Exhibit B

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Block Drug Co., Inc. v. Sedona Laboratories, Inc.
D.Del.,2007.
Only the Westlaw citation is currently available.
United States District Court,D. Delaware.
BLOCK DRUG COMPANY, INC., Plaintiff,
v.
SEDONA LABORATORIES, INC., et al., Defendant.
No. CIV A 06-350.

April 19, 2007.

Steven J. Balick, John G. Day, Tiffany Geyer Lydon, Ashby & Geddes, Wilmington, DE, for Plaintiff.
John W. Shaw, Karen Elizabeth, Keller Young, Conaway, Stargatt & Taylor, John G. Day, Ashby & Geddes, David S. Eagle, Patrick Andrew Costello, Klehr, Harrison, Harvey, Branzburg & Ellers, Wilmington, DE, Chad H. Conelly, Pro Hac Vice, David B. Goldstein, Pro Hac Vice, for Defendant.

MEMORANDUM ORDER

THYNGE, Magistrate J.

*1 Block Drug seeks production of two agreements between defendants Sedona Laboratories, Inc. ("SLI") and Nutri-Health Supplements, LLC ("NHS"), which SLI has refused to produce. Specifically, in its written submission and argument presented during a telephonic conference on March 28, 2007, Block Drug seeks production of the November 1, 2006 Settlement Agreement and Limited Mutual Release and the June 30, 2006 Agreement between SLI and NHS regarding the Confidentiality of Shared Opinion. SLI and NHS urge against production of both documents.

Block Drug's Position

Block Drug argues that based upon the Stipulated Protective Order entered on December 11, 2006, privilege for both documents may be maintained and as a result, both should be produced for outside counsel's eyes only. Block Drug maintains that SLI's reliance on FRE 408 is misplaced since it is directed to the admissibility, and not the discoverability, of compromise and offers to compromise.FN1It asserts that SLI improperly claims the applicability of the joint defense or common interest privilege. In support of its argument, Block Drug notes that both agreements were entered into before any joint defense effort existed between SLI and NHS and relies on the execution date of December 15, 2006 of the Joint Defense Agreement between defendants. Block Drug contends that the signing of that Agreement in December 2006, more than 2 months after the settlement agreement was signed, evidences that SLI and NHS previously had conflicting legal interests.

FN1. During the teleconference, Block Drug commented that only SLI included the documents in question on its privilege log. Therefore, it argues, since NHS failed to list either document as subject to privilege, NHS has waived any such claim.

SLI and NHS's Position

In opposing production, SLI and NHS point to cases which suggest that the joint defense or common interest privilege is an extension of the attorney-client privilege and the attorney work product doctrine. As background, they note that NHS, in January 2006, acquired all rights and interest of SLI in a product containing the alpha-galactosidase enzyme, which is in issue in the instant patent action. They contend that Block Drug fails to prove that their representations of a joint defense effort, from the onset of litigation, are inaccurate.[FN2] They maintain that the existence of the Opinion Agreement (the June 30, 2006 Agreement) alone is evidence of their joint cooperation as early as June 2006, more than six months before the execution of the Joint Defense Agreement,[FN3] which memorializes defendants' prior understanding regarding their

joint defense efforts. SLI and NHS rely on FRE 408 and its prohibition that acceptance of an offer to settle "is not admissible to prove liability for or invalidity of the claim or its amount."[FN4]

FN2. Defendants' argument requires Block Drug to prove a negative and suggests that Block Drug bears the burden of disproving a privilege before SLI and NHS are required to prove its existence.

FN3. The court understands that Block Drug is not requesting production of the Opinion Agreement and that it has not been produced.

FN4. During its oral presentation, Block Drug argued that the settlement agreement may be relevant to the issues of liability, damages, willfulness and knowledge-all matters that go directly to the validity or invalidity of and the amount of a claim.

Discussion

As a result of the parties' written and oral arguments, the court reviewed *in camera* the two agreements in dispute and the Joint Defense Agreement dated December 15, 2006. Below are the court's findings.

