IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA ex rel. YOASH GOHIL,	:	
	:	**CIVIL ACTION**
Plaintiff/Relator,	:	
v.	:	
	:	**NO. 02-2964**
SANOFI U.S. SERVICES INC., et al.,	:	
Defendants.	:	

ORDER

AND NOW, this 29th day of September, 2016, upon consideration of the plaintiff/relator's motion to compel (Doc. No. 165) and defendants' cross-motion to compel (Doc. No. 170), and all responses thereto, it is hereby **ORDERED** that the plaintiff's motion to compel is **GRANTED** and the defendants' cross-motion to compel is **DENIED**.[1]

[1] Plaintiff/relator Yoash Gohil brings this action under the False Claims Act (FCA), alleging that the defendants engaged in a fraudulent marketing scheme of Taxotere, which caused numerous healthcare providers to submit false claims to federally funded health insurance programs. Taxotere is a chemotherapy agent manufactured by Aventis, which Mr. Gohil was assigned to promote and sell in the Philadelphia region. For a more complete background of this qui tam action, see my memorandum denying the defendants' motion to dismiss the Second Amended Complaint (Doc. No. 125, Mar. 30, 2015). See also Order denying defendants' motion to dismiss the Third Amended Complaint, Doc. No. 151, Aug. 20, 2015.

The documents offer evidence that the defendants violated provisions in the Food, Drug, and Cosmetic Act (FDCA). The plaintiff alleges that the documents offer information about an elaborate corporate scheme by Rhone-Polenc Rorer (RPR)(Aventis' predecessor) to market Taxotere and other drugs to physicians for off-label uses. See In re Schering Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d 235, 240 (3d Cir. 2012)(noting that the FDCA's regulatory regime prohibits manufacturers from directly advertising off-label uses, such as through labeling claims or explicit statements made by sales representatives). Defendant Aventis was formed in 1998 when Rhone-Polenc Rorer (RPR) and Hoescht Marion Roussel merged. Mr. Gohil was an employee of Hoescht; his sales manager was an RPR sales representative who had been promoting Taxotere since 1996. Mr. Gohil alleges that the sales practices of RPR continued when RPR merged and Aventis was formed.

At the heart of the plaintiff's motion to compel is the issue of relevance. The defendants argue that these documents are irrelevant because they mostly involve the sales and marketing of Nasacort AQ and Lovenox. The defendants also argue that the marketing of Taxotere was carried out by a different business unit than Lovenox. The plaintiff

The defendants shall produce the following documents to the plaintiff/relator within **thirty (30) days** of the entry of this Order: [2]

1. All non-privileged documents produced by ex-Rhone-Poulenc Rorer ("RPR") employee Elaine Decembrino to Blank Rome LLP in 2007;[3]

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has offered evidence that the alleged fraudulent marketing scheme involved upper management. For this reason, the fact that the drugs were marketed by different units would be of little consequence. From what the plaintiff has provided, the directives to market Nasacort, Lovenex, and Taxotere may have come from management overseeing both units. The defendants' argument is not persuasive.

This evidence is relevant to the defendants' state of mind, motive, corporate intent, and/or reckless disregard for the truth or falsity of claims related to the plaintiff's action. It is discoverable under the federal rules of evidence. See FED. R. EVID. 404(b)(2)("This [character] evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.").

[2] The plaintiff has asked for the ability to use all of these documents in pre-trial proceedings "without restriction." These documents are relevant and discoverable. The documents may be used to support pre-trial motions so long as this use complies with any confidentiality agreements the parties have regarding discovery. Whether these documents are admissible for the purpose of finding judgment for the plaintiff is a different question to be addressed at a later (more appropriate) time.

[3] Upon termination from RPR in 1997, Ms. Decembrino took with her several thousand pages of documents, which outlined RPR's marketing of certain drugs off-label. Ms. Decembrino subsequently filed an employment action, which settled. In 2007, Ms. Decembrino gave these documents to plaintiff's counsel. Before attorneys reviewed the documents, a paralegal not involved in this action reviewed them to determine which may be covered by the attorney-client privilege. Those documents the paralegal considered privileged were sealed in an envelope. The other documents were reviewed by plaintiff's counsel for use in the deposition of Ms. Decembrino. Before Ms. Decembrino's deposition was taken in 2015, plaintiff's counsel notified defense counsel that he possessed these documents from Ms. Decembrino. Plaintiff's counsel provided defense counsel with all of the documents Ms. Decembrino gave him, including the documents which had been set aside as privileged. After some debate about whether other documents were also privileged, the defendant produced only 17 of the documents as part of discovery because those involved Taxotere but requested that the other documents be returned as irrelevant/misappropriated.

