

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

IN RE: VALEANT PHARMACEUTICALS
INTERNATIONAL, INC. SECURITIES
LITIGATION

THIS DOCUMENT RELATES TO:

18-cv-00089 (MAS)(LHG) (GMO Trust)

Lead Case No.: 3:15-cv-07658 (MAS) (LHG)

**ORDER AND OPINION OF THE
SPECIAL MASTER**

This matter comes before the Special Master upon Defendant Valeant Pharmaceuticals International, Inc., n/k/a Bausch Health Companies, Inc.'s ("Valeant") Motion to Compel Production of Certain Documents from the Plaintiffs in the above-captioned matter. (*In re Valeant Pharm. Int'l, Inc. Sec. Litig. (Class Action)*, No. 15-7658 (D.N.J.), ECF No. 745.) Plaintiffs GMO Trust, GMO Alpha Only Fund, GMO Benchmark Free Fund, GMO Implementation Fund, GMO Developed World Stock Fund, GMO International Large/Mid Cap Equity Fund, GMO International Equity Fund, GMO Tax-Managed International Equities Fund, GMO Funds PLC, GMO Global Equity Allocation Investment Fund, GMO World Equity Allocation Investment Fund PLC, GMO Global Real Return (UCITS) Fund, GMO Offshore Master Portfolios II Ltd., GMO Event-Driven Master Portfolio, GMO Global Equity Trust, GMO Master Portfolios (Onshore), L.P., GMO Mean Reversion Fund (Onshore), GMO Tax-Managed Global Balanced Portfolio, and GMO Mean Reversion Special Solution Fund, L.P. (collectively, "GMO Plaintiffs") opposed (*Class Action*, ECF No. 763), and Valeant replied (*Class Action*, ECF No. 769). After considering the submissions of the parties, and prevailing case law, and based upon the following, it is the opinion of the Special Master that Valeant's motion is **GRANTED**.

I. BACKGROUND

The Court has previously summarized many of the factual allegations at issue in this matter and the Special Master assumes the parties' familiarity with those allegations. *See e.g., In re Valeant Pharm. Int'l, Inc. Sec. Litig. (In re Valeant)*, No. 15-7658, 2017 WL 1658822 (D.N.J. Apr. 28, 2017), *reconsideration denied*, No. 15-7658, 2017 WL 3880657 (D.N.J. Sept. 5, 2017). Thus, the Special Master only recounts the factual background and procedural history necessary to decide the instant motion.

On October 22, 2015, Laura Potter brought a putative class action on "behalf of all persons who purchased or otherwise acquired Valeant stock between February 23, 2015 and October 20, 2015, inclusive ..., against Valeant and certain of its officers and/or directors for violations of the Securities Exchange Act of 1934" (*Class Action*, Compl. ¶ 1, ECF No. 1.) On May 31, 2016, the Court consolidated Ms. Potter's action with several other actions, and pursuant to the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4, the Court appointed Lead Counsel and a Lead Plaintiff in the consolidated action. (*Class Action*, Order 3, ECF No. 67.)

On June 24, 2016, Lead Plaintiff and Named Plaintiff filed a Consolidated Class Complaint (the "Class Complaint"). (*Class Action*, Class Compl., ECF No. 80.) The Class Complaint was "brought on behalf of purchasers of Valeant equity securities and senior notes between January 4, 2013 and March 15, 2016, ... to pursue remedies" under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"), Securities Exchange Commission Rule 10b-5, and Sections 11, 12(a)(2), and 15 of the Securities Act of 1933. (*Id.* ¶ 1.) On April 28, 2017, the Court decided six motions to dismiss filed by various groups of defendants in the *Valeant Class Action*. *See In re Valeant*, 2017 WL 1658822, at *1. On September 9, 2018, Lead Plaintiff and Lead

Counsel filed the First Amended Class Complaint naming additional defendants and bringing additional claims. (*Valeant Class Action*, First Am. Class Compl., ECF No. 352.)

