UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA ex rel. YOASH GOHIL,	:	
Plaintiff/Relator,	:	No. 02-CV-2964 (LFS)
v.	:	
SANOFI U.S. SERVICES INC., et al.,	:	
Defendants.	:	

ORDER

AND NOW, this _____ day of _____, 2016, upon consideration of Defendants' Cross-Motion to Compel the Return of the Misappropriated Decembrino Documents and any response thereto, it is hereby **ORDERED** that the Motion is **GRANTED** and that Plaintiff shall, within ten (10) calendar days of the entry of this Order::

1. Return to Defendants all RPR documents that he or his counsel obtained from Elaine Decembrino except the 17 Taxotere-related documents Defendants previously produced in discovery;

2. Identify all individuals, including third parties, who reviewed any of the RPR documents (except the 17 Taxotere-related documents Defendants previously produced in discovery) Plaintiff and his counsel obtained from Ms. Decembrino;

3. Identify any third persons or other parties provided access to (or copies of) any of the RPR documents (except the 17 Taxotere-related documents Defendants previously produced in discovery) Plaintiff and his counsel obtained from Ms. Decembrino;

4. Refrain from using any of the RPR documents (except the 17 Taxotere-related documents Defendants previously produced in discovery) obtained from Ms. Decembrino during the course of this litigation;

5. Identify and disclose to Defendants any additional attorney-client privileged communications or any work product that Ms. Decembrino or any other current or former employee of Defendants disclosed to Plaintiff or his counsel at any time (and produce to Defendants all related documents, communications, notes and memoranda); and

6. Provide the Court and Defendants with written certification of compliance with the provisions of this Order or risk the imposition of sanctions.

BY THE COURT:

_____

HONORABLE LAWRENCE F. STENGEL, U.S.D.J.

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Defendants.	:	

DEFENDANTS' CROSS-MOTION TO COMPEL THE RETURN OF MISAPPROPRIATED MATERIALS

Defendants Sanofi U.S. Services Inc., Aventis, Inc., and Aventisub LLC, (collectively "Aventis"), respectfully cross-move the Court to compel Plaintiff to return confidential and privileged documents that he obtained from Elaine Decembrino, a former employee of Rhone-Poulenc Rorer (a predecessor company to Aventis) who misappropriated the documents from the company near the conclusion of her employment there. Aventis incorporates by reference its attached Memorandum in Support of its Cross-Motion.

Respectfully submitted,

Dated: January 29, 2016

s/ Richard L. Scheff

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Defendants.	:	

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL AND FOR APPLICATION OF THE CRIME-FRAUD EXCEPTION AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR THE RETURN OF MISAPPROPRIATED MATERIALS

Defendants Sanofi US Services Inc., Aventis, Inc., and Aventisub LLC, (collectively "Aventis"), by and through their attorneys, Montgomery, McCracken, Walker & Rhoads, LLP and Shook, Hardy & Bacon, LLP, respectfully submit this Memorandum in Opposition to Plaintiff's Motion to Compel and for Application of the Crime-Fraud Exception (Dkt. 165) and in Support of Aventis' Cross-Motion for the Return of Misappropriated Materials.

Plaintiff's motion is no more than a regurgitation of the allegations of his Third Amended Complaint ("TAC") interspersed with unsworn and unsupported assertions of a "cover up," supposedly directed nearly 20 years ago by in-house counsel of a predecessor company to Aventis that allegedly involved two drugs[1] that are not the subject matter of this lawsuit and which were sold by sales forces that had nothing to do with Taxotere.

[1] These drugs are Lovenox and Nasacort AQ. Lovenox helps reduce the risk of deep vein thrombosis in patients undergoing certain surgeries or who have severely restricted mobility during acute illness. *See* Lovenox Homepage, available at http://www.lovenox.com (last visited 1/21/2016). Nasacort AQ is a nasal steroid that prevents the release of substances in the body that cause inflammation. *See* http://www.drugs.com/nasacort.html (last visited 1/21/2016). Neither drug is even in the same class of drugs as Taxotere, the chemotherapeutic agent at issue in this lawsuit.

Based on nothing more than conclusory, unsupported allegations from an unverified employment law complaint filed by a disgruntled former employee against Rhone-Poulenc Rorer ("RPR")[2] in 1998, Plaintiff asks the Court to "infer" that RPR in-house counsel directed the former employee, Elaine Decembrino, to destroy or alter documents evidencing impermissible off-label promotion and to enter an order requiring Aventis to produce each of the following categories of attorney-client privileged communications and related documents:

- All documents produced by ex-[RPR] employee Elaine Decembrino … to Blank Rome in 2007, including any documents which Aventis claims are privileged;[3]
- All documents related to communications about Decembrino between and/or among Aventis/RPR attorneys and management between 1996 and 2004; and
- All documents relating to any investigation, inquiries, and/or reviews about Decembrino's allegation about off-label marketing, the alteration or destruction of records, and/or EM-32 forms between 1996-2004.

Plaintiff's motion fails for several reasons. First, the unverified, long discontinued employment law complaint that Ms. Decembrino filed against RPR in 1998 does not establish a reasonable basis for application of the crime-fraud exception as to any of the categories of documents Plaintiff seeks. Ms. Decembrino's employment law complaint alleged off-label promotion of Nasacort AQ and Lovenox, not Taxotere, and included only a single, wholly conclusory allegation relating to the supposed improper destruction or alteration of any company records. In addition, Ms. Decembrino recently acknowledged that she had no role whatsoever in the marketing or promotion of Taxotere at RPR. In short, Plaintiff has not, and cannot, meet the

[2] RPR merged with Hoechst Marion Roussel to form Aventis in 1999.

[3] As discussed *infra*, Ms. Decembrino misappropriated 3,170 pages of documents from RPR and provided copies of them to counsel for Plaintiff in 2007. Only 17 of these documents even mention Taxotere, and Aventis has already produced those documents to Plaintiff in discovery. The remainder of these misappropriated RPR documents are, for ease of reference, referred to herein as the "Decembrino documents."

evidentiary standard to justify the abrogation of Aventis' attorney-client privilege based on the crime-fraud exception.

Second, Aventis is submitting a declaration from undersigned counsel, Richard L. Scheff (attached hereto as Exhibit 1), regarding recent conversations he had with former RPR in-house counsel Terence Green and Mark Feingold, both of whom directly and unequivocally refute Plaintiff's baseless crime-fraud allegations relating to Ms. Decembrino and the supposed alteration or destruction of RPR documents to further a crime or fraud.[4] For this reason as well, there is no reasonable basis to support application of the crime-fraud exception as to any of the three categories of Decembrino-related documents that Plaintiff seeks.[5]

On perhaps an even more fundamental level, the broad categories of privileged communications and other documents Plaintiff seeks to obtain are neither relevant to the claims or defenses of the parties nor proportionate to the reasonable needs of this case. Indeed, none of the misappropriated "Decembrino documents" Plaintiff seeks have anything to do with the marketing, promotion, or sale of Taxotere.[6] Much as Plaintiff would like to expand the scope of

[4] These former in-house counsel appear on 13 privileged RPR documents that were included in the 3,170 pages of RPR documents that Ms. Decembrino misappropriated from the company in 1997 and provided to counsel for Plaintiff in 2007. In the course of this discovery dispute, Aventis provided Plaintiff with a privilege log (Dkt. 165-3, Exh. B) for each of the 13 privileged RPR documents Ms. Decembrino misappropriated from RPR.

[5] Aventis invites the Court to review, in camera, the 13 privileged "Decembrino documents" that precipitated this discovery dispute. These privileged communications do not remotely evidence an intent on the part of RPR in-house counsel to direct or encourage the concealment of fraudulent marketing activities involving Nasacort AQ, Lovenox, or any other drug manufactured by RPR. Absent a showing that these privileged "Decembrino documents" fall under the crime-fraud exception, there can be no reasonable basis for Plaintiff to obtain the compelled production of the broad categories of privileged RPR and Aventis documents he seeks.