The defendant has moved for sanctions against the plaintiff, claiming that he should not be permitted to use the documents Ms. Decembrino "misappropriated" and gave to plaintiff's counsel. The defendant cites Burt Hill, Inc. v. Hassan, No. 09-1285, 2010 WL 419433 (W.D. Pa. Jan. 29, 2010), for this request. In Burt Hill, the documents in question were received from "an anonymous source" and implicated possible hacking of the opposing party's computers. It also does not appear that this case involved a False Claims Act action. Burt Hill is distinguishable.

The parties have provided the court with Ms. Decembrino's employment agreement. It is not clear from this agreement (which appears to be more focused on intellectual property protection) that Ms. Decembrino's actions necessarily violated the agreement or that the agreement covered the "misappropriated" documents. Regardless, the defendant has not filed a breach of contract action against Ms. Decembrino; the question of whether the documents were legally "misappropriated" is not one for this court to decide.

Even if the documents were "misappropriated," Ms. Decembrino's actions would not necessarily warrant exclusion of using the documents in this case. Federal courts recognize that there is a strong public policy to allow relators to use corporate documents from the defendant in the prosecution of FCA claims. See United States ex rel. Notorfransesco v. Surgical Monitoring Ass'n, Inc., No. 09–1703, 2014 WL 7008561, at *5 (E.D. Pa. Dec. 12, 2014) (Tucker, C.J.)("[P]rohibiting Notorfransesco's use of any confidential materials and demanding their return to SMA may be improper if such materials are "reasonably necessary" to pursuing her FCA claim."); United States ex rel. Head v. Kane Co., 668 F. Supp. 2d 146, 151-52 (D.D.C. 2009)("Enforcing a private agreement that requires a qui tam plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the

2. All non-privileged documents relating to communications about Ms. Decembrino between and/or among Aventis/RPR attorneys and management from 1996 to 2004; and

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defendant who is under investigation would unduly frustrate the purpose of [the FCA]."); United States ex rel. Ruhe v. Masimo Corp., 929 F. Supp. 2d 1033, 1038 (C.D. Cal. 2012)("Relators sought to expose a fraud against the government and limited their taking to documents relevant to the alleged fraud. Thus, this taking and publication was not wrongful, even in light of nondisclosure agreements, given 'the strong public policy in favor of protecting whistleblowers who report fraud against the government.'"(citation omitted)); U.S. v. Cancer Treatment Centers of America, 350 F.Supp.2d 765, 773 (N.D. Ill. 2004)("Relator and the government argue that the confidentiality agreement cannot trump the FCA's strong policy of protecting whistleblowers who report fraud against the government. Their position is correct and the defendant concedes as much."); Siebert v. Gene Security Network, Inc., 11–cv–01987–JST, 2013 WL 5645309, at *8 (N.D. Cal. Oct. 16, 2013)("The Court agrees that any alleged obligation by Siebert not to retain or disclose the confidential documents that form the basis of this action is unenforceable as a matter of public policy because it would frustrate Congress' purpose in enacting the False Claims Act—namely, the public policy in favor of providing incentives for whistleblowers to come forward, file FCA suits, and aid the government in its investigation efforts."); U.S. v. Mount Sinai Hosp., No. 13 Civ. 4735(RMB), 2015 WL 7076092, at *6 (S.D.N.Y. Nov. 9, 2015)("[T]he Court finds that there is strong public policy in favor of protecting those who report fraud against the government."). See also X Corp. v. Doe, 805 F. Supp. 1298, 1310 n.24 (E.D. Va. 1992)(recognizing public policy exception to employment breach of contract for taking documents showing illegal activity); U.S. ex rel. Ruscher v. Omnicare, Inc., No. 4:08–cv–3396, 2015 WL 4389589, at *4-5 (S.D. Tex. Jul. 15, 2015)(recognizing public policy exception). Compare Woods v. Boeing Co., No. 2:11–cv–02855–RMG, 2013 WL 5332620, at *1-5 (D.S.C. Sept. 23, 2013)(ordering the return of confidential corporate documents misappropriated to prosecute employee's ADA claim).