Pursuant to FRCP 26(b)(1), discovery is to be liberally allowed and parties "may obtain discovery regarding any matter not privileged, which is relevant to the claim or defense of any party...." Under the discovery rules, relevance is broader than admissibility at trial, and the rules recognize that "relevant information need not be admissible at trial if the discovery appears to be reasonably calculated to *lead to...* admissible evidence."*See*FRCP 26(b)(1). (emphasis added). Moreover, "while admissibility and discoverability are not equivalent, it is clear that the object of the inquiry must have some evidentiary value before an order to compel disclosure of otherwise inadmissible material will issue."*Bottaro v. Hatton Assoc.*, 96 F.R.D. 158, 159 (E.D.N.Y.1982). Therefore, evidence of settlement negotiations may be discoverable under Rule 26's broad provisions. *Lesal Interiors, Inc. v. Resolution Trust Corp.*, 153 F.R.D. 552, 561 (D.N.J.1994). SLI and NHS reason that their agreements at issue are inadmissible under FRE 408"to prove liability for or invalidity of the claim or its amount."As noted in the 2006 *Advisory Committee Notes,*Rule 408 cannot be read to immunize documents, such as preexisting materials, merely because they were "presented to an adversary in compromise negotiations."Balancing FRE 408 with the breath of discovery is a difficult exercise, however the focus of Rule 408 is to recognize the strong public policy favoring settlement and to promote that policy. Courts in this circuit and others, to effectuate the goals of both rules, have required a more " 'particularized showing' that the evidence sought is relevant and calculated to lead to the discovery of admissible evidence."*Lesal Interiors, Inc.*, 153 F.R.D. at 562. *See also, Fidelity Federal Savings and Loan Assoc. v. Felicetti*, 148 F.R.D. 532 (E.D.Pa.1993); *Bottaro, supra.*The court does not find that that showing has been made by Block Drug. Moreover, it is unclear whether the Settlement Agreement contains information relevant to the issues in this case based on the court's present understanding of those issues.

*2 SLI and NHS also maintain that neither document should be produced because of the joint defense or common interest privilege, which protects communications between individuals and entities and counsel for another person or company when the communications are " 'part of an on-going and joint effort to set up a common defense strategy." ' *In the Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir.1986), *quoting Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir.1984). The burden is on the party asserting the privilege to establish its existence by showing that "(1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived." *Id. citing, In re Grand*

Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F.Supp. 381 (S.D.N.Y.1975); *see also, Grand Jury Empanelled February 14, 1978*, 603 F.2d 469, 474 (3d Cir.1979). None of the cases cited by any litigant in the present matter addresses whether an agreement to share privileged information protects all contents of that agreement which prove and primarily relate to the *existence* of a common defense arrangement. Moreover, the cases cited do not address situations in which a protective order drafted, stipulated among the parties and ordered by the court exists and recognizes the need to and authorizes the disclosure of confidential, but not privileged, information under specific procedures. The Protective Order in the instant case deals with confidential information and Rule 26(c), in particular Rule 26(c)(7), levels of confidential information and the procedures regarding production for each level. Therefore, Block Drug's argument that production of the agreements is consistent with the Protective Order is misplaced. The Protective Order does not require nor is necessarily directed to production of documents which are subject to privilege. Further, from the court's review of the June 30, 2006 Agreement, a joint defense arrangement between SLI and NHS exists, at least on the issue of obtaining an opinion of counsel, because the common interests are identical and legal and not solely commercial. That being said, however, the court determines that certain relevant portions of that Agreement should be produced which directly evidence that a common interest privilege exists.

Regarding Block Drug's brief argument that privilege has been waived because NHS failed to include either agreement on its privilege log, the court finds that in light of the relationship between the parties as evidenced by the Agreements, the responsibility for maintaining the privilege rested with SLI, who did include the Agreements on its privilege log. As a result, no waiver occurred. Therefore,

IT IS ORDERED that:

1. Certain portions of the June 30, 2006 Agreement shall be produced consistent with the provisions of the Protective Order for outside counsel's eyes only. They are as follows:

*3 a. The first paragraph through Recital paragraph C.

b. Regarding Recital paragraph D from the words "Nutri-Health" through "retained", then from the words "to" through "Letter" and then from "in" through "Litigation."

c. Recital paragraph E.

d. Concerning Recital paragraph F from "the Parties to "("Opinion Letter")" and from "in light" to "Litigation."

e. Recital paragraph G.

f. Regarding paragraph 1, page 2 from "SLI shall use" through "Letter."

g. Regarding paragraph 2, page 2 from the beginning of the of the paragraph through "Agreement."

2. Certain portions of the Settlement Agreement and Limited Mutual Release Agreement dated November 1, 2006 shall be produced consistent with the Protective Order for outside counsel's eyes only, which include the title of the Agreement through the opening paragraph.

D.Del.,2007.
Block Drug Co., Inc. v. Sedona Laboratories, Inc.
Slip Copy, 2007 WL 1183828 (D.Del.)

