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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY
VB

IN RE: PHENYLPROPANOLAMINE
(PPA) PRODUCTS LIABILITY
LITIGATION,

MDL NO. 1407

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
AMENDED MOTION TO COMPEL
PRODUCTION OF AMENDED
PRIVILEGE LOG

This document relates to all
actions

CC: Counsel: BTK

I. INTRODUCTION

Plaintiffs filed an Amended Motion to Compel Production of Amended Privilege Log ("Plaintiffs' Motion"). Having reviewed pleadings filed in support of and in opposition to the motion, along with the remainder of the record, and, being fully advised, the court finds and concludes as follows:

II. BACKGROUND

Defendant Bayer provided plaintiffs with a privilege log on April 12, 2002. Plaintiffs raised objections to the log, requesting, inter alia, identifying information for all persons named in the log and more detailed descriptions as to why the documents warranted privilege and work product designations. Bayer provided an amended privilege log on July 19, 2002. Among other changes, the amended log included a document identifying forty attorneys whose names appear in the log.



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1 III. DISCUSSION

2 Case Management Order No. 1 ("CMO 1") requires the creation
3 of a privilege log when a party withholds the production of
4 requested documents or materials. The party withholding docu-
5 ments on the basis of a privilege or the work product doctrine
6 must: "describe each document or thing to which a privilege or
7 work product doctrine is asserted in sufficient detail to reason-
8 ably permit the party seeking discovery to assess whether or not
9 to dispute any such assertion of privilege or application of the
10 work product doctrine." CMO 1 at 12. See also Fed. R. Civ. P.
11 26(b)(5) ("When a party withholds information otherwise
12 discoverable under these rules by claiming that it is privileged
13 or subject to protection as trial preparation material, the party
14 shall . . . describe the nature of the documents, communications,
15 or things not produced or disclosed in a manner that, without
16 revealing information itself privileged or protected, will enable
17 other parties to assess the applicability of the privilege or
18 protection.")

19 A. Cast of Characters:

20 Plaintiffs first contest Bayer's refusal to provide a "cast
21 of characters" identifying each person named in the amended
22 privilege log. They assert that the forty attorneys identified
23 by Bayer constitute only a minority of the individuals named in
24 the log. Plaintiffs argue their inability to determine whether
25 they should challenge privilege and work product designations
26 without this information. For example, plaintiffs are hindered

1 in determining whether privilege designations may be challenged
2 on the basis that the documents were created, received, and/or
3 reviewed by individuals outside of Bayer. See, e.g., United
4 States Postal Serv. v. Phelps Dodge Refining Corp., 852 F. Supp.
5 156, 162-63 (E.D.N.Y. 1994) (finding documents produced by
6 outside consultants and drafts of documents sent to third parties
7 outside attorney-client privilege). Plaintiffs also note that
8 all but two of the other MDL defendants have provided casts of
9 characters.

10 Bayer objects to the provision of a cast of characters based
11 primarily on their belief that this information may be obtained
12 from a review of the documents they have produced in this litiga-
13 tion. They proffer that plaintiffs, rather than Bayer, should be
14 the party to undertake this identification task. Bayer notes its
15 willingness to provide identifying information in the event
16 plaintiffs attempt, but are unable to determine the employment
17 status of an individual appearing in the log. Bayer also asserts
18 that the inclusion of third parties in the privilege log does not
19 necessarily prove the waiver of a privilege. See, e.g., In re
20 Bieter Co., 16 F.3d 929, 935-40 (8th Cir. 1994) (finding private
21 consultant to a partnership a client representative entitled to
22 the protection of the attorney-client privilege).

23 While neither CMO 1 nor Rule 26(b)(5) explicitly require the
24 identifying information requested, courts have recognized the
25 value of this type of information. See, e.g., O'Connor v. Boeing
26 N. Am., Inc., 185 F.R.D. 272, 280 (C.D. Cal. 1999) (finding the

1 title or position of the author and recipient of a document
2 appropriately included in a privilege log). The court finds that
3 a cast of characters would better position plaintiffs to deter-
4 mine whether they should raise any challenges to Bayer's amended
5 privilege log. As such, this information would serve the purpose
6 of the privilege log provision contained in CMO 1 and Rule
7 26(b)(5), as well as advance the goal of judicial economy by
8 inhibiting unwarranted challenges.

9 While the inclusion of third parties in the privilege log
10 may or may not prove the waiver of privilege, a cast of charac-
11 ters would at least enable plaintiffs to properly assess this
12 question. Also, plaintiffs point to 260 documents which appear
13 to have been neither authored nor received by any of the forty
14 attorneys identified by Bayer. See Plaintiffs' Motion at 2.
15 Therefore, as it stands, a substantial number of entries identi-
16 fying documents as privileged or protected by work product do not
17 now include any indication that an attorney was in any way
18 involved with those documents. See, e.g., In re Grand Jury
19 Investigation, 974 F.2d 1068, 1071 (9th Cir. 1992) (finding
20 privilege log satisfactory in the face of a challenge where it
21 included, inter alia, the identification of the attorney involved
22 with documents alleged to be privileged) (citing Doe v. Milonas,
23 889 F.2d 885, 888 & n.3, 890 (9th Cir. 1989)).

