

**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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JONATHAN LEBEDOFF, Chief United States Magistrate Judge

The above-entitled matter came before United States Chief Magistrate Judge Jonathan Lebedoff on Plaintiffs' Motion to Compel the Production of Documents by Defendant PDI (No Doc. No.). 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 No. 52.

**I. BACKGROUND**

PDI, Inc. ("PDI") contracted with Defendant Bayer Corporation ("Bayer") in August, 2000 to serve as an outside sales force for Baycol. PDI employed approximately 500 sales representatives who were responsible for promoting Baycol to physicians nationwide. PDI has been named as a Defendant in approximately seventeen Baycol cases around the country, and PDI is a Defendant in approximately two cases which were transferred to this Court as part of the Baycol Multi-District Litigation ("MDL").

In May, 2002, the Plaintiffs' Steering Committee ("PSC") served a subpoena on PDI, requesting broad categories of documents relating to Bayer

and Baycol. PDI served objections to the subpoena, and the parties began negotiating over the scope of documents PDI would produce to the PSC. PDI first informed the PSC that it would begin producing documents in July, 2002, and later modified that date to August, 2002. PDI actually began producing documents in September, 2002. The parties have exchanged multiple communications over the last several months regarding PDI's production of documents, with many delays in production for various reasons.

Based on the correspondence submitted to the Court by the PSC (which are predominantly letters drafted by the PSC which have not been controverted by PDI in this motion), it appears that PDI began representing in July, 2002, that it would preserve computer hard drives which may have responsive information and would begin searching computers for responsive materials. In order to narrow the scope of the "data mining" from PDI's computers, the PSC agreed to limit the computers searched to the Regional Sales Managers, the National Sales Managers, and the Project Liaison. This reduced the numbers of computers to be searched from over 500 to approximately 55. The PSC also agreed to limit the search terms to three words: "Baycol," "cerivastatin," and/or "lipobay."

Numerous followup communications from the PSC to PDI between November, 2002, and February, 2003, show that the PSC understood that PDI would be searching the computers for responsive information and that PDI was facing various delays. On February 3, 2003, PDI's counsel wrote to the PDI that he would need "another week" to give a "project schedule on that aspect of

the production. On February 11, 2003, PDI's counsel wrote again as a followup, informing the PSC that "[o]n e-harvesting, PDI has committed that it will be completed and produced by March 30."

Plaintiffs filed the present motion to compel on February 13, 2003. Plaintiffs ask this Court to compel PDI to produce documents it has previously committed to produce, including information extracted from PDI's computers.<sup>1</sup> PDI opposes the motion, arguing that it has already produced substantial documents and that Bayer has presumably already produced many of the documents sought from PDI. PDI argues that it is "effectively a non-party" and that the cost of data-mining the information from its computer hard drives constitutes undue burden which outweighs the likely benefits in this litigation. PDI has submitted an estimate from a third party for "mining" 70 hard drives, which estimates a total cost of \$148,625. PDI claims that the estimate "does not include the costs of imaging the hard drives, processing the resulting data with objective coding, and privilege review." PDI estimates that its total costs "will approach or exceed \$1,000,000."<sup>2</sup> Nothing in the record before the Court

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<sup>1</sup> Plaintiffs' motion is somewhat vague in specifying the precise information it seeks from PDI, and it does not appear that PDI has objected to producing documents other than those which must be "mined" from its computers. Accordingly, for purposes of this motion, this Court will presume that PDI has produced the other documents at issue and that the only issue before the Court is whether PDI must "data-mine" its computers.

<sup>2</sup> PDI has not submitted any additional estimates to explain how it arrives at the \$1,000,000.00 estimate. The Court does not know if this estimate is to include the total litigation cost of reviewing, producing, and coding documents mined from 70 computers, or if the estimate contemplates a greater number of computers mined. On pages 2 and 7 of its brief, PDI states

suggests that PDI had objected to harvesting information from its computers on the basis of excessive cost until it filed its response to the present motion.

## **II. ANALYSIS**

Federal Rule of Civil Procedure 45 allows a person who is subject to a subpoena to move the Court for an order quashing the subpoena if the subpoena subjects the person to undue burden. Fed.R.Civ.P. 45(c)(3)(A).

This Court finds that PDI has not established that the request to “data-mine” its computers, as modified by the PSC, is unduly burdensome. Nor has PDI moved to quash the subpoena it claims burdensome. Although PDI attempts to characterize itself as a “non-party” in this litigation, it has been named in approximately nineteen Baycol lawsuits. Indeed, given that it employed over 500 people who were responsible for marketing Baycol, PDI is significantly more than a disinterested third-party in this litigation. Moreover, despite PDI’s current objections to the expense of data-mining, it appears that PDI has long committed to provide the requested discovery to Plaintiffs without contending that it was overly burdensome. Finally, this Court is unable to find any support for PDI’s contention that data-mining the approximately 55 computers at issue will cost \$1,000,000.00. The documents submitted by PDI to support this claim actually refute it, showing that the data-mining of 55 computers would cost approximately one-tenth that figure. PDI’s objections

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that “several hundred” and “hundreds” of computers are at issue, although PDI only sought an estimate for data mining 70 computers, and the PSC estimates that PDI needs to data mine approximately 55 computers.

are not supported by the record, and Plaintiffs' motion will be granted.

Based upon all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Compel the Production of Documents by Defendant PDI is **GRANTED** as set forth above. PDI will produce documents from the computers of its Regional Sales Managers, National Sales Managers, and Project Liaison within fifteen (15) days of the date of this Order.

Dated: April 2, 2003

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JONATHAN LEBEDOFF  
Chief United States Magistrate Judge