[6] Only 17 documents in the 3,170 pages of documents that Ms. Decembrino misappropriated from RPR in 1997 even mention Taxotere, and Aventis has already produced those documents to Plaintiff in discovery.

this FCA action to include every drug that RPR and Aventis ever manufactured or sold from 1996 through 2004, the Court has ruled that the claims to be litigated are limited to the oncologic, chemotherapeutic agent Taxotere that Plaintiff sold only at Aventis and only between 2000 and the beginning of 2002.

Finally, Plaintiff's motion avoids any meaningful discussion of the improper conduct of his counsel and Ms. Decembrino that precipitated this discovery dispute. The "Decembrino documents" that Plaintiff seeks to retain and use in this litigation were misappropriated from RPR by Ms. Decembrino in 1997 and provided to counsel for Plaintiff in 2007. Upon review of these documents in 2007, counsel for Plaintiff discovered they included at least several attorney-client privileged RPR communications. Despite knowing the documents were stolen from RPR, and knowing that they included attorney-client privileged communications belonging to RPR,[7] counsel for Plaintiff kept the documents in secret for nearly a decade, only revealing their existence when counsel believed Ms. Decembrino's subpoenaed deposition would shortly occur. Counsel for Plaintiff's improper actions in obtaining (and then withholding) these misappropriated, privileged, and confidential documents are, indeed, sanctionable and, at the very least, should not be rewarded by permitting Plaintiff to retain and use the documents in this litigation. *See Burt Hill, Inc. v. Hassan*, No. 09-1285, 2010 WL 419433 (W.D. Pa. Jan. 29, 2010). Aventis therefore cross-moves for the entry of an order compelling counsel for Plaintiff to return to Aventis the several thousand pages of RPR documents they wrongfully obtained

[7] Counsel for Plaintiff, using their own paralegal, did a privilege review and segregated certain documents from the trial team. Our review of the "Decembrino documents" revealed several additional privileged documents that were not segregated. There is no authority that permits third parties holding misappropriated documents to conduct a privilege review on behalf of an adversary. As a result of counsel for Plaintiff's actions, Plaintiff's entire trial team has been exposed to privileged RPR documents that were not segregated by their unauthorized internal privilege review.

from Ms. Decembrino in 2007, and barring Plaintiff from using the documents further in this litigation.

I. BACKGROUND

A. Elaine Decembrino

Ms. Decembrino was employed by RPR for only one year (1996-1997) during the time period covered by this lawsuit,[8] never worked for Aventis or with the Plaintiff, and knows nothing about Taxotere. (Scheff Decl. at ¶ 17; *see also* Dkt. 165-3, Exh. A ("[H]is client advised that RPR had two marketing departments. She worked in one of them and the other marketing department was responsible for Taxotere. As a result, she has no knowledge regarding Taxotere.")). In addition, Ms. Decembrino executed an employment agreement with RPR in which she agreed that upon termination of her employment she would promptly return to the company "any unpublished memoranda, notes, records, reports, sketches, plans or other documents held by [her] concerning any information, knowledge or data referred to in paragraph 1 herein, or pertaining to [RPR]'s business or contemplated business, whether confidential or not." (Dkt. 165-3, Exh. B, Decembrino Employment Agreement at ¶ 5.) Ms. Decembrino and her assistant, Linda Conolly, initiated an employment law civil action against RPR following the conclusion of her employment at RPR which related to Lovenox and Nasacort, not Taxotere. *See Conolly, et al. v. Rhone-Poulenc Rorer Pharmaceutical, Inc., et al.*, No. 98-3243 (E.D. Pa. June 23, 1998). The employment suit was resolved and discontinued before the district court ruled on RPR's motion to dismiss.

[8] Although Plaintiff's first-hand experience with Taxotere at Aventis was limited to only approximately two years (2000-02), the time period covered by his TAC spans back to 1996, some three years before Aventis was even formed.

B. Evolution of the Parties' Dispute Regarding the "Decembrino Documents"

In January 2008, Plaintiff moved to take the immediate deposition of Ms. Decembrino, ostensibly because she had a serious health issue and any relevant testimony she might have could be irretrievably lost. (Dkt. 39.) At no point during the course of full briefing on that motion did Plaintiff inform the Court or Aventis that his counsel already had obtained thousands of pages of stolen RPR documents from Ms. Decembrino, including several documents that counsel for Plaintiff determined were privileged. Unaware of the foregoing, the Court nevertheless denied Plaintiff's motion by Order dated February 29, 2008. (Dkt. 44.)

More than seven years later, on July 23, 2015, Plaintiff again moved to take the immediate deposition of Ms. Decembrino. (Dkt. 143.) This time, however, counsel for Plaintiff notified Aventis by letter that they possessed 3,170 pages of RPR documents Ms. Decembrino misappropriated from RPR. (Exh. A to the Scheff Decl., 7/23/15 letter to R. Scheff.) Counsel for Plaintiff also informed Aventis that when they obtained these stolen RPR documents from Ms. Decembrino in 2007, a Blank Rome paralegal reviewed the documents and determined that five of them were protected by RPR's attorney-client privilege. (Dkt. 165-3, Exh. A, 7/31/15 email to R. Scheff.) According to counsel for Plaintiff, they sealed those five privileged documents in an envelope and proceeded to review all of the other misappropriated RPR documents they obtained from Ms. Decembrino.[9] Of course, Aventis was unaware until mid-

[9] Plaintiff did not include this "new" information in his renewed motion to take the immediate deposition of Ms. Decembrino, but only addressed it in reply after Aventis raised the matter in its response in opposition. To the contrary, Plaintiff ironically argued that the need to depose Ms. Decembrino was imminent given the potential loss of discovery. The Court denied Plaintiff's motion without prejudice, but granted Plaintiff permission to take Ms. Decembrino's deposition following the Rule 26(f) conference. (Dkt. 154.) Counsel for Plaintiff subsequently sought to subpoena Ms. Decembrino for deposition – that deposition has been continued pending the resolution of this issue.

2015 that its privileged communications had been misappropriated, much less reviewed by counsel for its adversary in this litigation.

Following repeated requests, counsel for Plaintiff eventually provided Aventis with copies of the "Decembrino documents," including the five documents they determined were privileged. Aventis then conducted its own review of the contents of the "Decembrino documents" and the circumstances surrounding their misappropriation from RPR and determined that: (1) they contained eight additional privileged documents that counsel for Plaintiff failed to either identify or sequester, and, thus, were reviewed by counsel for Plaintiff; (2) only 17 of the documents related to Taxotere in any way; (3) Aventis would not have produced the non-Taxotere related documents in this case as they are confidential, irrelevant, and clearly not proportionate to the needs of the case; and (4) Ms. Decembrino's employment agreement with RPR prohibited her from misappropriating these documents, much less providing them to third parties such as counsel for Plaintiff.

Accordingly, Aventis requested that counsel for Plaintiff immediately return or destroy all 13 of the privileged "Decembrino documents" and that counsel identify all individuals who had reviewed them. (Dkt. 165-3, Exh. B, 9/18/15 letter to D. Kistler.) In addition, Aventis advised counsel for Plaintiff that with the exception of the 17 "Decembrino documents" that mentioned Taxotere, the remaining documents were inappropriately in their possession and would not have otherwise been produced by Aventis in response to a proper discovery request. (Dkt. 165-3, Exh. B, 9/23/15 letter to D. Kistler.) Acting in good faith, Aventis produced the 17 Taxotere-related documents and demanded the immediate return of the remaining irrelevant, confidential, and privileged "Decembrino documents."

In a responsive letter dated September 29, 2015, counsel for Plaintiff refused to return or destroy the 13 privileged documents unless they first received a privilege log. (Exh. B. to the Scheff Decl., 9/29/15 letter to R. Scheff.) Counsel for Plaintiff also argued the "Decembrino documents" related to off-label promotion generally and were therefore relevant to this case, which only concerns the promotion of Taxotere. (*Id.*) Aventis provided Plaintiff with the requested privilege log and again demanded the immediate return of the privileged and confidential misappropriated "Decembrino documents" and the identity of the individuals who reviewed them.[10] (Dkt. 165-3, Exh. B, 10/8/15 letter to D. Kistler.)

