

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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**In re BAYCOL PRODUCTS  
LITIGATION**

MDL No. 1431 (MJD/JGL)

**O R D E R**

This document relates to:

All Cases

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APPEARANCES

Charles Zimmerman, Esq., Robert Hopper, Esq., Ron Meshbesh, Esq., Turner Branch, Esq., Margaret Branch, Esq., Richard Lockridge, Esq., Mark Robinson, Esq., Gale Pearson, Esq. appeared on behalf of Plaintiffs' Steering Committee.

Kristine Janice, Esq., appeared telephonically on behalf of Plaintiffs' Steering Committee.

Peter Sipkins, Esq., appeared on behalf of Defendants Bayer Corporation and Bayer A.G..

Tracy Van Steenburgh, Esq., appeared on behalf of Defendant GlaxoSmithKline.

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JONATHAN LEBEDOFF, Chief United States Magistrate Judge

The above-entitled matter came on for hearing before United States Chief Magistrate Judge Jonathan Lebedoff on March 10, 2003, on the Emergency Motion for Protective Order of Defendants Bayer Corporation and Bayer A.G ("Bayer Defendants"). The case has been referred to the undersigned for resolution of pretrial discovery matters pursuant to 28 U.S.C. § 636, D. Minn. LR 72.1, and Pretrial Order Nos. 52 and 66.

**I. BACKGROUND**

The Bayer Defendants bring the present Motion for Protective Order to preclude discovery which is sought as a result of events taking place during the first U.S. Baycol trial, currently underway in Corpus Christi, Nueces County, Texas. At the beginning of that trial, captioned Haltom v. Bayer Corp, No. 02-60165-00-0-4 (the "Haltom trial"), Bayer Corporation ("Bayer") sent a letter to the 2121 members of the Corpus Christi Chamber of Commerce, referring to the Haltom trial, describing Bayer's impact on the local community, and giving Bayer's position on Baycol, the litigation, and settlement efforts (the "Letter"). The Letter was signed by Meredith B. Fischer, Vice President, Bayer HealthCare North America, Communications & Public Policy. Bayer's in-house Senior Counsel, Gary D. McConnell, Esq., approved the mailing, claiming that he thought it would be sent to a "relatively small number of people."

When the Letter was sent and made public, it immediately became the subject of allegations of jury tampering. The Haltom trial is proceeding and is expected to be concluded within a week to ten days. The Haltom trial court will then determine whether sanctions are appropriate, and the local Texas district attorney is investigating to determine whether other action may be warranted.

In this case, the Plaintiffs' Steering Committee ("PSC") has served subpoenas on Ms. Fischer and Mr. McConnell, seeking both documents and deposition testimony relating to the Letter. The Bayer Defendants seek a protective order, claiming that PSC's discovery demands during the pendency of the Haltom trial constitute an improper attempt to harass, embarrass, and

unduly burden Bayer. The Bayer Defendants move to bar the discovery on the grounds that it would interfere with the Haltom court's proceedings and that it seeks irrelevant, privileged, and/or duplicative discovery. The Bayer Defendants further argue that the subpoenas served on Ms. Fischer and Mr. McConnell are procedurally defective.

In response to the motion, PSC argues that it is not seeking to discover information relating to the allegations of jury tampering or improper conduct in the Haltom trial. Instead, PSC claims that the Letter makes statements about the development of Baycol and Bayer's efforts to ensure its safety and that Ms. Fischer and Mr. McConnell are now identified as witnesses with knowledge of these substantive facts. PSC further insists that it is not seeking to expand discovery into the parties' contacts with the media, although it contends that it will seek prior drafts of the Letter, in order to see what information was excluded from the Letter. PSC argues that the depositions of Ms. Fischer and Mr. McConnell constitute essential fact discovery which should take place before March 22, 2003, when counsel travel to Europe for depositions. PSC claims it is willing to accommodate the schedules of these witnesses so that the depositions will not impede their involvement in the continuing Haltom trial.

## **II. ANALYSIS**

### **A. Substantive Discovery Issues**

Federal Rule of Civil Procedure 26(c) allows a party to move the court for “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R.Civ.P. 26(c). A court has broad discretion in determining whether a protective order is warranted and the appropriate degree of protection. See May Coating Techs., Inc. v. Illinois Tool Works, 157 F.R.D. 55, 57 (D. Minn. 1994) (citations omitted).

Although Ms. Fischer may not be the most critical witness in this litigation, she has made statements that relate to the issues in this Multi-District Litigation (“MDL”), and a deposition discovering those facts does not justify a protective order under Fed.R.Civ.P. 26(c). PSC may take the deposition of Ms. Fischer for the purpose of discovering information which is either relevant to issues in this MDL or will lead to the discovery of admissible information. PSC shall not inquire into matters pending before the Haltom court which are unrelated to this MDL, such as the allegations of jury tampering. Prior to the deposition, the Bayer Defendants will produce any non-privileged documents not previously produced which relate to the development, testing, and monitoring of Baycol and the actions taken by Bayer regarding Baycol which were relied on by Ms. Fischer in sending the Letter.

This includes documents which may be responsive to Request Nos. 2<sup>1</sup>, 7-31, and 35 on Schedule A attached to the Subpoena Duces Tecum directed to Ms. Fischer. The parties are expected to mutually cooperate to set a date, time and location of Ms. Fischer's deposition, which shall be taken at a time that does not conflict with her involvement in the Haltom trial, but prior to March 22, 2003. As such, the Bayer Defendants' Motion for Protective Order with respect to Ms. Fischer is denied in part.

This Court will not allow the deposition of Mr. McConnell, Bayer's in-house counsel. PSC has made no showing that Mr. McConnell possesses any non-privileged information regarding facts in this MDL that cannot be obtained through non-privileged means. Accordingly, the Bayer Defendants' Motion for Protective Order with respect to Mr. McConnell is granted.

**B. Procedural Issues**

This Court has the authority to compel the Bayer Defendants to produce their employee, Ms. Fischer, for deposition and to produce documents. Accordingly, this Court need not address the questions regarding the procedural adequacy of the subpoenas served on Ms. Fischer and Mr. McConnell.

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<sup>1</sup> Request No. 2 seeks production of drafts of the Letter, to which the Bayer Defendants claim they may object as being attorney-client privileged. While the drafts may in fact be appropriately privileged, this Court has no information before it now to make that determination.

Based upon all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that the Emergency Motion for Protective Order of Defendants Bayer Corporation and Bayer A.G. is **GRANTED IN PART** and **DENIED IN PART** as set forth above.

Dated: March 11, 2003

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JONATHAN LEBEDOFF  
Chief United States Magistrate Judge