IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

IN RE: BENICAR (OLMESARTAN) PRODUCTS LIABILITY LITIGATION	:	Master Docket No. 15-2606 (RBK/JS)

ORDER RE: MEDICAL RECORDS PROTOCOL

This Order addresses the parties' dispute regarding their proposed Medical Records Protocol. The Court received the parties' letter briefs and heard oral argument. The parties' dispute boils down to whether plaintiffs should share the cost of obtaining, organizing, and storing copies of their, inter alia, medical and employment records, and/or whether plaintiffs should pay for copies of the records they request. Not surprisingly, plaintiffs want defendants to pay. Defendants want plaintiffs to share out of pocket costs and pay for the copies they request. The Court regrets the parties were unable to resolve their dispute. As will be discussed, the Court sides with defendants with the proviso that plaintiffs will get a credit for the costs they already incurred.

Background

As the parties know, this is a 1200 plus case Multidistrict Litigation ("MDL") involving defendants' olmesartan prescription drugs. The April 3, 2015 MDL Transfer Order [Doc. No. 1] states that plaintiffs are alleging they suffered "gastrointestinal injury, including sprue-like enteropathy, lymphocytic colitis, microscopic colitis, and collagenous colitis." In an effort to streamline discovery, each plaintiff is required to complete under oath a Plaintiff's Fact Sheet ("PFS") rather than answering formal interrogatories. See Doc. Nos. 73-1, 91. As part of this process plaintiffs are required to produce, inter alia, medical records and documents relating to their use of defendants' drugs.[1] Plaintiffs are also required to complete authorizations so defendants can obtain their records.[2] The Court understands that some plaintiffs have obtained and produced some or all of the records from their providers and/or employers.

Rather than relying on plaintiffs to produce all responsive records, defendants contracted with an outside company, MCS Group ("MCS"), to obtain, organize and store plaintiffs' records. MCS has set up a secure portal where all of the plaintiffs' records it obtained are identified and available for review. Defendants made all the arrangements to retain and negotiate fees with MCS and are confident the fees are more than

[1] See Plaintiff's Fact Sheets, Section X. (Document Demands) B.
[2] Authorizations must be returned for medical, employment, workers' compensation, disability and insurance records. Id. at Section X.A.

fair and competitive. Plaintiffs do not argue that MCS is not qualified or that its fees are unreasonable. This is not surprising since defendants have as much interest as plaintiffs in keeping costs down. As to those plaintiffs who want copies of the records MCS obtained, the parties' rub is that defendants want plaintiffs to share the out of pocket costs they paid to obtain the records.[3] Defendants also want plaintiffs to pay MCS's fee for producing the requested records. Plaintiffs want copies of all their records but do not want to pay any fees.

Defendants argue it is only fair plaintiffs pay half of the costs to obtain their records. They argue their proposal has already been adopted in the New Jersey Multi-County Litigation (February 3, 2016 LB at 3-4, Doc. No. 293), and that defendants' position is consistent with other Multidistrict Litigations. Id. at 4-5. Defendants also argue their proposal is consistent with the Federal Rules of Civil Procedure and New Jersey law. Id. at 6-7. Plaintiffs argue it is unfair to require them to share costs because they already incurred costs to produce records. February 10, 2016 LB at 1-3, Doc. No. 312. Plaintiffs also argue it is unfair because plaintiffs ignored their attempts to enter into an agreed protocol early in the case.[4] In addition, plaintiffs argue the Court should follow the default federal principle that each party pays its own costs to produce

[3] These fees are listed in defendants' March 2, 2016 Letter Brief ("LB") at Exhibit 1. Again, plaintiffs have not challenged the reasonableness of these fees.

[4] Defendants have not contested this assertion.

discovery. Id. at 3-5. Also, plaintiffs disagree that a Court Ordered Medical Records Protocol has been adopted in the related New Jersey litigation.

Discussion

Some of the parties' arguments can be summarily discounted. First, the Court has not been presented with competent proof that a Medical Records Protocol has been adopted in the related New Jersey litigation. No Court Order to this effect has been produced. In addition, the Court is reluctant to draw any conclusions from a snippet of a transcript from a state court May 8, 2015 conference, especially since plaintiffs disagree that a binding Order is in effect. Second, the Court is also reluctant to draw any firm conclusions from the fact that defendants' proposed protocol may have been adopted in other Multidistrict Litigations. The Court does not know if those protocols were adopted by consent. Third, the Court gives no weight in this 1200 plus MDL to the non-binding Law Division case defendants rely upon. See Vasquez v. Young Men's Christian Ass'n. of Somerset County, 263 N.J. Super. 408 (Law Div. 1992).