Counsel for Plaintiff again refused to return any of the "Decembrino documents" or to identify the individuals who reviewed them, arguing that Plaintiff was not the one who misappropriated the documents and that they were reasonably necessary to his pursuit of this lawsuit. (Dkt. 165-3, Exh. C, 10/15/15 letter to R. Scheff.) In addition, counsel for Plaintiff stated that they were free to communicate with Ms. Decembrino or anyone else regarding their communications with in-house counsel for Aventis so long as (in counsel for Plaintiff's view) the communications fell within the crime-fraud exception.[11] (Exh. C to the Scheff Decl, 11/24/15 letter to R. Scheff.)

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[10] Aventis provided a privilege log for the misappropriated documents notwithstanding that the Rule 26 privilege log requirement governs the assertion of privilege in civil discovery, not the improper conversion and unauthorized transfer of privileged and confidential materials by a former employee, as occurred here.

[11] In October of 2015, in the midst of the dialogue regarding the "Decembrino documents," counsel for Plaintiff notified Aventis that they obtained documents from two other former employees of Aventis (Timothy McCready and Peter Mercuri). Counsel for Plaintiff obtained these documents in 2002 and 2004 and, like the "Decembrino documents," kept them in secret for more than seven years during the pendency of this lawsuit. Like Ms. Decembrino, Mr. McCready and Mr. Mercuri misappropriated these documents in violation of their employment and confidentiality agreements. Aventis did not, however, object to Plaintiff's retention of these documents, because unlike the "Decembrino documents," they are not privileged and they generally relate to Taxotere and Aventis (not Nasacort and RPR).

By letter dated November 30, 2015, Aventis provided counsel for Plaintiff with case law that stands for the well-settled proposition that the parties to a litigation are not permitted to make unilateral, self-serving determinations as to whether the crime-fraud exception applies to a privileged communication; instead, the Court must make such serious determinations on application and a proper showing. (Exh. D. to the Scheff Decl., 11/30/15 letter to D. Kistler.) Counsel for Plaintiff should have been well aware of its fundamental obligation to respect Aventis' privilege rights, especially since counsel for Plaintiff recently vigorously defended a corporate client against a government crime-fraud motion that went to the Court of Appeals for the Third Circuit for determination in *In re Grand Jury*, 705 F.3d 133 (3d Cir. 2012).[12]

In addition, Aventis requested that counsel for Plaintiff identify: (1) whether Ms. Decembrino or any other current or former Aventis employees disclosed any potentially privileged communications they may have had involving counsel for Aventis or a predecessor company, or the contents of any Aventis or predecessor company work product; and (2) any "communications, documents, or other materials in your possession, custody or control … as to which you believe the crime-fraud exception applies." (Exh. D to the Scheff Decl.) To date,

[12] This is, unfortunately, not the first time counsel of record for Plaintiff has chosen to ignore their responsibility to uphold the integrity of the adversarial process and the privilege and confidentiality rights of adverse parties in litigation. On November 30, 2015, the United States District Court for the District of New Jersey entered an Order disqualifying counsel for Plaintiff (the Blank Rome firm) from continuing its representation of a *qui tam* relator against Boston Scientific (*United States ex rel. Bahsen v. Boston Sci. Neuromodulation Corp.*, No. CV 11-1210, 2015 WL 7720485, at *1 (D.N.J. Nov. 30, 2015)) based on an impermissible conflict of interest arising from the firm's employment of a former in-house corporate and compliance counsel for the company (Ritu Hasan).

While employed by Boston Scientific from 2009-11, Ms. Hasan "was engaged in internal investigations conducted by Boston Scientific in direct response to many of the allegations made by relators here regarding billing improprieties and retaliation. She was also involved in crafting Boston Scientific's findings and strategies to respond to these allegations." Blank Rome did not notify Boston Scientific of the obvious conflict or timely create an ethical screen to "wall off" Ms. Hasan from its *qui tam* representation against the company, even though Ms. Hasan's prior representation of Boston Scientific was listed on her profile on the Blank Rome website.

counsel for Plaintiff has refused to return any of the privileged or confidential "Decembrino documents;" nor has counsel for Plaintiff identified to Aventis any specific privileged "Decembrino documents" to which he believes the crime-fraud exception might apply.

Plaintiff never responded to Aventis' November 30, 2015 letter; instead Plaintiff filed his motion on December 15, 2015.

C. The Documents Plaintiff Seeks

Plaintiff seeks to compel the production of three categories of documents.

First, Plaintiff seeks "[t]he Decembrino documents in their entirety, including the documents which Aventis now claims are privileged." Although only Taxotere is at issue in the present litigation, these documents do not relate to its marketing or promotion, or even mention Taxotere at all.[13]

The second and third categories of documents Plaintiff seeks relate "to communications about Decembrino between and/or among Aventis RPR attorneys and management between 1996 and 2004" and "to any investigation, inquiries, and/or reviews about Decembrino's allegation of off-label marketing, the alteration or destruction of records, and/or EM-32 forms between 1996-2004."[14] Aventis opposes the production of any privileged documents it may possess from 1996-2004 relating to Ms. Decembrino and her allegations against RPR, which would ostensibly include work product and related attorney-client privileged communications regarding the employment law lawsuit she and her assistant, Ms. Conolly, brought against the

[13] Again, Aventis has already produced to Plaintiff the only "Decembrino documents" that mention or relate to Taxotere in any way. As Ms. Decembrino had nothing to do with Taxotere at RPR, the vast majority of the documents she misappropriated from the company and later provided to counsel for Plaintiff have nothing to do with Taxotere.

[14] Plaintiff has not discussed these categories of documents with Aventis (in discovery discussions or otherwise).

company in 1998. Such privileged communications and work product, assuming they exist, would not fall under the application of the crime-fraud exception that Plaintiff advocates (namely for supposed privileged communications reflecting RPR's in-house counsel directing Ms. Decembrino to destroy or alter documents to conceal impermissible off-label promotion). For this reason as well, there is no factual or legal basis upon which to compel the production of these categories of documents from Aventis.

II. LEGAL STANDARD

A. The Attorney-Client Privilege and the Work Product Doctrine

The "seal of secrecy" over attorney-client privileged communications has long been recognized as one of the central hallmarks of our justice system. *United States v. Zolin*, 491 U.S. 554, 562-63 (1989) ("We have recognized the attorney-client privilege under federal law, as the oldest of the privileges for confidential communications known to the common law."). The privilege enables full and candid discourse between clients and their attorneys, allowing the client to disclose information in confidence that might not have otherwise been made. *Upjohn Co. v. United States*, 449 U.S. 683, 389 (1981) (holding that the privilege exists to ensure "full and frank communication" and allows clients to make "full disclosure" to their attorneys). Consistent with its purpose, the privilege protects all communications confidentially made to seek, obtain, or provide legal advice. *Fisher v. United States*, 425 U.S. 391, 403 (1976).

Along with the attorney-client privilege, the work product doctrine "[protects] the attorney-client relationship and [permits] attorneys to carry out their duties fully." *In re General Motors LLC Ignition Switch Litig.*, 14-MD-2543, 2015 WL 7574460, at *7 (S.D.N.Y. Nov. 25, 2015). The work product doctrine permits attorneys to "prepare [their] legal theories and plan [their] strategy without undue and needless interference." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The work product doctrine is broader than the attorney-client privilege and protects both

tangible work and attorneys' mental impressions and strategies. *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 666 (3d Cir. 2003).

