

This Order has been prepared and filed by the Court.

KIMBERLY EVERETT,  
Plaintiff,

v.

BAYER CORP., BAYER HEALTHCARE, LLC, BAYER HEALTHCARE PHARMACEUTICALS, INC., BAYER SCHERING PHARMA AG, INTENDIS, INC., BAYER AG, TEVA PHARMACEUTICAL INDUSTRIES, LTD, TEVA PHARMACEUTICALS USA, INC., BARR PHARMACEUTICALS, LLC (formerly known as BARR PHARMACEUTICALS, INC.), BARR LABORATORIES, INC., JANE DOE DISTRIBUTORS (1-50), JILL DOE DISTRIBUTORS (1-50), JACK DOE WHOLESALERS (1-50), JACK DOE SELLERS (1-50), JOHN DOE MARKETERS (1-50), JOAN DOE FORMULATORS (1-50), JIM DOE HEALTH CARE PROVIDERS (1-50), JEAN DOE (1-50), ST. MARY'S HOSPITAL, NURSE SHARI GOMEZ, DR. BIKKINA MAHESH, HEART & VASCULAR ASSOCIATES-NOTHERN, DR. HOWARD BENN, DR. JOSE LUIS SABOGAL, BETTER HEALTHCARE OF NEW JERSEY, LLC, PASSAIC COMMUNITY PHARMACY, INC. d/b/a PASSAIC COMMUNITY PHARMACY, SAMIRKUMAR PATEL, R.PH., ABC COMPANIES (1-10), JANE DOE NURSES (1-10), JOHN DOE PHYSICIANS (1-10), DEF COMPANIES (1-10), DEF COMPANIES (10-15), and JIM DOE PHARMACISTS (1-5),  
Defendant(s).

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

BERGEN COUNTY

DOCKET NO. BER-L-2813-13

CIVIL ACTION ORDER

**FILED**

**SEP 25 2014**

BRIAN R. MARTINOTTI  
J.S.C.

**THIS MATTER** having been opened to the Court on motion by Defendants Passaic Community Pharmacy, Inc. and Samirkumar Patel, R.Ph, by and through their attorneys, White & Williams,

LLP, and the Court having read and considered the papers submitted, and heard oral argument, and for good cause having been shown;

For the reasons set forth in the accompanying decision;

**IT IS** on this 25th day of September 2014,

**ORDERED THAT:**

1. The Motion to Compel Production of the Settlement Agreement is GRANTED.
2. The Plaintiff shall produce the Settlement Agreement to the Defendants within twenty-one (21) days. The amount of the settlement shall be redacted before production.
3. A copy of this Order shall be served on all counsel within five (5) days and posted on the court's website.



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BRIAN R. MARTINOTTI, J.S.C

NOT TO BE PUBLISHED WITHOUT

THE APPROVAL OF THE COMMITTEE ON OPINIONS

KIMBERLY EVERETT,  
Plaintiff,

v.

BAYER CORP., BAYER HEALTHCARE, LLC,  
BAYER HEALTHCARE PHARMACEUTICALS,  
INC., BAYER SCHERING PHARMA AG,  
INTENDIS, INC., BAYER AG, TEVA  
PHARMACEUTICAL INDUSTRIES, LTD, TEVA  
PHARMACEUTICALS USA, INC., BARR  
PHARMACEUTICALS, LLC (formerly known as  
BARR PHARMACEUTICALS, INC.), BARR  
LABORATORIES, INC., JANE DOE  
DISTRIBUTORS (1-50), JILL DOE  
DISTRIBUTORS (1-50), JACK DOE  
WHOLESALEERS (1-50), JACK DOE SELLERS (1-  
50), JOHN DOE MARKETERS (1-50), JOAN DOE  
FORMULATORS (1-50), JIM DOE HEALTH CARE  
PROVIDERS (1-50), JEAN DOE (1-50), ST.  
MARY'S HOSPITAL, NURSE SHARI GOMEZ,  
DR. BIKKINA MAHESH, HEART & VASCULAR  
ASSOCIATES-NOTHERN, DR. HOWARD BENN,  
DR. JOSE LUIS SABOGAL, BETTER  
HEALTHCARE OF NEW JERSEY, LLC, PASSAIC  
COMMUNITY PHARMACY, INC. d/b/a PASSAIC  
COMMUNITY PHARMACY, SAMIRKUMAR  
PATEL, R.PH., ABC COMPANIES (1-10), JANE  
DOE NURSES (1-10), JOHN DOE PHYSICIANS (1-  
10), DEF COMPANIES (1-10), DEF COMPANIES  
(10-15), and JIM DOE PHARMACISTS (1-5),  
Defendant(s).

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

BERGEN COUNTY

DOCKET NO. BER-L-2813-13

CIVIL ACTION

Argued: September 10, 2014  
Decided: September 25, 2014

ARGUED BY:

For Plaintiff Kimberly Everett: Barry R. Sugarman, Esq. (Sugarman Law, LLC)

For Defendants Passaic Community Pharmacy, Inc. and Samirkumar Patel, R.Ph.:  
Christopher Morgan, Esq. (White & Williams, LLP)

For Defendant Howard Benn, M.D.: Michael J. Smith, Esq. (Giblin & Combs,  
LLC)

For Defendant Jose Luis Sabogal, M.D.: Rosalind B. Herschthal, Esq. (Marshall  
Dennehey Warner Coleman & Goggin, P.C.)