The Court concludes that a fair resolution of the parties' dispute can be reached while at the same time accommodating the parties' concerns. In principle, plaintiffs do not object to a Medical Records Protocol along the lines defendants propose. That is why plaintiffs originally tried to engage defendants in a dialogue about a protocol. What plaintiffs are concerned about

is paying duplicate costs. ("Plaintiffs should not be required to bear the financial burden twice for collecting medical and employment records." February 10, 2016 LB at 2-3, Doc. No. 312). Plaintiffs' concern can be addressed by not requiring they pay duplicate costs. In other words, a credit should be given for the costs plaintiffs already incurred.

It cannot be seriously doubted that the retention of MCS is a substantial benefit to all parties. MCS is able to collect relevant records in an efficient manner and store them in an easily retrievable form. This costs money. If plaintiffs want the benefit of MCS's services, it is appropriate they pay their fair share. The time and effort plaintiffs save by using MCS's services is likely to offset whatever they have to pay.

Defendants' recent submission aptly demonstrates why MCS's services are needed. See March 7, 2016 LB, Doc. No. 376. In their letter defendants summarize the status of the document productions in twelve (12) bellwether cases. The takeaway is that plaintiffs did not produce all of their records. For example, in Alonzo (C.A. No. 15-5391), plaintiff produced 15 pages from four (4) providers. In contrast, MCS collected 621 pages from eleven (11) providers. Another example is Johnson (C.A. No. 15-5146). In that case plaintiffs produced 164 pages from six (6) providers. In contrast, MCS obtained 1061 pages from sixteen (16) providers. This more than aptly illustrates why MCS's services are necessary and appropriate.

Assuming plaintiffs do not have to pay duplicate costs, there is nothing unfair about defendants' proposal. The paramount fact is that plaintiffs do not have to pay for anything they do not want. Under defendants' proposal plaintiffs can access a secure portal to identify the available records. If plaintiffs do not want copies, they will not pay any charges. Only if plaintiffs want copies of records will they have to pay half of the cost of obtaining the records and MCS's copying charges.[5]

To the extent plaintiffs argue there is no authority to require them to pay for copies of their records, they are wrong. If there was ever any ambiguity about this point it was clarified in the December 1, 2015 amendments to the Federal Rules of Civil Procedure. Rule 26(c)(1)(B) now provides that for good cause the Court may issue an Order allocating the expenses of discovery.[6]

Although the Committee Notes to the recent amendments indicate that cost-shifting is not a common practice, this is an appropriate instance where the Court's discretion should be exercised. Defendants undoubtedly spent substantial resources to negotiate and contract with MCS. Further, defendants have and will pay costs to obtain records plaintiffs should have produced

[5] It appears that plaintiffs' half-share will be relatively nominal. See Defendants' March 7, 2016 LB.

[6] The Committee Note to the amendment notes that, "[e]xplicit recognition [of authority to allocate costs] will forestall the temptation some parties may feel to contest this authority.").

themselves. Defendants should not be saddled with 100% of the cost to obtain records plaintiffs should produce. The track record thus far illustrates why defendants reasonably contracted with MCS instead of relying on plaintiffs to produce all relevant records. It cannot be gainsaid, however, that the Court's ruling protects plaintiffs' interests. Plaintiffs will not pay duplicate costs. Plaintiffs will only pay half of the costs incurred to obtain their records, and a fair charge to copy or digitize the documents they request.

Conclusion and Order[7]

Accordingly, for the foregoing reasons, it is hereby ORDERED this 18th day of March, 2016, that the Court adopts in principle defendants' proposed Medical Records Protocol. The Protocol must include the following conditions: (1) plaintiffs do not have to pay a fee to gain access to MCS's secure portal to decide if they want copies of any records. If plaintiffs' request, they must be able to identify the records on the portal before they decide if they want copies, (2) if a plaintiff requests records from MCS, that plaintiff shall pay one-half of the fees to obtain the records, as well as MCS's copying/production charge to the plaintiff. Provided, however, that the out of pocket costs plaintiffs already incurred to obtain the records they produced with their Fact Sheets shall be

[7] The Court leaves it to the parties to work out the "nuts and bolts" of their protocol.

deducted from the one-half fee they are required to pay[8], and (3) the final Medical Records Protocol shall be submitted for Court approval by March 31, 2016, with a letter identifying any disputes.

s/Joel Schneider
JOEL SCHNEIDER
United States Magistrate Judge

[8] It is not unfair to deduct these costs which will result in defendants paying plaintiffs' shortfall. This is a small price to pay for defendants' failure to engage in a meaningful dialogue before MCS was hired. In comparison to the transaction costs incurred in this MDL, the cost to defendants will be negligible.