B. The Reasonable Basis Standard

The crime-fraud exception to the attorney-client privilege cannot apply unless the movant first can establish a "reasonable basis" to support a good faith belief that: (1) "the client was committing or intending to commit a crime or fraud" at the time of the privileged communication; and (2) "the legal advice [sought or provided] was in furtherance of the alleged crime or fraud." *In re Grand Jury*, 705 F.3d 133, 151 (3d Cir. 2012); *see also In re Neurontin Antitrust Litigation*, 801 F. Supp. 2d 304, 311 (D.N.J. 2011) (holding that requisite criminal or fraudulent intent must be established at the time of the privileged communication to support application of the crime-fraud exception). If the movant asserts that counsel intended to further a crime or fraud, then the movant must establish that a specific bad intent existed at the time the legal advice was provided.[15] *In re Grand Jury Subpoena*, 745 F.3d 681, 692 (3d Cir. 2014).

Therefore, movants seeking application of the crime-fraud exception must demonstrate that there were "*particular* communications with counsel or attorney work product" that were "*intended* . . . to facilitate or to conceal criminal activity." *In re General Motors*, 2015 WL 7574460, at * 9 (emphasis in original). In addition, the Third Circuit requires that the movant demonstrate a direct causal link between the legal advice sought or provided and the alleged crime or fraud. *In re Neurontin*, 801 F. Supp. 2d at 309-10. Privileged communications or work

[15] With respect to attorney work product, the crime-fraud exception is not triggered unless the movant can first establish that the specific work product was, in fact, used in furtherance of a crime or fraud. *In re Grand Jury Subpoena*, 745 F.3d at 694; *see also In re Grand Jury (OO-2H)*, 211 F. Supp. 2d 564, 566-67 (M.D. Pa. 2002) ("[T]he crime must have been committed after the work product was generated, or the work product must have [been] generated as part of an ongoing criminal endeavor.").

product that merely "relate[] to" criminal activity cannot trigger the exception. *In re Grand Jury Subpoena*, 745 F.3d at 693.

Courts have analogized the "reasonable basis" standard for application of the crime-fraud exception to establishing "probable cause" for a criminal arrest or the issuance of a search warrant. *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797, 2014 WL 80563, at *3 (E.D. Pa. Jan. 9, 2014). The standard is intended to be reasonably demanding; neither speculation nor evidence that shows only a distant likelihood of corruption is enough to trigger loss of the privilege as to any specific communication. *In re Grand Jury*, 705 F.3d at 153. It requires the movant to proffer sufficient evidence to give the Court a "good faith belief" that the crime-fraud exception applies. *Speth v. Goode*, 607 F. App'x. 161, 165 (3d Cir. Mar. 13, 2015). As such, the movant must be able to articulate specific facts relating to the legal advice sought or provided and a direct causal connection with the underlying crime or fraud. *Id.*; *see also In re Grand Jury*, 705 F.3d at 153.

III. ARGUMENT

A. The Documents Plaintiff Seeks Do Not Fall Under Any Exception to the Attorney-Client Privilege

1. *There is no Reasonable Basis to Support the Application of the Crime-Fraud Exception for the Documents Plaintiff Seeks*

Plaintiff's motion does not establish a reasonable basis to support a good faith belief that the crime-fraud exception applies to any of the 13 privileged "Decembrino documents," much less the three broad categories of additional Decembrino-related documents that Plaintiff seeks to obtain.[16] Plaintiff does not provide any evidence – as opposed to ungrounded, unsupported, and

[16] In other words, Plaintiff presents no evidence that "the attorney-client communications for which production is sought are sufficiently related to and were made in furtherance of" the supposed fraud he (continued…)

unsworn accusations – to support a "reasonable basis" that any of the documents constitute communications in which RPR's "in-house counsel … directed employees to destroy evidence of wrongdoing." (Pl's Mem. at p. 16.) Fundamentally, Plaintiff's motion fails because he has not and cannot establish a direct causal link between any RPR attorney-client communications or work product relevant to this litigation and the supposed "Fraudulent Marketing Scheme" alleged in his TAC and regurgitated throughout his motion and attachments.[17] In addition, in-house counsel for RPR (including the attorney who supported the same Primary Care product group as Ms. Decembrino in 1996 and 1997) specifically deny the supposed wrongdoing Plaintiff would have the Court infer they engaged in. (*See* Scheff Decl. at ¶¶ 2-16.)

Plaintiff's crime-fraud "evidence" is not evidence at all and does not remotely approach the reasonable basis standard for application of the crime-fraud exception to the attorney-client privilege as to any privileged RPR or Aventis documents. This "evidence" consists exclusively of unverified, unsupported allegations from Ms. Decembrino's 1998 employment law complaint that related exclusively to the products Nasacort AQ and Lovenox – neither of which is even

(…continued)
alleges at RPR. *See In re Grand Jury*, 2016 U.S. App. LEXIS 580, at * 5 (9th Cir. Jan. 14, 2016) (internal citations omitted). Absent such a showing, Plaintiff's motion necessarily fails.

[17] Plaintiff's reiteration throughout his motion of the various allegations of his TAC strongly suggests that he seeks a premature adjudication of the facts underlying his FCA claims in the nature of an inappropriate "trial on the papers." For sound policy reasons, courts are loath to undertake such analyses on discovery motions for application of the crime-fraud exception. *See, e.g., Barba v. Shire US Inc.*, No. 1:10 ml 2181, 2015 WL 7015324, *3 (S.D.Fla. Nov. 12, 2015) (explaining that determinations on crime-fraud applications should be avoided where "intricate and case determinative matter[s] require a thorough adversarial process"); *see also In re Method for Processing Ethanol Byproducts & Related Subsystems Patent Litig.*, No. 1:10 ML 2181 LJM DML, 2015 WL 2345635, *2 (S.D. Ind. May 15, 2015) (noting that "questions of the nature and quality of the proof and how to address underlying factual disputes and the inferences that ought to be drawn from these facts are particularly acute" where crime-fraud applications implicate the parties' substantive factual and legal disputes)

mentioned in the TAC - as well as Plaintiff's own self-serving and unsupported characterizations and allegations.

Plaintiff also purports to submit as "evidence" a declaration from his counsel, Nicholas C. Harbist, Esq., in which Mr. Harbist avers that he has personal knowledge of, *inter alia*, various RPR documents. For example, Mr. Harbist claims to have personal knowledge regarding the contents of RPR EM-32 forms dating from 1996 and the specific circumstances surrounding apparent revisions to the forms. (*See* Dkt. 161-2, Harbist Decl. at ¶ 27, and Dkt. 161-6, Exh. U.) Mr. Harbist, of course, does not possess any personal knowledge regarding the specific facts and circumstances surrounding the RPR EM-32 forms appended to his sworn Declaration, much less sufficient personal knowledge to support his self-serving characterizations of their contents, intent, revisions, and purpose. Similarly, Mr. Harbist also claims personal knowledge of a 1996 RPR interoffice memorandum, invoices, and an unsigned contract between RPR and CoMed Communications. (*See* Dkt. 161-2, Harbist Decl. ¶ 31, and Dkt. 161-6, Exh. Y.) Mr. Harbist even claims personal knowledge of RPR disbursement requests, promotional events, and invoices, as well as the specific reasons and rationales behind the documents. (*See* Dkt. 161-2, Harbist Decl. at ¶ 33, and Dkt. 161-6, Exh. AA.) Obviously, Mr. Harbist has no personal knowledge regarding any RPR documents from 1996 or 1997. Indeed, not only has Mr. Harbist never been employed by RPR or Aventis,[18] but his own Declaration demonstrates that he did not even know of Ms. Decembrino until 2007, ten years after the documents at issue were created. Accordingly, these baseless accusations do not constitute "evidence" at all; much less support a

[18] Of course, Plaintiff was never employed by RPR in any capacity either, and as Aventis previously argued in support of its motion to dismiss the TAC, Plaintiff's allegations of fraud dating from 1996-99 are based solely on previous public disclosures such as Ms. Decembrino's 1998 employment law complaint.

reasonable basis for application of the crime-fraud exception as to any of the categories of Decembrino-related documents Plaintiff seeks.