24 Moreover, given that the majority of defendants in this
25 litigation have provided plaintiffs with casts of characters, the
26 court does not believe that requiring the provision of this

1 information will impose an undue burden on Bayer. See O'Connor,
2 185 F.R.D. at 280 n.13 (finding defendants failed to show that
3 identifying the title or position of authors and recipients in a
4 privilege log would impose a burden). In fact, placing the
5 burden on Bayer, rather than on plaintiffs, will likely more
6 efficiently and accurately resolve any questions plaintiffs may
7 have with respect to these privilege and work product designa-
8 tions.

9 As such, the court grants plaintiffs' request to compel an
10 amended privilege log including a cast of characters and orders
11 Bayer to provide this information within three (3) weeks of the
12 date of this order. The court also orders the two unnamed
13 defendants who have not as yet supplied casts of characters to do
14 so in accordance with this order. In constructing these docu-
15 ments, defendants may look for guidance to the casts of charac-
16 ters already provided in this litigation by other defendants.

17 B. Privilege/Work Product Descriptions:

18 Plaintiffs next assert that Bayer provided only "boiler
19 plate" descriptions of the foundation for privilege and work
20 product designations for more than seventy percent of the docu-
21 ments (830 out of 1,215), indicating generally that these docu-
22 ment address "development, testing, labeling and marketing" of a
23 Bayer product. These broadly worded descriptions, plaintiffs
24 argue, do not allow an assessment as to the applicability of the
25 privilege or work product protection asserted, and indicate a
26 failure of Bayer to discharge its duty under CMO 1 and the law.

1 See CMO 1 at 12 and Fed. R. Civ. P. 26(b)(5).

2 Bayer asserts the adequacy of the contested descriptions and
3 an inability to provide more detail without revealing privileged
4 information. They also argue that additional information would
5 not bolster plaintiffs' ability to assess the privilege and work
6 product designations. Moreover, Bayer rejects the apparent
7 assertion that the privilege log must contain all of the informa-
8 tion necessary to sustain their burden of proof on their claims
9 of privilege:

10 Although the person from whom the discovery is sought
11 decides whether to claim a privilege or protection, the
12 court ultimately decides whether, if this claim is
13 challenged, the privilege or protection applies.
14 Providing information pertinent to the applicability of
15 the privilege or protection should reduce the need for
16 an in camera examination of the documents.

17 The rule does not attempt to define for each case what
18 information must be provided when a party asserts a
19 claim of privilege or work product protection. Details
20 concerning time, persons, general subject matter, etc.,
21 may be appropriate if only a few items are withheld,
22 but may be unduly burdensome when voluminous documents
23 are claimed to be privileged or protected, particularly
24 if the items can be described by categories.

25 Fed. R. Civ. P. 26 (b)(5) advisory committee's notes, 1993
26 amends.

27 The court finds that, outside of the missing cast of charac-
28 ters, Bayer provided sufficient information to allow an assess-
29 ment of the privilege and work product designations. Certainly,
30 defendants grouped a large portion of the documents into a fairly
31 broad category - documents relating to "development, testing,
32 labeling and marketing." Plaintiffs put specific emphasis on the

1 conjunctive "and" in this phrase, asserting the unlikelihood that
2 all of these documents address all four of these topics. How-
3 ever, the court does not see how plaintiffs would be better
4 positioned to assess a privilege or work product designation were
5 Bayer to have specified that, for example, one document involved
6 only issues of "development" and another only issues of "label-
7 ing."

8 Moreover, a review of the log as a whole does not reflect
9 Bayer's failure to discharge its duties under CMO 1 and Rule
10 26(b)(5). The log contains numerous examples of documents (on
11 plaintiffs' count 385 documents total) which do not fall into the
12 "development, testing, labeling and marketing" category. Addi-
13 tionally, Bayer identifies the type of privilege asserted, the
14 type of document at issue, and the document number and date, and
15 names the individuals who authored, received, and/or were copied
16 on each document. See, e.g., In re Grand Jury Investigation, 974
17 F.2d at 1071 (finding log sufficient where it identified: (1)
18 attorney and client involved; (2) nature of the document; (3) all
19 persons or entities shown on document to have received or sent
20 document; (4) date document generated, prepared, or dated; and
21 (5) information on document's subject matter); Dole, 889 F.2d at
22 888 & n.3, 890 (finding privilege log would be sufficient where
23 it identified all of the above except for information as to a
24 document's subject matter, and also included all persons or
25 entities known to have been furnished a document or informed of
26 its substance).