On January 3, 2018, the GMO Plaintiffs filed a Complaint against Valeant, J. Michael Pearson, and Howard B. Schiller. (*GMO Trust, et als. v. Valeant Pharmaceuticals International, Inc., et als (GMO)*, No. 18-00089 (D.N.J.), ECF No. 1.) The Complaint asserts claims under Sections 10(b) and 20(a) of the Exchange Act and SEC Rule 10b-5. (*Id.*) On October 22, 2018, Valeant served its first requests for the production of documents (the “Requests”) on the GMO Plaintiffs. Request Nos. 7 and 11 are at issue in this motion. These Requests provide:

- **Request No. 7:** All Documents and Communications Concerning investment policies, procedures, philosophy, strategies or practices that You used to review or analyze the Valeant Securities, any information contained in the Marketing Materials,¹ or Your alleged purchase of Valeant Securities, including any minutes of meetings.
- **Request No. 11:** All Documents Reflecting any Communications between You and any advisors, consultants, investment managers, auditors, or other third parties Relating to Valeant, Valeant Securities.

On July 29, 2019, the GMO Plaintiffs served objections and responses to the Requests. In response to Request No. 7, the GMO Plaintiffs stated various general objections and further provided that they were “willing to meet and confer with Valeant concerning the appropriate scope of documents responsive to this Request, if any.” In response to Request No. 11, the GMO Plaintiffs similarly stated various general objections and further provided that they would “conduct a reasonable search for and produce responsive, non-privileged or otherwise unprotected communications in their possession, custody or control, if any, between [the GMO] Plaintiffs and any advisors, consultants, or investment managers relating to the subject matter of this Action.”

¹ The Requests define “Marketing Materials” as “any offering circulars, free writing prospectuses, term sheets, offering memoranda, offering memorandum supplements, marketing documents, investor materials, and other draft and final written materials provided to You or in Your possession in connection with or Relating to the Valeant Securities.”

Neither response indicated that documents were being withheld on the basis of the stated objections.

On January 23, 2020, Valeant requested that the GMO Plaintiffs provide an update on their document production, search terms, custodians, and the sources searched, and offered to meet and confer concerning the GMO Plaintiffs' discovery obligations. The GMO Plaintiffs responded that their initial discovery responses included offers to meet and confer and the GMO Plaintiffs considered Valeant's failure to respond to those offers as a "tacit withdrawal" of the requests. The GMO Plaintiffs also identified the custodians, search terms, and sources searched. Thereafter, the GMO Plaintiffs produced their documents on a rolling basis. The GMO Plaintiffs did not indicate that they were withholding any non-privileged documents that hit on the search terms based on their objections.

On January 13, 2021, Valeant took the deposition of the GMO Plaintiffs' 30(b)(6) witness, Matt Kadnar. Mr. Kadnar testified about several categories of documents that the GMO Plaintiffs had not produced in response to the Requests. The first category pertains to documents that the GMO Plaintiffs would have produced to their clients showing the strategies in which the GMO Plaintiffs were invested. The second category relates to presentations concerning the GMO Plaintiffs' various strategies that the GMO Plaintiffs would have prepared and presented to their prospective investors. The third category of documents includes several internal documents with draft talking points for client communications regarding the GMO Plaintiffs' investment in Valeant.

Following Mr. Kadnar's deposition, on February 4, 2021, Valeant requested that the GMO Plaintiffs produce the following: monthly documents sent to clients regarding its investment positions, the presentations shared with current and prospective investors regarding its investment

strategies, and any communications sent to clients concerning the GMO Plaintiffs' decision to purchase or sell Valeant securities (collectively referred to as the "Withheld Documents"). Valeant argued that the Withheld Documents were responsive to its Requests (Nos. 7 and 11, specifically) and would have expected those documents to be hits in response to the search terms used by the GMO Plaintiffs for their document production. On February 9, 2021, the GMO Plaintiffs responded that Valeant had waived its right to pursue further discovery by not requesting additional documents or engaging in a meet and confer sooner.