Plaintiff's "evidence" clearly fails to meet the standard of proof required to establish that otherwise privileged communications were used to further a crime or fraud. In short, the evidence fails to raise the specter of fraud in any way because it does not point to a communication showing that this type of improper or illegal advice was actually provided by counsel at RPR. *See In re Grand Jury*, 705 F.3d at 151 (holding that the crime-fraud exception does not apply unless the movant can first establish a privileged communication sought with the intent of aiding or furthering a crime or fraud). In fact, at no point in the "Decembrino documents" are there any communications from RPR counsel that relate to any alleged cover-up, crime or fraud.[19] *See In re Grand Jury*, 2016 U.S. App. LEXIS 580, at * 5 (9th Cir. Jan. 14, 2016) (holding that district court must "determine that the specific attorney-client communications for which production is sought are sufficiently related to and were made in furtherance of the intended, or present, continuing illegality"). Rather than providing the Court with evidence of this nature, Plaintiff proffers only hollow accusations of the purported concealment of off-label promotions through the alteration of EM-32 forms with citation only to Mr. Harbist's Declaration. (*See* Pl's Mem. at p. 14.).

Nor can Plaintiff properly rely on the regurgitated allegations of his TAC that Aventis engaged in a supposed nationwide "Fraudulent Marketing Scheme" to support the crime-fraud inference he asks the Court to draw. The reasonable basis standard requires Plaintiff to establish

[19] In fact, Ms. Decembrino's complaint repeatedly alleges that RPR's in-house counsel Terence Green took affirmative steps to ensure compliance with RPR policies. (Dkt. 165-3, Exh. D at ¶¶ 26, 28.) In contrast, her complaint includes only a single passing, conclusory reference to the supposed alteration or destruction of documents, without identifying any RPR in-house counsel. (*Id.* at ¶ 29.)

the existence of particular attorney-client communications that were intended to further a specific crime or fraud. *In re General Motors*, 2015 WL 7574460 at *9. A generalized, inferential supposition that such communications "must have" occurred solely because of the supposed scope of Plaintiff's FCA allegations does nothing to meet the reasonable basis standard required for application of the crime-fraud exception.

Even if Plaintiff's allegations and supposed crime-fraud "evidence" could somehow be interpreted as approaching the reasonable basis standard, which it does not, Plaintiff has not and cannot draw a logical causal connection between the privileged documents he seeks and the allegations of fraud relating to the marketing and promotion of Taxotere in his TAC. *See Haines v. Liggett Grp. Inc.*, 975 F.2d 81, 90 (3d Cir. 1992) (to establish application of the crime-fraud exception, the plaintiff first must demonstrate the privileged communications at issue were the "causa pro causa, the advice that leads to the deed"). Here, Plaintiff's allegations and "evidence" relate solely to Nasacort and Lovenox and their marketing by RPR in 1996 and 1997. Even assuming this occurred, it has nothing to do with the promotion and marketing of Taxotere and, as such, cannot be used to establish a reasonable basis that the crime-fraud exception should be applied against Aventis in connection with Plaintiff's Taxotere-based FCA claims.[20] Not only did Ms. Decembrino work in a separate, independent product group at RPR that had nothing to do with Taxotere, but Ms. Decembrino -- through her counsel -- recently admitted that she possesses no knowledge or information concerning Taxotere.

[20] As discussed *infra* at Section C, the "Decembrino documents" and other Decembrino-related documents that Plaintiff seeks to compel Aventis to produce are not relevant or proportionate to the issues and needs of this case; rather, Plaintiff intends to use these documents as improper propensity evidence against Aventis.

Given the unsubstantiated and irrelevant Nasacort and Lovenox-based "evidence" and allegations upon which Plaintiff relies, one can only conclude that his crime-fraud motion amounts to nothing more than a "fishing expedition." *Zolin*, 491 U.S. at 571. There is no reasonable basis for application of the crime-fraud exception as to any of the categories of documents Plaintiff seeks, he cannot meet his burden to pierce Aventis' attorney-client communications, and his motion should be denied.

2. *Counsel for RPR did not Direct Ms. Decembrino to Destroy or Alter Documentary Evidence of Wrongdoing*

Plaintiff asks the Court to infer that during the relevant time period in-house counsel for RPR directed Ms. Decembrino to destroy and alter documentary evidence of wrongdoing regarding impermissible off-label marketing of RPR drugs. No such thing occurred, and Plaintiff presents no reasonable basis for the Court to conclude or "infer" otherwise. In short, the attached sworn Declaration of Richard L. Scheff regarding conversations he had with Terence Green and Mark Feingold, former in-house counsel for RPR during the relevant time period whose names appear in the privileged documents Ms**.** Decembrino misappropriated from RPR, conclusively refute Plaintiff's allegations of a counsel-directed corporate cover-up at RPR.

Mr. Green served as legal counsel for the Primary Care Group at RPR – the same group that Ms. Decembrino and her assistant, Linda Conolly, supported in a marketing role in 1996-97.[21] (Scheff Decl. at ¶¶ 3-5.) Mr. Green confirmed that neither Ms. Decembrino nor Ms. Conolly was a part of the Advanced Therapeutics Group at RPR, and they had no involvement or responsibilities in connection with the marketing, promotion or sale of Taxotere.

[21] Mr. Green is also named in Exhibit FF to Mr. Harbist's Declaration (Dkt. 165-3), a 1997 Wall Street Journal article that attempts to sensationalize Ms. Decembrino's unsubstantiated allegations against RPR. Mr. Green confirmed to Mr. Scheff that he was neither consulted by the WSJ reporter nor asked to provide comment in connection with the story.

(*Id.*) Further, Mr. Green affirmed, in no uncertain terms, that he never directed Ms. Decembrino or any other RPR employee to destroy or alter documents they thought might reflect impermissible off-label promotion of any RPR drug. (*Id.* at ¶¶ 10-11.)

Mr. Scheff also spoke with Mr. Feingold, who likewise directly refutes the stated basis for Plaintiff's crime-fraud motion – namely that in-house counsel for RPR somehow directed Ms. Decembrino (and presumably others) to destroy or alter documentary evidence of wrongdoing. Mr. Feingold served as legal counsel for the Advanced Therapeutics Group at RPR, the group responsible for Taxotere, during the relevant time period. (*Id.* at ¶ 12.) He did not support Ms. Decembrino or anyone else in the Primary Care Group at RPR. (*Id.* at ¶ 13.) Mr. Feingold does not recall Ms. Decembrino or her assistant (and co-plaintiff in Ms. Decembrino's employment law action against the company), Linda Conolly, ever coming to him with any questions or concerns regarding the marketing or promotion of Taxotere, much less requesting direction from him regarding the disposition of company documents that related to the marketing or promotion of Taxotere or any other drug. (*Id.* at ¶ 15.) Finally, Mr. Feingold expressly denies directing anyone to destroy documents or cover up any illegal conduct at any time. (*Id.* at ¶ 16.)

Whereas Plaintiff asks the Court to broadly pierce Aventis' attorney-client privilege based solely on the unverified, unsubstantiated allegations of off-label promotion of Lovenox and Nasacort AQ that Ms. Decembrino made in her 1998 employment suit against RPR, Aventis proffers direct evidence from the in-house RPR counsel in question to refute Ms. Decembrino's (and by extension, Plaintiff's) baseless crime-fraud allegations. Accordingly, Plaintiff's motion should be denied.

3. *The 13 Privileged "Decembrino Documents" Demonstrate There is No Reasonable Basis for Application of the Crime-Fraud Exception*

The parties' dispute arises out of Plaintiff's refusal, once his counsel finally notified Aventis of the existence of the misappropriated "Decembrino documents," to return to Aventis or destroy: (1) 13 privileged documents (five of which counsel for Plaintiff determined were privileged when they first obtained them in 2007); and (2) the vast majority of the "Decembrino documents" that have nothing to do with Taxotere, the subject of this lawsuit. These documents do not, as Plaintiff would have the Court "infer," demonstrate the perpetration or concealment of a crime or fraud on the part of RPR, much less one directed by RPR in-house counsel.

