

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

ALLERGAN, INC.,	§	
	§	
Plaintiff,	§	
	§	Case No. 2:15-cv-1455-WCB
v.	§	LEAD CASE
	§	
TEVA PHARMACEUTICALS USA, et al.,	§	
	§	
Defendants.	§	

ALLERGAN, INC.,	§	
	§	
Plaintiff,	§	
	§	Case No. 2:16-cv-0401-WCB
v.	§	
	§	
FAMY CARE LIMITED,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Before the Court is the Opposed Motion to Amend the Stipulated Protective Order in Civil Action No. 2:16-cv-0401 as to Defendant Famy Care Limited Only, Dkt. No. 271, filed by defendant Famy Care Ltd. (“FCL”). FCL requests that the Protective Order governing the consolidated case be amended in FCL’s individual case to allow two non-attorneys to view material that the plaintiff Allergan, Inc., designated “Confidential.” FCL has also filed Defendant Famy Care Limited’s Motion for In-Person Hearing, Dkt. No. 283, which requests an in-court hearing on its motion to amend the protective order. Plaintiff Allergan, Inc., also opposes this motion. Dkt. No. 283, at 4. The Court DENIES both motions.

BACKGROUND

On August 24, 2015, Allergan filed Case No. 2:15-cv-1455 against Teva Pharmaceuticals USA, Inc.; Akorn, Inc.; Mylan Pharmaceuticals, Inc.; and Mylan, Inc. Allergan filed a separate action against Innopharma, Inc., on September 8, 2015. Allergan, Inc. v. Innopharma, Inc., Case No. 2:15-cv-1504 (E.D. Tex.). That case was consolidated with the previous action on October 29, 2015. Id., Dkt. No. 20.

On January 4, 2016, the Court entered a protective order agreed upon by the parties that were then party to the consolidated case. Dkt. No. 86.¹ Under that protective order, the parties may designate as “Confidential” any material “that a Producing Party believes in good faith can be disclosed to select employees or agents of a Receiving Party . . . solely for the purposes set forth herein without substantial risk of harm to the Producing Party.” Id. at 3. In defining “Confidential” information, the order provides:

Examples of such information include, but are not limited to: trade secrets or other confidential research, development, commercial, proprietary, non-public, technical, business, financial, patent prosecution, sensitive, or private information, including any approved or unapproved New Drug Application (NDA) or Abbreviated New Drug Application (ANDA) that purports to cover a product involved in this suit and any amendments thereto, or any correspondence with the FDA regarding same. The term also includes extremely sensitive confidential information that a Producing Party believes in good faith: (i) creates a substantial risk of harm to the Producing Party if disclosed to select employees or agents of a Receiving Party . . . ; (ii) is necessary to protect the privacy interests of an individual; or (iii) is subject to an express obligation of confidentiality owed by the Producing Party to a third party.

Id. Access to Confidential information is restricted to the receiving party’s outside counsel and “up to three In-House counsel per group of affiliated parties and each counsel’s clerical staff and paralegals.” Id. at 8.

¹ “Dkt. No.” citations refer to Case No. 2:15-cv-1455, unless otherwise noted.

Allergan sued FCL on April 12, 2016, and Allergan and FCL jointly moved to consolidate the case with the previously instituted action, No. 2:15-cv-1455 (lead case). See Case No. 2:16-cv-401, Dkt. Nos. 1, 29. The joint motion to consolidate did not mention the protective order entered in the lead case. Id., Dkt. No. 29. Neither did the subsequent consolidation order entered on June 16, 2016. Dkt. No. 140.

The parties, including FCL, engaged in discovery under the existing protective order through February 10, 2017, with expert discovery continuing through May 16, 2017. See Dkt. No. 269, at 2. FCL, for example, “was providing accelerated fact discovery” during the summer of 2016. Dkt. No. 271, at 4 (FCL served initial disclosures as well as noninfringement and invalidity contentions in July 2016, and produced documents to Allergan on June 6 and June 20, 2016).