Thereafter, the parties engaged in a meet and confer that was unsuccessful. The GMO Plaintiffs maintained that Valeant's request for the Withheld Documents was untimely and waived. Valeant offered to serve new requests for the production of documents, as the deadline to issue requests for production had not yet passed. However, the GMO Plaintiffs indicated that their response to any new requests would be the same. Accordingly, as the parties reached an impasse, Valeant filed the instant motion.

II. ARGUMENT

Valeant argues that under Rule 26(b)(1) of the Federal Rules of Civil Procedure ("FRCP")² it is entitled to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed.R.Civ.P. 26(b)(1). Valeant also argues that relevancy is to be broadly construed for purposes of Rule 26(b). Valeant contends that pursuant to Rule 34, the GMO Plaintiffs were required to state with specificity the basis of their objections and identify whether any documents were being withheld on that basis. Valeant maintains that it is entitled to the Withheld Documents because they are relevant to the claims and defenses at issue in this case. Valeant contends that it first learned of the Withheld Documents

² All subsequent references to a Rule are references to a Federal Rule of Civil Procedure.

during the deposition of Mr. Kadnar. Valeant argues that the GMO Plaintiffs do not dispute the relevancy of the Withheld Documents, but rather claim that Valeant made a “tacit withdrawal” of its Requests by not following up sooner. Valeant disagrees, contending that the burden is on the party responding to document requests to identify whether any documents are being withheld on the basis of any objections asserted. Valeant further contends that the GMO Plaintiffs’ responses to the Request do not reveal what objections the GMO Plaintiffs are actually making, whether any documents were produced in response to the Request, or whether a complete response has been made. Valeant asserts that the GMO Plaintiffs cannot dictate the boundaries of discovery through such unilateral declarations.

The GMO Plaintiffs argue that Valeant has waived its right to seek additional documents from them because it had an obligation under the Rules to timely follow up on discovery that it deemed was improperly withheld. The GMO Plaintiffs contend that especially where electronic discovery is involved, which contains a complex and time-consuming process for producing, the parties should meet and confer early in discovery to agree on the scope of each party’s rights and responsibilities. The GMO Plaintiffs assert that Valeant waited almost two years after receiving the GMO Plaintiffs’ objections and responses and nearly one year after receiving the GMO Plaintiffs’ search parameters to object. The GMO Plaintiffs also argue that the Withheld Documents are irrelevant to the extent not previously produced or publicly available and it would be unduly burdensome for the GMO Plaintiffs to produce them at this time. The GMO Plaintiffs contend that the Withheld Documents fall into two categories: (1) documents describing the GMO mutual funds’ general investment strategies, and (2) communications with GMO clients concerning the GMO Plaintiffs’ Valeant Investment. The GMO Plaintiffs contend that with respect to the first category, Valeant has failed to identify a basis as to the relevancy of these documents.

The GMO Plaintiffs argue that there is nothing in the record to indicate that such documents contain any information relating to the GMO Plaintiffs' decision to invest in Valeant common stock. The GMO Plaintiffs also argue that the funds' principal investment strategies are publicly available by way of registration statements and prospectuses, among other documents, filed with the SEC. With respect to the second category, the GMO Plaintiffs contend that their level of diligence in investing in Valeant is irrelevant because the GMO Plaintiffs were entitled to rely on the integrity of the market price for Valeant common stock and the truthfulness of Valeant's public statements and that no amount of diligence by the GMO Plaintiffs would have revealed Valeant's fraud. The GMO Plaintiffs further contend that they already produced an extensively detailed 83-page investment presentation made to GMO's investment committee, Valeant already questioned GMO witnesses about the decision to purchase Valeant stock, and the GMO Plaintiffs specifically refused to produce client communications in their answers to the Requests. To the extent any of these client communications or documents concerning the "talking points" contained search terms, they would have been produced to Valeant. The GMO Plaintiffs also contend that producing such documents at this time would be unduly burdensome because they already produced a 30(b)(6) witness who testified at length about the funds' investment policies and the documents requested in the first category would be duplicative of this testimony and are also publicly available. Furthermore, they would have to search for, review, and produce additional documents, which would be duplicative of other evidence and testimony, and Valeant should not be rewarded for its dilatoriness in pursuing discovery.

