Ont.Div.Ct.)).² The Plaintiffs in Vitapharm had moved to intervene in a related case pending in the District of Columbia for the purpose of seeking modification of a protective order. Such amendment was necessary in order to obtain access confidential documents. In the

² The Vitapharm decision was rendered by Justice Cummings, who, Plaintiffs represent, is presiding over the applicant's Baycol case in Ontario.

Canadian proceedings, the defendants moved to enjoin the Plaintiffs from seeking access to discovery in the U.S. action. The court denied the injunction. In doing so, the court first noted that the Plaintiffs were seeking access to discovery already produced in the U.S. litigation, as opposed to a request to conduct discovery in the U.S. The court found that were it not for the protective order, the defendants would not be in a legal position to object. Vitapharm ¶ 31. Because a protective order was in place in the U.S. litigation, however, the court proceeded to discuss § 1782. Recognizing that U.S. courts have found that discovery under § 1782 should not be granted if such discovery will offend the foreign tribunal, the court stated:

¶ 45 A Canadian court generally will be reluctant to prevent someone from gathering evidence extraterritorially, as its ultimate admissibility in a Canadian proceeding will be determined by the Canadian courts. (citations omitted).

The court further noted that the Plaintiffs' motion to intervene served the purpose of saving considerable time and money. Id. ¶ 48. The court further found that the Plaintiffs' motion seeking access to the U.S. discovery is not oppressive or unfair to the defendants. Id. ¶ 49. "To the contrary. Such access is consistent with the three policy objectives underlying the CPA - facilitating access to justice, judicial efficiency and behaviour modification. In particular, there will be significant savings in litigation costs through such access." Id. The court then held that Plaintiffs' access to discovery evidence "does not violate the rules and procedure of this court." Id. ¶ 50. The defendants appealed this decision.

In the meantime, the Plaintiffs' motion to intervene was heard in the action pending in the District of Columbia. In re Vitamins Antitrust Litigation, Civ. No. 99-197,

MDL No. 1285 (D.D.C. 2001). The court granted the motion for permissive intervention, but deferred allowing amendment to the protective order until the Canadian appellate process was complete.

The Canadian appellate court dismissed the appeal based on the defendants' concession that if the appellate court were to adopt the lower court's characterization of Plaintiffs' motion as only seeking access to discovery evidence, the appeal should be dismissed. One justice, however, provided separate reasons to dismiss the appeal. With respect to access to discovery in the passive sense, Justice Farley noted "[t]here is no compulsory disclosure thereby in a sense that someone is being coerced to provide material to the Canadian Plaintiffs which is not already required solely for the U.S. Litigation. Further there will be no intrusion into the privacy of these persons since they will not be subjected to any further questioning or document production than they would have been already been required to do even if there were no Canadian proceedings." ¶ 29. If discovery was sought in the active sense, however, Justice Farley would have come to the opposite conclusion as such a request would clearly be an end run around the applicable Canadian procedural rules. ¶ 30.

This Court similarly finds that allowing the Canadian Plaintiffs access to discovery materials already produced will not offend the Canadian tribunal. Nor will it prejudice Defendants by further intruding into their privacy or subjecting them to further questioning or document production.

On the other hand, it is clear that allowing the Canadian Plaintiffs the right to conduct discovery in the U.S., prior to class certification, is contrary to the applicable

procedural rules of Ontario. Thus, to the extent that the application of the Canadian Plaintiffs seek to conduct discovery in the U.S. pursuant to § 1782, the application must be denied. The Court will thus grant the Canadian Plaintiffs' motion to intervene only to the extent that they seek access to documents already produced.

Motion to Modify Protective Order

This Court also has broad discretion in deciding whether to amend the protective orders. Grove Fresh Distributors Inc. v. Everfresh Juice Company, 24 F.3d 893, 896 (7th Cir. 1994). Protective orders may be amended to allow access to non-parties for use in other litigation. Id.; Meyer Goldberg, Inc. of Lorain v. Fisher Foods, Inc., 823 F.2d 159 (6th Cir. 1987). In such cases, the court should weigh the policy considerations of efficient resolution of litigation through the avoidance of duplicative discovery against any prejudice that may result to the substantial rights of the party opposing amendment. Grove Fresh Dist., 24 F.3d at 896. "Even if prejudice is demonstrated, the court has broad discretion in determining whether the injury outweighs the benefits of modification." Id. (citation omitted). Where the party seeking modification is a "bona fide" litigant, and shows that the two actions are virtually identical, it follows that the discovery produced in the first action is relevant to the second action. Id. See also, EEOC v. National Children's Center, 146 F.3d 107-108 (noting with approval district court's granting permissive intervention and access to confidential documents to three non-parties presenting similar claims against defendant).

In this case, the Canadian Plaintiffs have presented similar claims to those at issue in the United States. Under these circumstances, and without delving into Canadian law,

it follows that the evidence sought by the Canadian Plaintiffs would be relevant to their claims. Further, the Court finds that disclosure of discovery materials produced that are not marked confidential would avoid duplicative discovery while causing no undue delay or prejudice to Defendants. Accordingly, PTO No. 24, ¶ 3(a) is hereby amended to allow the Canadian Plaintiffs access to discovery material produced that are not marked confidential.

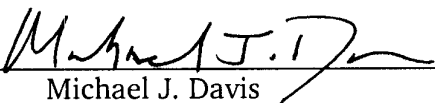
Different issues arise, however, with respect to discovery material that has been marked confidential. As the Court has ordered further briefing concerning discovery marked confidential, this aspect of the motion will be deferred.

Access to Verilaw

The Canadian Plaintiffs also seek permission to participate in the Verilaw online e-mail public filing program established for use in this MDL so that she may be aware of all public filings in this proceeding. The Court notes that the District Court has set up a web site for this proceeding, and through this site, any person may view the docket for this case. By viewing the docket, one may be kept abreast of the documents filed in this proceeding. Accordingly, the request to participate in Verilaw will be denied.

IT IS HEREBY ORDERED that the Canadian Plaintiffs' motion to Intervene pursuant to Fed. R. Civ. P. 24(b)(2) is GRANTED in part, DENIED in part and DEFERRED in part as set forth in this opinion.

Date: *May 6, 2003*



Michael J. Davis
United States District Court