UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: ZANTAC (RANITIDINE) PRODUCTS LIABILITY LITIGATION

MDL NO. 2924 20-MD-2924

JUDGE ROBIN L. ROSENBERG
MAGISTRATE JUDGE BRUCE REINHART

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THIS DOCUMENT RELATES TO: CONSOLIDATED ECONOMIC LOSS AND MEDICAL MONITORING CLASS ACTIONS

DEFENDANTS' MOTION TO COMPEL CLASS PLAINTIFFS' PRODUCTIONS

Brand Defendants[1] move this Court for an order compelling the Class Plaintiffs in both the economic-loss and medical-monitoring class actions to produce documents and responses to Defendants' First Set of Requests for Production to Consumer Plaintiffs Nos. 41–50, 52, 56–59, and 70 and First Set of Interrogatories to Consumer Plaintiffs Nos. 13 and 21.

Plaintiffs' ESI is critical to both class certification and the claims and defenses of the individual cases. But to date, the 110 Class Plaintiffs in the economic-loss and medical-monitoring cases have produced a grand total of **one page** of ESI. They have not produced **any** e-mail communications, text messages, or other requested ESI. Plaintiffs have also refused to use most of Defendants' proposed search terms to find relevant ESI. In particular, Plaintiffs have categorically rejected all search terms related to cancer risk factors, other lawsuits, statutes of limitations, and economic loss. These terms are needed to identify information relevant to the claims and defenses, as well as to class certification criteria including adequacy and typicality.

Even with limited visibility into Plaintiffs' ESI, Defendants have demonstrated the deficiencies in Plaintiffs' efforts by identifying responsive ESI that Plaintiffs failed to produce. Plaintiffs' discovery deficiencies are the result of an inadequate search process that excludes responsive information and does not comply with Rule 26(g)'s "reasonable inquiry" requirement. The deficiencies in Plaintiffs' processes are compounded by (1) counsel apparently allowing clients to search and collect their own ESI using unreliable search tools and (2) a refusal to search sources of potentially responsive ESI based on inaccurate representations or assumptions as to collectability and contents (sources are, however, readily searchable at minimal cost).

[1] GlaxoSmithKline Holdings (Americas) Inc.; GlaxoSmithKline LLC; GlaxoSmithKline PLC; Boehringer Ingelheim Corporation; Boehringer Ingelheim International GMBH; Boehringer Ingelheim Pharmaceuticals, Inc.; Boehringer Ingelheim Promeco, S.A. de C.V.; Boehringer Ingelheim USA Corporation; Pfizer Inc.; Chattem, Inc.; Sanofi US Services Inc.; and Sanofi-Aventis U.S. L.L.C.

Defendants therefore respectfully request that the Court compel:

- Collection of Plaintiffs' e-mail and social-media accounts, as well as other documents and sources of potentially responsive ESI, including the sources Plaintiffs have said they have been excluding—including photographs, videos, Instagram, TikTok, Facebook Messenger, Twitter Direct Messages, and Snapchat;

- Application of all of Defendants' proposed search terms to Plaintiffs' ESI followed by review of the culled ESI, as well as review of all collected photographs and videos, for responsiveness and privilege; and

- Production of responsive and non-privileged ESI, along with a Rule 26(g) certification for each Plaintiff at the conclusion of each Plaintiff's production or lack thereof.

I. BACKGROUND

On July 29, 2020, Defendants served their First Set of Requests for Production and First Set of Interrogatories. Among other things, Defendants requested documents and information related to each Plaintiff's complaint, lawsuit, alleged injuries, and damages; over-the-counter or prescription brand-name Zantac; any other ranitidine-containing products; NDMA; any Defendant named in the complaint; and any manufacturer, distributor, retailer, or supplier of over-the-counter or prescription brand-name Zantac. *See* **Ex. A** (outlining requests). The requests sought all responsive documents, whether hard copy or electronic, including, but not limited to, online communications, e-mail messages, internet postings, comments to articles, and social media. *Id.*

Plaintiffs served initial responses on October 31, 2020, and amended responses on August 31, 2021. But to date, only one of the 110 Class Plaintiffs (less than 1%) has produced any ESI, and that Plaintiff produced one single-page social-media post.[2] On October 19, 2021, at the Special Master's direction, Defendants provided Plaintiffs a set of proposed search terms related to cancer