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Gutter v. E.I. DuPont de Nemours and Co.
S.D.Fla.,2001.
Only the Westlaw citation is currently available.
United States District Court,S.D. Florida.
Steven J. GUTTER, on behalf of himself and all others similarly situated, Plaintiff,
v.
E.I. DuPONT DE NEMOURS AND COMPANY and Edgar S. Woolard, Jr., Defendants.
No. 95-2152-CIV-GOLD.

Jan. 31, 2001.

Barry S. Taus, Bruce E. Gerstein, Kevin S. Landau, Noah H. Silverman, Scott W. Fisher, Garwin Bronzaft Gerstein & Fisher LLP, Robert I. Harwood, Wechsler Harwood LLP, New York, NY, C. Oliver Burt, III, Michael J. Pucillo, Robert Scott Palmer, Manuel Juan Dominguez, Berman Devalerio Pease Tabacco Burt & Pucillo, West Palm Beach, FL, Elwood S. Simon, John Zuccarini, Elwood S. Simon & Associates, Birmingham, MI, Marvin A. Miller, Miller Faucher Cafferty & Wexler, Chicago, IL, for Plaintiff.
Crescenzo D'Avossa, pro se.
Darin P. McAtee, David Boies, Evan R. Chesler, Cravath Swaine & Moore LLP, New York, NY, David Boies, Boies Schiller & Flexner, Armonk, NY, Dawn Giebler-Millner, John A. Boudet, Greenberg Traurig, Orlando, FL, Edward A. Moss, Shook Hardy & Bacon, Humberto H. Ocariz, Humberto Ocariz PA, Miami, FL, for Defendants.

REPORT AND RECOMMENDATION REQUIRING DISCOVERY OF CERTAIN SETTLEMENT DOCUMENTS

THEODORE KLEIN, Special Master.

*1 DuPont settled a number of cases brought against it arising out of claims involving Benlate. In many of those cases, the parties agreed by contract to keep the terms of those settlements confidential. Plaintiff now seeks discovery of those settlement documents including some underlying documents as part of the 42 case discovery program, and DuPont has resisted such discovery, as it was contractually obligated to do in some of those agreements. Some agreements apparently only require the plaintiffs, and not DuPont, to maintain confidentiality.

Federal Rule of Evidence 408 creates no settlement privilege for purposes of discovery, but rather precludes the admission of compromise negotiations into evidence. Federal Civil Procedure Rule 26(b)(1) still requires a showing that settlement-related materials must appear reasonably calculated to lead to the discovery of admissible evidence before they may be discovered.*Morse/Diesel, Inc. v. Trinity Industries, Inc.*, 142 F.R.D. 80 (S.D.N.Y.1992). Some courts require a particularized showing of relevancy of such information, *e.g. Fidelity Federal Savings and Loan*, 148 F.R.D. 532 (E.D.Penn.1993); *Bottaro v. Hatton Associates*, 96 F.R.D. 158 (E.D.N.Y.1982), while others reject this extra condition as violative of the "modest threshold" of relevancy Rule 26(b) requires. *Bennett v. LaPere, M.D.*, 112 F.R.D. 136, *139-140* (D.R.I.1986) (explicitly rejecting the *Bottaro* approach in holding that once material is shown to be relevant and not privileged, the party resisting discovery must show good cause for nondisclosure). In either case, Plaintiff has made a sufficient showing, and DuPont does not automatically disagree with that position.[FN1]

FN1. Although DuPont obviously disagrees with the conclusions reached by Plaintiff in justifying discovery of these settlement documents, it apparently concedes that given the broad scope of Rule 26(b), this normally protected area is discoverable within the aegis of the ostensible legal theories advanced by Plaintiff. It does so by recognizing Plaintiff's "asserted need for information about the settlements in the 42 cases" although not conceding the rel-

evance of that information.

Where the litigants part company is on the issue of disclosure when the parties to the settlement agreement have entered into a confidentiality agreement. DuPont contends that in some of the agreements it is bound to maintain confidentiality, and that therefore it cannot produce settlement-related documents without violating its contractual obligations to maintain the confidentiality of those settlements. As to those agreements in which only the plaintiff is bound, DuPont has no such obligation, and accordingly has no cognizable objection on this ground. In those agreements in which DuPont is bound to maintain confidentiality, other considerations here call for overriding those strictures.