It appears that FCL first proposed allowing non-attorneys access to Confidential information on October 31, 2016. Dkt. No. 271-5; compare Dkt. No. 271-4 (email from FCL’s counsel to Allergan’s counsel on September 9, 2016, states, without further explanation, that FCL would “like to discuss a modification to the protective order” at a future date). FCL requested that Ms. Minaksi Bhatt, an attorney and Vice President of Intellectual Property at Lupin Pharmaceuticals, Inc., (collectively, together with Lupin Ltd., “LPI”), as well as Ms. Rachita Naidu and Mr. Manish Mundra, two non-attorneys in LPI’s Intellectual Property Management Group, be designated as FCL’s three “In-House counsel” representatives.² Dkt. No. 271, at 1-2.

² FCL represents that it entered into an agreement with LPI granting LPI the authority to supervise and control the litigation, and therefore proposes LPI personnel as “In-House counsel.” Dkt. No. 271, at 1 n.3. (FCL is the ANDA-holder; LPI will act as FCL’s United States distributor. Id.) Allergan has not opposed FCL’s motion to amend the protective order on this ground.

In nearly identical declarations, Ms. Naidu and Mr. Mundra averred that LPI's Intellectual Property Management Group, of which they are a part, "supervises FCL's litigation counsel in this case," and that they review FCL's filings, contentions, and discovery responses, and will review FCL's expert reports. Dkt. No. 271-10, at 3; Dkt. No. 217-11, at 3. They also state that their "responsibilities at Lupin are limited to management of intellectual property and patent litigation," explaining that they "track patent litigations, provide updates on those litigations to management, and . . . communicate with other groups about those litigations," while limiting those communications "to information already in the public domain." Id.

Allergan agreed to treat Ms. Bhatt as "In-House counsel" under the protective order but objected to treating Ms. Naidu and Mr. Mundra in that manner, because they are not attorneys. As revealed by FCL's briefing of its motion to modify the protective order, LPI has another in-house attorney, Ms. Kathryn Jones, who works with Ms. Bhatt but whom FCL has not proposed to serve as "In-House counsel" under the protective order. See Dkt. No. 279-3.

DISCUSSION

I. Legal Standard

The parties disagree about the proper legal standard for the Court to apply to this disputed issue. FCL contends that it never agreed to have the existing protective order govern the consolidated cases and that Allergan bears the burden of proving that the existing protective order should apply to FCL. Allergan, meanwhile, argues that the existing protective order applies to all of the parties in the consolidated cases and that FCL bears the burden of showing good cause to amend that protective order as it applies to FCL.

Even though FCL's case was consolidated after the protective order had been entered in the lead case, that does not mean that FCL's case is not governed by the protective order. As

stated in the consolidation order, FCL's separate case would "remain[] active for venue determinations and trial," but the case against FCL was otherwise "consolidated for all pretrial issues (except venue) with the Lead Case." Dkt. No. 140, at 1. The "parties [were] instructed to file any future filings (except relating to venue) in the Lead Case." Id. In other words, venue and trial were carved out, but the FCL case was consolidated for all other purposes.

Furthermore, FCL did not object to the protective order for more than four months after consolidation. Meanwhile, FCL and Allergan were engaged in discovery and were producing a large volume of documents pursuant to the existing protective order. See, e.g., Dkt. No. 271, at 4 (FCL made two document productions to Allergan in July 2016). Allergan, in particular, produced more than 1.5 million pages of documents under the terms of the protective order. Dkt. No. 278, at 7. For months, FCL accepted Allergan's productions under the protective order and gave no reason for the parties to behave otherwise. Its contention that the protective order should be modified in its case comes late and ignores the prior proceedings in the case.

Thus, after successfully moving to consolidate the cases for all pretrial issues but venue, FCL accepted discovery on the same terms as the other defendants without objection. The consolidation order and FCL's conduct establish that the parties have treated the existing protective order as applicable to the entire consolidated case, including FCL's individual case. FCL's current motion is therefore properly viewed not as an opposition to the entry of a protective order under Fed. R. Civ. P. 26(c), but as a request to modify the existing one.

FCL argues that Allergan should bear the burden of showing good cause to maintain the existing protective order in effect as to FCL even if, consistent with the title of FCL's motion, FCL is viewed as moving to amend the current protective order. According to FCL, the nonmoving party always has the burden of showing good cause when the moving party

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