Valeant responds that the GMO Plaintiffs' theory of the case does not dictate the scope of discovery. Valeant contends that one of the key issues in this case is whether the GMO Plaintiffs actually relied upon Valeant's alleged misstatements or omissions and the Withheld Documents

are clearly relevant to this inquiry. Valeant reiterates that discovery is broad and the permissible scope includes all non-privileged material relevant to any party's claims or defenses. Valeant further responds that it was unable to request the Withheld Documents at an earlier point in time because it was not clear from the GMO Plaintiffs' discovery responses that they were withholding documents based on the objections asserted, and these issues only came to light after the deposition of the GMO Plaintiffs' 30(b)(6) witness. Valeant contends that Rule 34 requires a party stating an objection to a request to identify whether any documents are being withheld on the basis of that objection. The GMO Plaintiffs did not do so.

Valeant further contends that the GMO Plaintiffs' belated attempt to amend their discovery responses to assert that certain information is publicly available is improper. The GMO Plaintiffs emphasize these publicly-available documents without claiming that they reflect all documents responsive to Valeant's Requests. The fact that some documents may be publicly available does not allow the GMO Plaintiffs to avoid producing other responsive materials. Finally, Valeant argues that the GMO Plaintiffs' claims that producing the Withheld Documents would be unduly burdensome is speculative and does not justify their withholding of relevant discovery materials. Nor is the fact that Valeant deposed certain GMO witnesses a sufficient substitute for withheld discovery.

III. DISCUSSION

Rule 26(b)(1) addresses the scope of discovery in litigation and provides:

any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible in evidence to be discoverable.

Courts have construed this rule liberally, creating “a broad range for discovery which would encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Jones v. DeRosa*, 238 F.R.D. 157, 163 (D.N.J. 2006) (internal quotation marks and citations omitted). Discovery of all relevant evidence “provides each party with a fair opportunity to present an effective case at trial.” *Id.* (internal quotation marks omitted).

A party’s discovery requests are governed by Rule 34, which allows requests for discovery within the scope of Rule 26, including requests for documents and electronically stored information. A party responding to discovery requests must “either state that inspection and related activities will be performed as requested or state with specificity the grounds for objecting to the request, including the reasons.” Rule 34(b)(2)(B). Further, a party stating an objection to a request “must state whether any responsive materials are being withheld on the basis of that objection.” FRCP 34(b)(2)(C); *see also Microsoft Corp. v. Softicle.com*, 2017 WL 4387376, at *8 (D.N.J. Oct. 2, 2017). The purpose of requiring a party to identify whether any documents are being withheld on the basis of a stated objection is to “end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain as to whether any relevant and responsive information has been withheld on the basis of the objections. *See* 2015 Adv. Comm. Notes to Rule 34.

Here, the Special Master finds that the Withheld Documents are relevant to the claims and defenses at issue in this matter. The Withheld Documents include monthly documents that the GMO Plaintiffs sent to their clients regarding their investment positions, presentations shared with current and prospective investors regarding the GMO Plaintiffs’ investment strategies, and

communications sent to clients that discussed the GMO Plaintiffs' decision to purchase or sell Valeant securities. Mr. Kadnar testified about the existence of these documents, which were not produced in discovery, and which Valeant contends are responsive to its Request Nos. 7 and 11.