Counsel for Plaintiff and their paralegals have reviewed all of the privileged documents misappropriated by Ms. Decembrino in violation of the spirit, if not the letter, of the Rules of Professional Responsibility. *See* Fed. R. Civ. P. 26(b)(1) and R.P.C. 8.4. Through their review of the privileged and confidential "Decembrino documents," counsel for Plaintiff knows that none of them demonstrate conduct or communications by former RPR attorneys that could even remotely fall under the crime-fraud exception. If there were, as Plaintiff asks the Court to infer, any RPR attorney-client privileged communications in which counsel for the company directed Ms. Decembrino to destroy or alter company documents in an effort to conceal impermissible off-label promotion of Lovenox or Nasacort AQ, then Ms. Decembrino would presumably have taken them with her when she was terminated from her employment and supplied them to counsel for Plaintiff along with the other 3,170 pages of RPR documents that she misappropriated from the company. Therefore, if the Court can reasonably infer anything in connection with Plaintiff's motion, it is that if the 13 privileged documents Ms. Decembrino stole from RPR do not support a "reasonable basis" for application of the crime-fraud exception, then no other documents will. To establish this conclusively, Aventis invites in- camera review

of the 13 privileged documents. Doing so, Aventis respectfully submits, will only further demonstrate that Plaintiff's crime-fraud motion has no merit.

4. *Aventis Did Not Impliedly Waive the Privilege as to the Documents Plaintiff Seeks*

Plaintiff's argument that Aventis impliedly waived the attorney-client privilege as to all three categories of the Decembrino-related documents he seeks because RPR and Aventis supposedly "made tactical use of its investigations" in responding to regulatory correspondence from the FDA's Division of Marketing, Advertising and Communications ("DDMAC") is baseless.

A party challenging application of the attorney-client privilege on the basis of an alleged waiver bears the burden of demonstrating that the waiver, in fact, occurred. *Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc.*, 227 F.R.D. 382, 390 (W.D. Pa. 2005). If an affirmative disclosure of an attorney-client privileged communication is made to a federal agency, the waiver extends to an undisclosed privileged communication only if: (1) the waiver is intentional; (2) the disclosed and undisclosed privileged communications concern the same subject matter; and (3) they ought in fairness to be considered together. Fed. R. Evid. 502(a). Therefore, subject matter waivers – as Plaintiff seeks here – are "limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner." Fed. R. Evid. 502 advisory committee's note (2007).

Plaintiff cannot demonstrate that RPR or Aventis waived the attorney-client privilege in connection with any of the three letter-responses to DDMAC that he cites. (Dkt. 165-3, Exhs. H, I, L.) First, the letters do not disclose the substance of the company's attorney-client privileged communications (Pl's Mem. at p. 28), nor do they purport to disclose the results of any internal

investigations involving counsel.[22] Rather, as requested by DDMAC, the letters describe Aventis' efforts to comply with its previous requests to revise or cease using certain Taxotere marketing materials and express Aventis' intent to comply with DDMAC's regulatory requests going forward.[23] Plaintiff fails to cite a single case where such routine regulatory correspondence with DDMAC[24] has been found to effect a partial waiver of the attorney-client privilege, much less an implied subject matter waiver, and our research has revealed none.

Plaintiff's invocation of the fairness doctrine is equally unavailing, because the DDMAC letters in question: (1) do not disclose the substance of any attorney-client privileged communications; and (2) have not been used by Aventis to gain an unfair advantage in the present litigation. *See Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1426 n.12 (3d Cir. 1991) (noting that the fairness doctrine supports a finding of implied subject-matter

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[22] The waiver cases that Plaintiff cites do not support the proposition that the attorney-client privilege can be waived without an affirmative disclosure (partial or selective) of otherwise privileged communications. For example, most of the disclosures at issue in *In re Sealed Case* reflected attorney-client communications and the court assumed that the attorney-client privilege applied to such communications absent waiver. 676 F.2d 793, 812 (D.C. App. 1982). Similarly, in *Permian Corp. v. United States*, the privileged character of the disclosed communications was not challenged; the only issue on appeal was whether the privilege had been waived. 665 F.2d 1214, 1217 (D.C. App. 1981). In contrast, Aventis' response-letters to DDMAC do not disclose any attorney-client communications and nowhere even reference the advice of counsel.

[23] For example, the August 8, 2001 letter attached as Exhibit H to the Harbist Declaration (Dkt. 165-3) is a response to a regulatory request from DDMAC to cease using certain specific promotional materials. Aventis's letter response states simply: "We wish to assure you that, effective immediately, the use of this sales aid has been discontinued," and "[w]e are discontinuing the use of these [specific billboards], and any similar materials." Like the rest of the DDMAC correspondence Plaintiff cites, this letter nowhere purports to disclose the substance of any privileged communications.

[24] According to Plaintiff, the Court should find a broad, subject-matter waiver of Aventis's attorney-client privilege as to all communications relating to its interactions with the FDA because "Aventis represented [to DDMAC] that it was committed to complying with the law in 1996 and provided its innocent mistake explanation for its misconduct in 2001-2002." (Pl's Mem. at p. 29.) Plaintiff has not, however, cited any evidence that Aventis misrepresented any facts in its letter-responses to DDMAC. Nor has Plaintiff cited any legal authority for the outlandish proposition that a generalized statement of present intent could somehow constitute a waiver of the attorney-client privilege.

waiver only if a party discloses a portion of otherwise privileged communications while withholding the rest *and* the disclosing party disadvantages its adversary by presenting a one-sided story in litigation). Ultimately, Aventis did not disclose the substance of any privileged attorney-client communications in its letters to DDMAC, but even if it had, Aventis has not used the DDMAC letters to tell a one-sided story in the present litigation. The fairness doctrine, therefore, is simply inapplicable.

B. The Decembrino-Related Documents Plaintiff Seeks Are Irrelevant and Not Proportionate to the Needs of the Case

All three categories of privileged and confidential documents that Plaintiff seeks relate in one way, shape, or form to Ms. Decembrino, a former RPR employee who, by her own admission, had no professional experience with, and possesses no knowledge concerning, Taxotere, the subject of this litigation. First, Plaintiff seeks the Court's permission to retain and use the thousands of pages of misappropriated RPR documents his counsel obtained from Ms. Decembrino, some dating from more than 20 years ago, that have absolutely nothing to do with the marketing, promotion, or sale of Taxotere. These misappropriated "Decembrino documents" concern the sales and marketing of Lovenox and Nasacort, two non-chemotherapeutic drugs. Putting aside for the moment the impropriety of counsel for Plaintiff's actions in first obtaining, reviewing, and then secreting these misappropriated documents for eight years, these documents simply are not relevant to the claim or defense of any party to this action and, therefore, do not fall within the permissible scope of discovery under Rule 26.

In addition, Plaintiff seeks to compel the production of any documents Aventis may have that relate in any way to Ms. Decembrino or her lawsuits against RPR and her allegations of off-label promotion of Lovenox and Nasacort AQ. Like Ms. Decembrino, these documents have nothing to do with Taxotere and are completely irrelevant and disproportionate to the reasonable

needs of this case in contravention of F. R. C. P. 26(b)(1). Effective on December 1, 2015, Federal Rule of Civil Procedure 26(b)(1) was amended to provide:

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense **and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.**

Fed. R. Civ. P. 26(b)(1) (emphasis added to identify the amendment).[25] "Thus, considerations of both relevance and proportionality now govern the scope of discovery." *United States ex rel. Shamesh v. CA, Inc.*, No. CV 09-1600-ESH, 2016 WL 74394, at *7 (D.D.C. Jan. 6, 2016). Indeed, "[p]roportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense." Fed. R. Civ. P. 26(b) advisory committee's note (2015).