Despite the salutary purposes of preserving confidentiality to encourage settlements, under appropriate circumstances courts have the authority to encroach upon such agreements. *Bennett, supra., ABF Capital Management v. Askin Capital,* 2000 WL 191698 (S.D.N.Y.2000) (Litigants cannot shield a settlement agreement from discovery merely because it contains confidentiality provisions if it itself is relevant to the subject matter of the action, or is likely to lead to relevant evidence). Citing public policy concerns, a number of courts have held that such confidentiality provisions will not be utilized as a shield to obstruct the discovery process. *Channelmark Corporation v. Destination Products International, Inc.,* 2000 WL 968818 (N.D.Ill.2000); *Key Pharmaceutical, Inc. v. ESI-Lederle, Inc.,* 1997 WL 560131 (E.D. Penn 1997); *Tribune Co. v. Purcigliotti,* 1996 WL 337277 (S.D.N.Y.1996); *Young v. State Farm Mutual Automobile Insurance Co.,* 169 F.R.D. 72 (S.D.W.V.1996); *Kalinauskas v. Wong,* 151 F.R.D. 363 (N.D.Nev.1993); *Koprowski v. Wistar Institute of Anatomy and Biology, 1993 WL 332061 (E.D.Penn.1993); City of Hartford v. Chase,* 942 F.2d 130*(2nd Cir.1991); See also Bank of America National Trust & Savings Ass'n v. Hotel Rittenhouse Associates,* 800 F.2d 339 (3d Cir.1986). This is particularly true when confidentiality provisions may have the effect of silencing witnesses with a settlement agreement where the facts of one controversy are relevant to another. *See, Channelmark and Kalinauskas, Id.; Wendt v. Walden University, Inc.,* 1996 WL 84668 (D.Minn.1996); *Scott v. Nelson,* 697 So.2d 1300 (Fla. 1st DCA 1997). ("Settlement agreements which suppress evidence violate the greater public policy").

*2 In this instance, there are sufficient reasons to require disclosure of the settlement agreements. The Plaintiff's theories of recovery include claims that DuPont and its attorneys engaged in a fraudulent scheme to conceal material adverse evidence in many cases relating to Benlate testing, and that DuPont issued false statements which misled the securities market as to the extent of DuPont's potential exposure in the Benlate cases, thus artificially inflating the price of DuPont's stock.

Discovery of the settlement documents appears reasonably calculated to lead to admissible evidence on those issues. Plaintiff's theories include claims that there may have been selective disclosure and advertisement of certain settlements favorable to DuPont and a pattern of seeking to keep confidential those settlements where the adverse results had been discovered. In addition, the allegations raised by plaintiff regarding the *Davis Tree* settlement and its aftermath lend further support to the proposition that discovery of settlement information requested in this instance falls within the ambit of F.R.C.P. 26(b)(1).[FN2]

FN2. DuPont has not responded to those allegations, but has strongly maintained that it plans to save that fight for another day. Plaintiff contends that after settling *Davis Tree* and other cases with DuPont, the Friedman Rodriguez firm was hired by DuPont for $6,445,000 to perform unspecified legal work, and failed to disclose this retention to its clients or the courts. At this juncture, these allegations, together with the reasons set forth above, raise sufficient reasons to justify disclosure of the

confidential settlement agreements under the standards enunciated above.

As for DuPont's time frame argument, the time period of the alleged fraud does not necessarily circumscribe the period of discovery. In fact, in previous Reports, the Special Master has recommended the temporal scope of discovery to be from January 1, 1992 through November 8, 1996. The *Davis Tree* settlement took place in August of 1996.

The Davis Tree allegations raised by the plaintiff call for further airing of the facts surrounding that settlement, including revisiting any new *subpoenas duces tecum* issued to the Friedman, Rodriguez law firm and its successors.

Plaintiff has asked for settlement-related documents from the 42 cases consisting of the agreements, damage analyses, expert reports, negotiating guidelines and settlement policy guidelines. This request is too broad. Damage analyses are protected by the work product privilege, as are undisclosed expert reports, negotiating guidelines and settlement policy guidelines.[FN3] The documents which should be produced are the settlement agreements themselves, any documents filed in court, reports of disclosed experts, and any correspondence exchanged between the parties relating to such settlement agreements.

FN3. Plaintiff has eschewed the suggestion to tailor this request, which might have yielded discoverable materials within these categories.

In order to prevent improper dissemination of these materials, any documents produced should be subject to the same terms and conditions as contained in the Permanent Protective Order entered by the Special Master in this cause on September 19, 1997.

S.D.Fla.,2001.
Gutter v. E.I. DuPont de Nemours and Co.
Slip Copy, 2001 WL 36086590 (S.D.Fla.)

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