For Defendant St. Mary's Hospital: Jayne Turner, Esq. (Reiseman Rosenberg  
Jacobs & Heller, P.C.)

**MARTINOTTI, J.S.C.**

Before this Court is Defendants Passaic Community Pharmacy, Inc.'s ("PCC") and Dr. Samirkumar Patel's (hereinafter, collectively, "Defendants" or "Movants") Motion to Compel Production of the Settlement Agreement<sup>1</sup> ("Settlement Agreement") between Plaintiff Kimberly Everett ("Everett") and Co-Defendant Bayer Corporation, et al. ("Bayer"). Co-Defendants Dr. Howard Benn ("Dr. Benn") and Dr. Jose Luis Sabogal ("Dr. Sabogal") joined in this motion (all defendants other than Bayer when referred to as a group will be defined as "Non-Bayer Defendants"). Everett has filed opposition to this Motion.<sup>2</sup>

**FACTS**<sup>34</sup>

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<sup>1</sup> During oral argument, counsel for Plaintiff Kimberly Everett stated that the Settlement Agreement was not subject to a confidentiality agreement.

<sup>2</sup> Bayer did not file opposition to this motion and did not participate in oral argument.

<sup>3</sup> This action is part of the In Re *YAZ*®, *Yasmin*®, *Ocella*® Litigation, Case No. 287, which was assigned to this Court for centralized management (now multicounty litigation) in February 2010.

<sup>4</sup> This is a brief synopsis of the facts pertinent to this motion.

In April 2011, Everett developed deep vein thrombosis (DVT), allegedly as a result of taking *Beyaz*®. She was treated at St. Mary's Hospital and given a prescription to take 80mg of Lovenox® once per day instead of the recommended dosage of twice per day. PCC, through pharmacist Dr. Patel, filled the prescription as written. After the pain persisted for ten (10) days, Everett returned to the hospital, where she was diagnosed with a pulmonary embolism and related injuries.

On April 11, 2013, Everett filed an amended complaint. The first section of the Complaint alleges causes of actions against Bayer and its related entities for injuries sustained as a result of taking *Beyaz*®. The second section of the Complaint asserts claims against the Non-Bayer defendants based on theories of negligence and malpractice. On July 23, 2014, Everett notified the Non-Bayer Defendants that all claims between Everett and Bayer had been settled. Bayer entered a Settlement Agreement and filed a stipulation of dismissal as to the Bayer defendants.

## ARGUMENTS

### PCC's and Dr. Patel's Arguments

PCC and Dr. Patel argue that the public policy of New Jersey supports disclosure of the Settlement Agreement. PCC and Dr. Patel argue R. 4:10-2 is written broadly and allows for discovery of any matter that is "relevant to the subject matter" of the action. Full and complete disclosure of relevant facts in litigation "will best lead to the truth" and "advances the interest of justice." Llerena v. J.B. Hanauer & Co., 368 N.J. Super. 256, 268 (Law Div. 2002); Medford v. Duggan, 323 N.J. Super. 127, 139 (App. Div. 1999). PCC and Dr. Patel further contend Bayer still will play a key role in discovery, and disclosure of the Settlement Agreement will permit the remaining defendants to assess any potential witness bias. Defendants contend non-disclosure risks

a “Mary Carter-type agreement”<sup>5</sup> between Everett and the Bayer defendants, and disclosure is necessary to determine if Defendants will be entitled to a damages offset.

In support, PCC and Dr. Patel rely on Llerena, supra. Llerena, supra, held that, absent a specific showing of harm, discovery of a settlement agreement between a former employee and an insurance company would not undermine public policies that encouraged settlement.

PCC and Dr. Patel argue Osowski v. AMEC Const. Management, Inc., 69 A.D.3d 99, 106 (N.Y.A.D. 2009), sets the standard for whether to compel production of a settlement agreement. In Osowski, the court held that disclosure of the terms of a settlement agreement may be appropriate where “material and necessary” to a non-settling party’s case. Further, defendants cite Wyeth v. Organus Pharma, Inc., 2010 WL 4117157, \*4 (D.N.J. 2010), for the proposition that production of a settlement agreement may be appropriate where settlement impacts the amount of damages.

PCC and Dr. Patel have expressed a willingness to participate in a confidentiality agreement regarding the Settlement Agreement.

#### Dr. Benn’s Argument

Dr. Benn joins in the motion arguing that the Settlement Agreement is relevant to a material issue in the case, namely, the potential offset for the medical malpractice defendants. In support, Dr. Benn cites Ciluffo v. Middlesex General Hospital, 146 N.J. Super. 476 (App. Div. 1977), and Clark v. University Hospital, 390 N.J. Super. 108 (App. Div. 2006). In these cases, the court held that where a plaintiff sustains successive injuries and settles with the first tortfeasor, subsequent tortfeasors may be entitled to a credit to prevent double recovery.