"[A] party moving to compel discovery bears the initial burden of proving the relevance of the requested information." *Morrison v. Philadelphia Housing Auth.*, 203 F.R.D. 195, 196 (E.D. Pa. 2001). While relevance is not defined under the discovery rules, the term is defined in Rule 401 of the Federal Rules of Evidence. Rule 401 states that in order to be relevant, evidence must have "a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *King v. Hasbro, Inc.*, No. 07–4001, 2009 WL 3157319, at *1 (E.D. Pa. Sept. 28, 2009) (internal citations omitted). Thus, the scope of discovery is limited to those

[25] This amended version "shall govern . . . in all proceedings in civil cases . . . and, insofar as just and practicable, all proceedings then pending." C.J. Robert's Order to Am. Fed. R. Civ. P.

communications and information that are specifically relevant to the claims set forth in the TAC and Aventis' defenses thereto.

Here, the allegations of Plaintiff's TAC are properly limited to Aventis' promotion of Taxotere. At RPR, the marketing and promotion of Taxotere was within the purview of the Advanced Therapeutics Group, a separate business unit from the Primary Care Group with whom Ms. Decembrino worked. Documents related to non-chemotherapeutic drugs, whose marketing and promotion were overseen by separate and different product groups, are simply not relevant to the ultimate question of whether Aventis caused the submission of false claims for Taxotere reimbursement, as Plaintiff alleges in his TAC.

Even if the Court were to determine that non-Taxotere related documents were somehow remotely relevant, the Court must also determine whether Plaintiff's request is proportional to the needs of the case.[26] In determining whether a discovery request is proportional, the court may look to several factors, including "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit . . . ." *Wertz v. GEA Heat Exchangers Inc.*, No. 1:14-CV-1991, 2015 WL 8959408, at *3 (M.D. Pa. Dec. 16, 2015).

First, as discussed above, the non-Taxotere related documents Plaintiff seeks have no bearing on the issues at stake in this action. Nasacort AQ and Lovenox are not mentioned once in Plaintiff's TAC, and the promotion of those drugs by RPR has no importance to the ultimate

[26] The commentary to the 2015 amendments to F.R.C.P. 26 states that "[t]he present amendment restores the proportionality factors to their original place in defining the scope of discovery . . . [and] reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections."

resolution of this case. Ultimately, Plaintiff's FCA claims will fall or rise based on the evidence concerning Aventis' marketing and promotion of Taxotere and the submission of claims to the government for reimbursement of the drug for cancer patients.

Although information still "need not be admissible in evidence to be discoverable," the documents Plaintiff seeks have no probative value. Fed. R. Civ. P. 26(b)(1). The documents Plaintiff seeks, at best, could somehow constitute impermissible propensity evidence regarding RPR's promotional practices while Ms. Decembrino was employed there. *Ansell v. Green Acres Contracting Co.*, 347 F.3d 515, 525-26 (3d Cir. 2003) ("Unfair prejudice under Rule 403 could arise if a jury uses 404(b) evidence to infer propensity rather than intent."). The documents have no connection to Taxotere, the subject of this action, and any possible evidentiary value in the documents is clearly outweighed by the attendant discovery burden they would impose on Aventis.

Finally, to permit discovery concerning the marketing, promotion, and sale of non-chemotherapeutic drugs that are not even mentioned in the TAC over the entire span of the eight-year time period alleged in Plaintiff's TAC would expand the scope of discovery exponentially, imposing an enormous and grossly disproportionate burden and expense on Aventis to identify, preserve, collect, review, and produce such documents.[27] For this reason, as well as the reasons stated above, Plaintiff's motion should be denied.

[27] The interpretation of Rule 26, and all of the Federal Rules of Civil Procedure, is couched in Rule 1, which requires that the Rules "be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." *See* Fed. R. Civ. P. 1 advisory committee's note (2015) (noting that "the parties share the responsibility" to employ the rules consistently with the standards of Rule 1, and that "[e]ffective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure"). Requesting the production of broad categories of documents that have no reasonable connection to the substantive allegations in Plaintiff's TAC does not abide by these precepts – rather, it seeks to impose on Aventis an unreasonable burden of production of documents that fall squarely outside the purview of the action.

C. Aventis Cross-Moves for the Compelled Return of the Misappropriated "Decembrino Documents"

Plaintiff's request for production of the documents that Ms. Decembrino misappropriated from RPR in 1997 and deposited with counsel for Plaintiff in 2007 is more appropriately seen as a request to retain. Plaintiff and his counsel should never have obtained these stolen documents in the first place, and their conduct in reviewing the documents and retaining them in secret for nearly a decade – despite determining that some of the documents were clearly privileged – was improper. Aventis therefore cross-moves for an order directing counsel for Plaintiff to return the "Decembrino documents" immediately, and for an order prohibiting Plaintiff and his counsel from using the misappropriated documents or their contents further in this litigation.

Only 17 documents – out of 3,170 pages – of the misappropriated documents counsel for Plaintiff obtained from Ms. Decembrino even mention Taxotere. Aventis has since reproduced those 17 documents to Plaintiff in discovery. The vast majority of the "Decembrino documents," however, do not relate in any way to the claims or defenses of any party to this litigation, are confidential, and some are privileged. Aventis attempted in good faith to avoid judicial intervention by repeatedly demanding the return of the "Decembrino documents" that are not related to Taxotere, as well as an agreement not to use them during the course of this litigation. Plaintiff's counsel refused, asserting that they are entitled to use the documents—however they were obtained—pursuant to a "public policy exception" for FCA lawsuits. Plaintiff simply is wrong, and the cases Plaintiff's counsel has cited in support thereof are inapposite. There is no "public policy exception" permitting Plaintiffs, while their own FCA lawsuits are pending, to obtain and use misappropriated privileged and confidential documents they received from other non-relator, former employees. Such use and retention of misappropriated privileged and

confidential documents flies in the face of the rules governing discovery and the spirit, if not the letter of the Rules of Professional Conduct. *See* Fed. R. Civ. P. 26(b)(1) and R.P.C. 8.4.

Federal courts have the inherent power to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc*., 501 U.S. 32, 43 (1991)(internal citations omitted). "[T]he inherent power extends to a full range of litigation abuses." *Chambers*, 501 U.S. at 46. This includes the unauthorized taking of documents. *See Perna v. Elec. Data Sys., Corp*., 916 F. Supp. 388, 401 (D.N.J. 1995) (recognizing inherent power of court to impose sanction of dismissal where the plaintiff subverted the litigation process by improperly reviewing documents that belonged to the defendant that were not produced in discovery); *see also Chamberlain Grp., Inc. v. Lear Corp.*, 270 F.R.D. 392, 398 (N.D. Ill. 2010) (finding sanctions appropriate where the plaintiff failed to disclose the "receipt of proprietary or confidential documents" for approximately one year); *Fayemi v. Hambrecht & Quist, Inc*., 174 F.R.D. 319, 324 (S.D.N.Y. 1997) ("[T]he court here has the inherent authority to sanction a party who attempts to use in litigation material improperly obtained outside the discovery process . . . .").

1. *Plaintiff's Counsel Must Return the Misappropriated "Decembrino Documents"*

Plaintiff—through counsel—has improperly obtained privileged and confidential materials that belong to Aventis and which are not otherwise discoverable in this litigation. In *Burt Hill, Inc. v. Hassan*, No. 09-1285, 2010 WL 419433 (W.D. Pa. Jan. 29, 2010), the court addressed a factually similar situation and ordered the return of all privileged and confidential material. Specifically, an unknown source who the parties believed was one of the plaintiff's current or former employees, stole the plaintiff's privileged attorney-client communications, attorney work product, and other confidential materials and delivered them to the defendant. *Id.*

at *1. For months the defendant and his attorney reviewed the documents without notifying the plaintiff, and even then refused to return them. *Id.*

The court found that an attorney who receives privileged or confidential documents is required to immediately "cease review, notify the owner, and abide by the owner's instructions regarding the documents' disposition." *Id.* at *4 (citing *Herman Goldner Co. v. Cimco Lewis Indus.*, 58 Pa. D. & C. 4th 173 (Pa. Ct. Com. Pl. Phila. Cnty. 2002)). These "ethical obligations extend[] not only to privileged documents, but to documents that were proprietary and/or confidential," and "apply with even greater, and stricter, force in connection with advertent but unauthorized disclosures" *Id.* at *4, 8 n.11. The court further concluded that any relief afforded following the unauthorized disclosure of privileged and confidential materials to defendant extends to its attorneys, agents, and "any other persons to whom the [d]efendants or their counsel have provided" the materials. *Id.* at *9.