The GMO Plaintiffs argue that “nearly all of the relevant discovery in this case, which arises from a fraud committed by Valeant, is in Valeant’s possession, not GMO’s.” The GMO Plaintiffs further argue that “[f]or the most part, the GMO Plaintiffs’ conduct... is irrelevant to claims at issue in this action[,]” and that therefore, they do not have to produce the Withheld Documents. The Special Master disagrees. Discovery is not so one-sided. *See Rule 26(b)(1)*. In the very same sentence, the GMO Plaintiffs’ acknowledge that the GMO Plaintiffs’ conduct, including “their purchases of Valeant stock and their reliance on the integrity of the market price and the veracity of Valeant’s statements” is relevant to this matter. Furthermore, the GMO Plaintiffs admit that they produced an 83-page investment presentation to Valeant “that contains an extraordinarily detailed analysis of the factors considered by GMO and the diligence that GMO conducted in connection with its Valeant investment.” The Special Master struggles to understand how the GMO Plaintiffs view this 83-page presentation as relevant and therefore produced it in discovery, yet argue that the “presentations shared with current and prospective investors regarding the GMO Plaintiffs’ investment strategies” (identified as part of the Withheld Documents) are irrelevant and not discoverable. The GMO Plaintiffs also note a variety of client communications that they produced discussing the Valeant investment and which Valeant used to question certain witnesses. It is similarly difficult to understand how these communications are considered relevant in the GMO Plaintiffs’ view, yet the “communications sent to clients that discussed the GMO Plaintiffs’ decision to purchase or sell Valeant securities” (identified as part of the Withheld Documents) are irrelevant.

The Special Master also disagrees with the GMO Plaintiffs' argument that Valeant waived its right to pursue the Withheld Documents because it waited too long to follow up on them. The GMO Plaintiffs claim that Valeant had every opportunity to review their discovery responses and document production and has waived the right to renegotiate the scope of discovery because of its lack of diligence. It is unclear to the Special Master what diligence on Valeant's part would have identified the existence of these missing documents prior to the deposition of Mr. Kadnar. Unlike the cases cited by the GMO Plaintiffs, the existence of the Withheld Documents was not readily apparent on the face of the GMO Plaintiffs' responses to Valeant's Requests, and the GMO Plaintiffs have not stated, with specificity, how a review of their document production would have identified the discovery dispute at an earlier time. Thus, it is unclear how Valeant did or should have known about the existence of the Withheld Documents to pursue them before the deposition of Mr. Kadnar. Rather, the existence of the Withheld Documents first became apparent at the deposition of Mr. Kadnar. Additionally, Valeant's request for the Withheld Documents fell within the discovery period. Therefore, it was not untimely in and of itself.

Furthermore, the GMO Plaintiffs contend that they relied upon certain search terms and parameters to which Valeant agreed when conducting its initial document collection and review. However, Valeant argues that the Withheld Documents should have appeared in response to those search parameters. Thus, it is unclear whether the GMO Plaintiffs located the Withheld Documents with the original search terms, yet decided to withhold the documents on the basis of the stated objections, or whether the Withheld Documents were not identified during the initial search and would require different search parameters to locate at this point. If the former, the GMO Plaintiffs should have identified that they were withholding said documents, and producing them at this time should not require extensive effort. If the latter, the parties are directed to agree upon narrow search

terms and parameters to locate the Withheld Documents, without requiring the GMO Plaintiffs to engage in a lengthy and time-consuming document collection and review.

Moreover, the GMO Plaintiffs' argument that certain documents are publicly available should have been made in response to Request Nos. 7 and 11, and will not excuse their discovery obligations. It is also unclear from the GMO Plaintiffs' opposition whether the documents which they indicate are publicly available are the actual documents sought by Valeant. The GMO Plaintiffs indicate that "the GMO mutual funds' principal investment strategies are made available to investors or potential investors and are publicly available." They further contend that they "file registration statements and prospectuses, among other documents, with the SEC, which can be accessed on the SEC's online EDGAR system" and that they also provide "additional publicly available information about these funds, including descriptions of their strategies, on [their] website[.]" It is also unclear if these "publicly available" documents reflect all documents that would be responsive to Valeant's Requests. It is further unclear whether these "publicly available" documents are the documents to which Mr. Kadnar testified. To the extent some of the Withheld Documents are publicly available, the GMO Plaintiffs may provide the location of those documents to Valeant. To the extent any of the Withheld Documents are not publicly available, they should be produced.

IV. CONCLUSION

For the reasons set forth above, the Special Master grants Valeant's Motion to Compel the Withheld Documents.

Dennis M. Cavanaugh

**DENNIS M. CAVANAUGH, U.S.D.J. (Ret.)
Special Master**

Date: November 30, 2021