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<sup>5</sup> A Mary Carter agreement generally is defined as “a settlement device . . . [that] secretly and unfairly allies one defendant with plaintiff to the prejudice of the other defendant.” Jiorle v. Mupo, 2009 N.J. Super. UNPUB. LEXIS 2332, at \*16 (App. Div. Aug. 26, 2009) (quoting Benz v. Pires, 269 N.J. Super. 574, 578 n.2 (App. Div. 1994)).

### Dr. Sabogal's Argument

Dr. Sabogal states that production of the Settlement Agreement will ensure that his rights to discovery are protected. Dr. Sabogal reiterates that Bayer still must actively participate in the discovery process; Dr. Sabogal expressed concern that Bayer could defeat their discovery obligations through a private agreement with Everett.

### Everett's Argument

Everett opposes the motion to compel on the grounds the Settlement Agreement is not relevant and not likely to lead to the discovery of relevant information. Specifically, Everett argues, among other reasons, the Settlement Agreement is not related to PCC's or Dr. Patel's duty to Everett to discover the incorrect dosage, the issue of the alleged error's causation of her injuries, and the Non-Bayer Defendants liability for damages.

Everett argues the Settlement Agreement is neither relevant to the claims and defenses nor helpful to the remaining defendants. Everett points out that typical settlement agreements do not contain admissions of liability or substantive information about the case. In fact, most settlements contain an express denial of liability. Everett posits that the agreement with Bayer is "typical," but, if the Court requires further assurance that the agreement is not relevant, Everett is prepared to submit the agreement for in camera review.<sup>6</sup>

Everett objects to Movants' inference that the case law establishes a general rule of discovery for settlement agreements and argues reliance on Llerena, supra, is misplaced. In that case, the court held a prior settlement agreement with another plaintiff tended to show the employer had notice of ongoing sexual harassment and demonstrated a pattern of discrimination in the workplace. Similarly, the court in Wyeth, supra, permitted production of a settlement agreement

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<sup>6</sup> At oral argument, the Court rejected the request for an in camera review.

where the agreement was indicative of the company's previous dealings with generic manufacturers, a central issue in the case. Everett avers that the case law permits introduction of settlement agreements only when highly relevant and in the public interest.

Everett also contests Dr. Benn's argument that production of the Settlement Agreement is necessary to calculate a right to an offset, arguing Ciluffo and Clark only address discoverability of settlement agreements after the verdict. Accordingly, Defendants will have no right to a credit or disclosure of the information in the agreement until after the trial and after the jury apportions liability to each party.

Finally, Everett refutes Dr. Sabogal's contention that failure to produce the Settlement Agreement will inhibit his discovery rights. Specifically, Everett points out that Defendant's discovery rights will be protected by a general subpoena power and the Rules of Court.

### **DECISION**

In New Jersey, parties may compel discovery of information relevant to any party's claims or defenses. R. 4:18-1; R. 4:23-1. Information is relevant when it has any tendency to make a fact of consequence more or less probable. N.J.R.E. 401. As a general rule, New Jersey's discovery rules should be construed liberally. Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 535 (1997). Although the text of the rule is broad, this Court retains discretion to limit the discoverability of information.

Parties may not use the discovery process to find evidence in support of a mere "hunch" or "suspicion" of a cause of action. Gray v. Town of Darien, 927 F.2d 69, 74 (2d Cir.) aff'd 996 F.2d 537 (2d Cir.), cert. denied, 114 S. Ct. 388 (1993). Moreover, "it as long been established that pleadings reciting mere conclusions without facts and reliance on subsequent discovery do not

justify a lawsuit.” Lass v. Suburban Restoration Co., Inc., 317 N.J. Super. 574, 582 (App. Div. 1998). The discovery process may not be used merely as a fishing expedition. Trinity Church v. Beas, 394 N.J. Super. 159, 166 (App. Div. 2007).

This motion presents competing public policies. On the one hand, New Jersey courts strive to promote and encourage settlements. As such, some settlement agreements are confidential, and statements made in conjunction with a settlement are not discoverable. On the other hand, full and complete disclosure of material information advances the interest of justice and facilitates accurate and efficient disposition of cases.

Recently, In the Matter of the Complaint of SeaStreak LLC, as Owner of the Vessel SeaStreak Wall Street for Exoneration or Limitation of Liability, Civil Action No. 13-315 (WJM), the court ordered the production of a confidential agreement between a sea captain allegedly responsible for a crash that injured dozens of commuters and his former employer. Despite the confidentiality provision in the separation agreement, Judge Falk ordered its discovery on the grounds that the agreement was “plainly relevant” to the underlying action.

In light of the standards to be considered, namely, if the information could lead to the discovery of relevant information, plus the lack of a confidentiality agreement, this Court finds the Settlement Agreement should be produced. However, the Court will permit Everett to redact the amount of the settlement from the agreement before production.

### **CONCLUSION**

For the foregoing reasons, Defendants PCC’s and Dr. Patel’s Motion IS GRANTED.