Federal Court Cour fédérale

Date: 20151119

Docket: T-1048-07

Ottawa, Ontario, November 19, 2015

PRESENT: Case Management Judge Mireille Tabib

BETWEEN:

ELI LILLY CANADA INC.,
ELI LILLY AND COMPANY,
ELI LILLY COMPANY LIMITED
AND ELI LILLY SA

Plaintiffs
(Defendants by Counterclaim)

and

TEVA CANADA LIMITED

Defendant
(Plaintiff by Counterclaim)

ORDER

UPON the motion of the Defendants by Counterclaim ("Lilly") for an order requiring the Plaintiff by Counterclaim ("Teva") to produce or give it access to the data files relevant to trade spend (item 4 of the motion to compel filed August 4, 2015).

AND UPON considering the parties' respective motion records and supplementary motion records and hearing counsel's oral submissions;

I am satisfied that what Lilly seeks is the production of relevant raw data, namely, for the year 2006, 2007 and 2008 (as limited by counsel for Lilly at the hearing) relating to:

a) all direct sales made by Teva to each of its Canadian customers;

b) all indirect sales to each Canadian customer reported to Teva by wholesalers;

c) the negotiated or estimated trade spend rate and the form of that trade spend (using the categories of trade spend outlined in production TEVA 0061) recorded in Oracle for each Canadian customer; and

d) the actual payments or spending of trade spend for each Canadian customer, and the form of that trade spend using the same categories as above.

This data is relevant because trade spend is the most significant cost of sales, but is generally neither negotiated, recorded, tracked or calculated by Teva on a product by product basis. As such, in order for the parties' experts to evaluate the cost of allegedly lost olanzapine sales, they will have to estimate the trade spend that would have been incurred by Teva in relation to olanzapine. The calculation will depend on estimated sales to customers, which may vary from month to month and province to province, on the trade spend for each customer, and how estimated sales of olanzapine might have affected the actual trade spend, which Teva admits may be adjusted and vary from the rate negotiated or estimated for each customer. Trade spend may take several forms, including discounts, education allowances, free goods, to name but a few. There is no indication that Teva's method of evaluating the dollar value of trade spend in forms other than discounts is uncontested. The complexity of the calculations mentioned above is exemplified by the fact that Teva, using the very data that Lilly is requesting, has produced several different iterations and calculations of its trade spend rates, some of which it now admits

are unreliable. Clearly, the exercise of estimating the trade spend that would have been incurred on lost sales of olanzapine will be a matter for experts, and will require the experts to understand and use the raw data mentioned above in order to arrive at an estimate.

I am satisfied that the data set out above is available in electronic form, either in Teva's Oracle system, in its Data Analyser software system, or in a combination of both and that this data constitutes a "document", as defined in Rule 222 (1).

As a result, it is clear that, save for the exercise of the Court's discretion and the application of the principles of proportionality, Lilly is entitled to the production of this data.

The evidence before me discusses the difficulties and challenges of trying to extract from Teva's Oracle system the trade spend for each product in past time periods. However, other than the bare assertion in Mr. Youtoff's affidavit to the effect that data from the Oracle system for the years 2007 and prior has been archived, is not accessible on site and that accessing it is "a difficult and time-consuming undertaking", the evidence does not address at all any potential difficulty or challenges of copying and delivering to Lilly the raw data contained in Oracle and Data Analyser. Without better evidence of how difficult or time-consuming it would be to access archived data from the Oracle system and without any evidence that it would then be difficult, costly or time-consuming to identify and copy the relevant data, the court cannot conclude that the request is overly onerous. There is evidence before me that Oracle, as a whole, contains much more information than that which is strictly relevant to these proceedings, but no evidence to the effect that the specific data set out above cannot be discreetly extracted and copied in an intelligible format either from Oracle or from Data Analyser, to which part of the Oracle data is already exported automatically. Even if data cannot be extracted and exported in an intelligible

and accessible manner, there is no evidence that discrete modules cannot be isolated and produced. Again, that would have been Teva's evidentiary burden and it has not been met.

I do not accept Teva's submissions to the effect that it could not or did not know that it had to meet this burden because Lilly's request was somehow vague or all-encompassing. The question and matching submissions that originally appeared as item 4 of Lilly's list of refusals was as follows: "(…) a request for access for our experts, if necessary, to the data files relevant to trade spend (…)". "The data files relevant to trade spend have not been produced by Teva. (…) To the extent the computer system is the only place where this information exists it must be produced or access provided. A computer file is a "document" producible under the Rules." Teva was clearly on notice that Lilly was seeking production of raw data relevant to trade spend and not necessarily production or inspection of the entire Oracle system. Teva has not established that the relevant data files cannot be produced or that their production would be overly onerous.

Finally, I am not satisfied that Teva has already produced such information as might be most relevant and probative in other forms, such that production of the raw data would be duplicative or excessive. Teva has previously produced detailed reports of sales and trade spend, but now says its methodology was flawed and that these reports are unreliable. It has in the past produced some reports from Oracle, but they are admittedly incomplete as they do not include indirect sales. It has now produced or promised to produce new reports showing aggregate yearly sales and blended trade spend, some on a per customer basis, some on the basis of customer groupings. However, these reports are not broken down by month or quarter, or by province and in some cases not even by specific customers. In order to understand these last reports, including why, surprisingly, they show negative trade spends in some instances, Lilly would have to go through yet another round or rounds of questioning. Teva asserts that it is "virtually impossible to

reliably reconcile" the trade spend payments against the purchases to which they relate, or to "discreetly attribute the portion of each payment that was paid on the basis of any product". Therefore, without allowing Lilly access to the raw data and an opportunity to test that assertion, Teva concludes that its raw data will not be useful or probative and that Lilly should instead settle for the yearly aggregates and blended rates Teva intends to produce using the raw data.

I am satisfied that the raw data is relevant, that Teva has not produced all of the relevant raw data, that what has been produced so far and that Teva intends to produce is not an adequate or appropriate substitute for the raw data in the circumstances. I have not been satisfied that production of the data files would be impossible, unduly onerous or lack proportionality. I am satisfied that it is fair and just that Lilly benefit from the same opportunity as Teva has had to access and work with the raw data directly.

THIS COURT ORDERS THAT:

1. Teva shall produce to Lilly the raw data relating to the following information for the years 2006, 2007 and 2008:

    a) all direct sales made by Teva to each of its Canadian customers;

    b) all indirect sales to each Canadian customer reported to Teva by wholesalers;

    c) the negotiated or estimated trade spend rate and the form of that trade spend (using the categories of trade spend outlined in production TEVA 0061) recorded in Oracle for each Canadian customer; and

    d) the actual payments or spending of trade spend for each Canadian customer, and the form of that trade spend, using the same categories as above.

2. Costs of this motion, in the amount of $2500, shall be payable by Teva to Lilly.

3. If the parties cannot agree as to the delays for production, they are to file written submissions, accompanied by their mutual dates of availability to participate in a hearing by telephone, should the Court wish to hold a hearing.

"Mireille Tabib"
Case Management Judge