The court ordered that defendant's counsel "immediately return to [p]laintiff all copies of the [privileged and confidential materials] within their possession" and provide the plaintiff with "written notice identifying all persons who have received copies of the [privileged and confidential materials], which documents were provided, and an explanation of why those documents were provided." *Id.* The court further ordered that the defendant's counsel "ensure the destruction of any copies in their clients' possession, as well as those copies in the possession of any other person to whom the [d]efendants or their counsel have provided [the privileged and confidential documents]." *Id.* Finally, to ensure that the defendant's counsel had returned or destroyed all copies consistent with the court's order, the court also required that defendant's counsel certify, under penalty of perjury, that each of these steps had been completed. *Id.*

Here, Plaintiff's counsel obtained privileged and confidential documents belonging to Aventis from Ms. Decembrino more than eight years ago, at which time a paralegal from Blank Rome reviewed the documents and determined that at least some of them were privileged. Inexplicably, counsel for Plaintiff failed to notify Aventis that they obtained these privileged and confidential documents until July of last year.

When Plaintiff's counsel finally provided copies of the "Decembrino documents" to Aventis in July 2015, Aventis promptly requested that counsel return the documents and identify who had reviewed them. Aventis explained that counsel for Plaintiff obtained the documents in violation of Ms. Decembrino's employment agreement and that they contained confidential internal communications, memoranda, and related documents—all of which are irrelevant to the litigation at hand with the exception of 17 Taxotere-related documents (which Aventis agreed Plaintiff could keep). Aventis would not have agreed to produce the other 3,000+ pages of non-Taxotere-related "Decembrino documents" had Plaintiff requested them in discovery. Aventis further advised that the "Decembrino documents" contained eight additional privileged documents that were not set aside by counsel for Plaintiff, and which clearly had been reviewed by counsel, and agreed to provide a privilege log detailing these documents, which included internal communications between Aventis and their counsel or documents reflecting legal advice and meeting minutes where Aventis attorneys provided such advice. Despite Aventis' multiple requests, counsel for Plaintiff refused to return the privileged and confidential materials they obtained from Ms. Decembrino in 2007. (Dkt. 165-3, Exh. C, Oct. 15, 2015 letter to R. Scheff.)

In correspondence with Aventis, counsel for Plaintiff contended they may properly retain and use the 'Decembrino documents" because Plaintiff did not take the documents directly from Aventis and because the documents are supposedly "reasonably necessary to Plaintiff's pursuit

of this action." In other words, counsel for Plaintiff argued that the violation of Aventis' rights which enabled Plaintiff to obtain the "Decembrino documents" should be ignored for public policy reasons under the FCA.

There is, however, no public policy exception under the FCA where a relator obtains documents misappropriated by a third party that are unrelated to their own FCA claims. *See Walsh v. Amerisource Bergen Corp*., No. 11-7584, 2014 WL 2738215, at *6-7 (E.D. Pa. June 17, 2014). Similarly, in *U.S. ex rel. Notorfransesco v. Surgical Monitoring Association, Inc*., No. 09-1703, 2014 WL 7008561, at *5 (E.D. Pa. Dec. 12, 2014), the relator took documents in violation of a confidentiality agreement with her employer-defendant, who in turn filed a counterclaim against the relator for breach of contract and sought an injunction prohibiting use of the documents and ordering their return. Although the court recognized a public policy exception permitting confidentiality agreements to give way to the needs of relators in FCA litigation, the court stated it only would apply the public policy if the information taken was related to proving the relator's claim, which the relator had not yet shown.

Here, counsel for Plaintiff obtained documents from a former employee (Ms, Decembrino) that she improperly took from RPR in violation of her employment agreement and hid that fact from Aventis for nearly a decade. These are not documents that Plaintiff himself took from Aventis during the course of his employ to support his own FCA claims. Nor can Plaintiff, as required in *Walsh* and *Notorfrancesco*, make a particularized showing that these non-Taxotere related RPR documents are reasonably necessary to his FCA claims.

2. *Ms. Decembrino's Employment Agreement Prohibited Her from Taking or Disclosing RPR Documents*

Ms. Decembrino's employment agreement explicitly states that upon termination of her employment she must promptly return to the company "any unpublished memoranda, notes,

records, reports, sketches, plans or other documents held by [her] concerning any information, knowledge or data referred to in paragraph 1 herein, ***or*** pertaining to [RPR's] business or contemplated business, whether confidential or not." (Dkt. 165-3, Exh. B, Decembrino Employment Agreement at ¶ 5) (emphasis added).

During the parties' telephone conference on November 13, 2015 to discuss these issues, Plaintiff's counsel argued (for the first time) that the confidential and privileged RPR documents counsel obtained from Ms. Decembrino did not fall within the scope of her employment agreement because they were not related to trade secrets and because the term "confidential" is not specifically defined in the employment agreement. Counsel's argument is misplaced. Paragraph 5 of Ms. Decembrino's employment agreement requires the immediate return of all documents "referred to in paragraph 1," which covers patents and discoveries, ***or*** "pertaining to [RPR's] business" regardless of confidentiality. Thus, Ms. Decembrino's employment agreement required her to return and not disclose the documents she provided to Plaintiff's counsel. Accordingly, Plaintiff's counsel must promptly return the documents they received in violation of Ms. Decembrino's employment agreement.[28]

In accordance with the foregoing, Aventis respectfully requests that the Court order Plaintiff to: (1) return all RPR documents that he or his counsel obtained from Elaine

[28] Even if Ms. Decembrino's employment agreement did not prohibit the misappropriation and disclosure of these documents, her actions constitute the tort of conversion, thereby requiring return of the documents. *Synthes, Inc. v. Emerge Med., Inc.*, No. 11-1566, 2012 WL 4205476, at *30 (E.D. Pa. Sept. 19, 2012) ("[U]nder Pennsylvania law, conversion is the deprivation of another's right of property, or use or possession of a chattel, or other interference therewith, without the owner's consent and without legal justification."(internal quotations omitted)). Under Pennsylvania law, an employee's retention of documents belonging to their employer following termination constitutes conversion. *See Prudential Ins. Co. of Am. v. Stella*, 994 F. Supp. 318, 324 (E.D. Pa. 1998) (finding Prudential stated claim for conversion where defendant-insurance agent failed to return client files and time cards in a timely fashion); *Fort Washington Res., Inc. v. Tannen*, 846 F. Supp. 354, 362 (E.D. Pa. 1994) (finding conversion where consultant refused to return documents he prepared for former employer).

Decembrino except the 17 Taxotere-related documents Aventis previously produced; (2) identify all individuals, including third parties, who reviewed any of the documents at any time; (3) identify any third persons or other parties provided access to (or copies of) any of the RPR documents Plaintiff obtained from Ms. Decembrino; (4) refrain from further using these documents during this litigation; (5) immediately identify and disclose to Aventis any additional RPR or Aventis attorney-client privileged communications or any work product that Ms. Decembrino or any other former employee disclosed to them at any time (and produce to Aventis all related documents, communications, interview notes and memoranda); and (6) certify compliance to the Court and Aventis with the order entered on this Cross Motion or risk the imposition of sanctions.

IV. CONCLUSION

For the foregoing reasons, Aventis respectfully asks this Court to deny Plaintiff's Motion to Compel and Application for the Crime-Fraud Exception (Dkt. 165) with prejudice. Additionally, Aventis asks this Court to grant its Cross-Motion to Compel the Return of the misappropriated "Decembrino documents" and direct Plaintiff to provide the further relief requested therein.

Respectfully submitted,

Date: January 29, 2016

s/ Richard L. Scheff

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically and is available for viewing and downloading from the ECF system; it has been sent to the following persons via the Court's electronic filing system on this 29th day of January 2016:

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