While courts are split on whether this public policy overrides an employee's breach of an employment agreement in the context of the FCA, most federal courts have held that documents, which were improperly taken from a company, may be used to support a False Claims Act claim based on a "public policy exception." See Stephen M. Payne, Let's be Reasonable: Controlling Self–Help Discovery in False Claims Act Suits, 81 U. CHI. L.REV. 1297, 1310 (2014)("Courts are currently split on the issue, using one of three distinct approaches. The first and largest group of courts holds that public policy voids confidentiality agreements in the context of the [False Claims Act]. A second, smaller group takes the opposite approach, holding that confidentiality agreements are enforceable. The Ninth Circuit has adopted a third approach, holding that the admissibility of documents obtained through self-help discovery turns on the reasonableness of the relator's conduct in relation to the need for the documents."). These documents should be relevant to the FCA claim in order for the exception to apply. See Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc., 637 F.3d 1047, 1061-62 (9th Cir. 2011)(explaining that, even if public policy exception available, would not apply to taking more documents than what was necessary to prosecute qui tam claim); Shmushkovich v. Home Bound Healthcare, Inc., No. 12 C 2924, 2015 WL 3896947, at *2 (N.D. Ill. Jun. 23, 2015)("The protections afforded self-help discovery under the False Claims Act, however, have only extended to the collection of materials that are reasonably related to the formation of a case.").

Furthermore, it would be inefficient and a waste of resources to have the plaintiff return the "misappropriated documents" only to then have them produced in discovery. See X Corp. v. Doe, 805 F. Supp. 1298, 1311-12 (E.D. Va. 1992)(denying request for return of misappropriated corporate documents because would be inefficient and no irreparable harm possible under the parameters of discovery disclosure); Shmushkovich v. Home Bound Healthcare, Inc., No. 12 C 2924, 2015 WL 3896947, at *3 (N.D. Ill. Jun. 23, 2015)("[C]ourts, however, have recognized the inefficiency of ordering return of documents that formed the basis of a relator's claims and that will inevitably be recovered in discovery." (citations omitted)).

Plaintiff's counsel also received "misappropriated" documents from two other former employees. The defendants did not object to the plaintiff's retention of those documents because these documents involved Taxotere and Aventis, not RPR and other drugs. As the defendant's actions show, the real question here is one of relevance, not of propriety.

3. All non-privileged documents relating to any investigations, reviews, and/or inquiries, whether done by counsel or not, of Decembrino's allegations about off-label marketing, the alteration or destruction of records, and/or EM-32 forms from 1996 to 2004.[4]

IT IS FURTHER ORDERED that Aventis shall produce to the Court, for *in camera* review and a determination as to whether the crime-fraud exception applies, documents over which Aventis claims any privilege and that (1) relate to any investigation, inquiry, and/or review made in response to FDA communications and warnings to Aventis/RPR; (2) relate to Aventis/RPR's responses to the FDA communications and warnings; or (3) are among the documents Elaine Decembrino provided to counsel for Plaintiff/Relator.[5] These documents shall be forwarded to the Court within **thirty (30) days** of the entry of this Order.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.

[4] The defendant argues that this discovery request is not "proportional to the needs of the case" and its production would be too burdensome. The plaintiff already has the first category of discovery requested. The other two categories requested relate only to Ms. Decembrino. Given the narrow scope of this topic, discovery of this information would not be so burdensome to prevent its production. Furthermore, the defendant claims that the sorts of documents the plaintiff requests (i.e., communications indicating that forms and documents were not destroyed or altered) do not exist. If this is so, there will likely be very little the defendant has to produce. On the other hand, the information being requested is highly relevant to intent element of the plaintiff's claims.

[5] It is unclear from the briefing what these privileged communications involve and whether they are covered by the privilege or the crime-fraud exception. The plaintiff/relator has provided "a factual basis adequate to support a good faith belief by a reasonable person…that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." U.S. v. Zolin, 491 U.S. 554, 572 (1989). I will need to see them to make this determination. After I have reviewed the documents, I will rule on whether the crime fraud exception applies and/or the documents are privileged.