UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re: AVANDIA MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	:	2007-MD-1871
THIS DOCUMENT RELATES TO: ALL ACTIONS	:	HON. CYNTHIA M. RUFE

PRE-TRIAL ORDER NO. 70 - NON-WAIVER OF OBJECTIONS TO PRODUCTION ON ATTORNEY-CLIENT PRIVILEGE OR WORK PRODUCT GROUNDS PURSUANT TO FEDERAL RULES OF EVIDENCE 502(d)

Procedural Background and Reasons for Order

1. On December 7, 2009, this Court filed a Memorandum Opinion and Pre-Trial Order No. 84 overruling attorney-client privilege and work product immunity objections made by Defendant GlaxoSmithKline LLC, formerly known as SmithKline Beecham Corporation ("GSK")[1] with respect to 25 sample documents, which had been the subject of the Special Discovery Master's Eighth Report and Recommendation.

2. On December 8, 2009, the United States Supreme Court filed its Opinion in *Mohawk Industries v. Carpenter* (U.S. Sup. Ct. No. 08-678) holding that the collateral order doctrine does not allow interlocutory appeals of orders by trial courts overruling attorney-client privilege and work product immunity objections to production of documents.

[1] On October 27, 2009 SmithKline Beecham Corporation redomiciled from Pennsylvania to Delaware, converted into a limited liability company and changed its name to GlaxoSmithKline LLC.

3. On December 15, 2009, without waiving its right to appeal this Court's privilege rulings upon the entry of final judgment, GSK informed the Special Discovery Master that GSK would voluntarily review the documents listed on GSK's privilege log in light of the Court's Memorandum Opinion and Pre-Trial Order No. 84.

4. GSK informed the Court in its Status Report filed on January 15, 2010 that GSK intends to produce thousands of documents currently listed on GSK's privilege log because, based on the December 7, 2009 Memorandum Opinion and Pre-Trial Order No. 84, it is likely this Court would not sustain GSK's attorney-client privilege and work product immunity objections as to those documents. The documents previously designated on the privilege log that GSK will produce shall be referred to in the remainder of this Order as the "Produced Documents."

5. GSK has requested this Court to enter this Order holding that the Produced Documents shall be treated for all pre-trial, trial and appeal purposes as documents on which this Court overruled GSK's attorney-client privilege and work product immunity objections and ordered GSK to produce the documents.

6. GSK has also requested this Court exercise its authority under Rule 502(d) of the Federal Rules of Evidence to order that GSK's production of the Produced Documents shall not be regarded as a waiver of GSK's attorney-client privilege or work product immunity objections in this Court or any other federal or state court or in any other litigation or proceeding.

7. GSK also intends to produce the Produced Documents in the Avandia product liability litigation pending in the Court of Common Pleas of Philadelphia County in the Mass Tort Program before the Honorable Sandra Mazer Moss.

Order

In order to expedite the production of the Produced Documents and avoid the undue delay, burden and expense that would result if GSK were required to seek privilege rulings from this Court on every single document in order to preserve its appeal rights with respect to its attorney-client privilege and work product immunity objections, this Court enters the following Order:

1. GSK's production of the Produced Documents in accordance with this Order is without prejudice to GSK's position that the Produced Documents are protected by the attorney-client privilege or the work product immunity and without prejudice to GSK's legal right to appeal this Court's December 7, 2009 Memorandum Opinion and Pre-Trial Order No. 84 upon the entry of final judgment in any of the underlying actions or as otherwise permitted by law.

2. The Produced Documents shall be treated for all purposes, including pre-trial, trial and appeal purposes in this proceeding and in the underlying actions comprising this MDL proceeding as documents as to which this Court overruled GSK's attorney-client privilege and work product immunity objections and ordered GSK to produce, consistent with this Court's December 7, 2009 Memorandum Opinion and Pre-Trial Order No. 84.

3. GSK retains the right to renew, supplement or seek more specific rulings before or during trial on its attorney-client privilege and work product immunity objections respecting the Produced Documents.

4. GSK's production of the Produced Documents shall not constitute a waiver of any privilege or protection with respect to: (a) those documents; (b) any other communications or documents relating to the subject matter of those documents; or (c) any other

communications or documents relating to the parties who sent or received or are named in those documents.

5. This Order is, and shall be construed as, an Order under Rule 502(d) of the Federal Rules of Evidence ordering that privilege or protection is not waived by disclosure connected with the litigation pending before this Court. Accordingly, as is explicitly set forth in Rule 502(d), the production of these documents is not a waiver of any privilege or protection in any other federal or state proceeding. Without limiting the foregoing, the existence of this Order shall not impair or affect GSK's legal right to assert privilege claims or work product immunity objections for the documents produced in any other actions, shall not affect a waiver, and shall not be used to argue that any waiver of privilege or protection has occurred by virtue of any production of those documents in this case before this Court or any other Court or in any other litigation or proceeding.

6. GSK's production of the Produced Documents in the Avandia product liability litigation pending in the Court of Common Pleas of Philadelphia County in the Mass Tort Program before the Honorable Sandra Mazer Moss shall not: (a) be construed as a waiver of any attorney-client privilege or work product immunity protection; or (b) deprive GSK of the protection of Rule 502(d) of the Federal Rules of Evidence as set forth in paragraph 5 of this Order.

7. All of the provisions of this Order shall apply not only to the Produced Documents, but also to the substantially similar documents that GSK would have designated as privileged in documents not yet produced (and would have added to a privilege log), but which will now be produced without being designated on a privilege log because of GSK's determination that it is likely this Court would not sustain the attorney-client privilege or work

product immunity objections based on this Court's Memorandum Opinion and Pre-Trial Order No. 84. All such documents shall be treated as Produced Documents entitled to the protections of this Order.

8. Any use of the Produced Documents shall be subject to all of the provisions of Pre-Trial Order No. 10 in this case.

9. Nothing in this Order shall be interpreted as precluding GSK from determining and informing the Plaintiffs' Steering Committee that GSK has concluded a particular document or documents among the Produced Documents are not protected by the attorney-client privilege or the work product immunity.

Cynthia M. Rufe

Rufe, J.

Date: February 2nd, 2010