[2] Notably, this lone single-page social media post represents .0008% of the total pages produced by Plaintiffs (*see* **Ex. B**). Further, despite Plaintiffs' anticipated arguments regarding the robustness of their document production to date, approximately 30% of their productions consist of documents from former plaintiffs, retention letters, or documents indicating records not found/patient not found. *See id.*

risk factors, economic loss, risky behaviors, cancer lawsuits, and statutes of limitations. *See* Proposed Order at Appendix A (**Ex. C**).[3]

On October 28, 2021, pursuant to the Court's order, Plaintiffs disclosed the following:

Search Terms:

- Plaintiffs propose applying only 41 search terms to identify responsive ESI (28 of which are names of defendants or retailers);[4]
- Plaintiffs are not using any search terms regarding cancer risk factors, other cancer lawsuits, or risky behaviors; and
- Plaintiffs are not using most of Defendants' search terms regarding statutes of limitations and economic loss.

Sources Searched:

- Plaintiffs are not searching Instagram, Snapchat, TikTok, Facebook Messenger, or Twitter Direct Messages; and
- Plaintiffs have made a blanket (and inexplicable) determination that photographs and videos "are not relevant to the issues in this case."

Search Process:

- Plaintiffs' counsel are relying on Plaintiffs' recollections before deciding whether even to search known sources of ESI;
- Plaintiffs are not collecting and then searching their ESI, but rather are purportedly searching their ESI at each individual source; and
- Plaintiffs' counsel have relinquished some of the responsibility to search for ESI to each of the 110 individual Class Plaintiffs and those individuals' own technological capabilities and judgment calls as to responsiveness.

See Fegan Letter at 2–4 (Oct. 28, 2021) (**Ex. D**). The parties have exchanged written correspondence and engaged in meet-and-confers, but are unable to resolve this dispute.

II. LEGAL STANDARD

Requesting parties may move to compel discovery responses when responding parties provide evasive or incomplete productions or responses. FED. R. CIV. P. 37(a)(3)(B)(iii)-(iv),

[3] This search term approach was proposed after prior efforts to address the matter proved fruitless.
[4] By contrast, Defendants are using 973 agreed-upon search terms to identify responsive ESI. Moreover, those terms cannot be applied at the source because they include wildcards and terms and connectors, which are standard for litigation search terms. Here, however, Plaintiffs oppose applying a much smaller set of search terms and oppose using wildcards and terms and connectors.

37(a)(4). Motions to compel under Rule 37(a) are committed to the discretion of the trial court. *Commercial Union Ins. Co. v. Westrope*, 730 F.2d 729, 731 (11th Cir. 1984). Requesting parties "may 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).

III. ARGUMENT

Plaintiffs' ESI contains critical information. For example, social media provides a contemporaneous record of an account holder's digital history, including a frank snapshot of a Plaintiff's physical and mental state in relation to the claims in this litigation. One court observed:

> The value of [electronic communications] can be particularly significant in litigation due to the fact that the ease of sending or replying to such messages can cause people to say things they might not otherwise say in traditional correspondence. Indeed, they are often replete with unrehearsed, spontaneous statements that surpass in simplicity and frankness and ease of understanding other far more complicated bits of evidence.

BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc., No. 15 C 10340, 2018 WL 1616725, at *10 (N.D. Ill. Apr. 4, 2018); *see also Locke v. Swift Transp. Co.*, No. 5:18-CV-00119-TBR-LLK, 2019 WL 430930, at *2 (W.D. Ky. Feb. 4, 2019) ("social media information is treated just as any other type of information would be in the discovery process").

A. Plaintiffs Should Be Required to Apply All of Defendants' Search Terms.

Plaintiffs' proposal to omit most of Defendants' proposed search terms and withhold entire categories of responsive ESI should be rejected. In particular, Plaintiffs have stated that they will not search for—and thus will not produce—ESI regarding cancer risk factors, other cancer lawsuits, and risky behaviors. *See* **Ex. D** at 3–4. Plaintiffs have also rejected most of Defendants' search terms regarding statutes of limitations and economic loss. *See id.* Instead, they propose 41 terms that are indefensibly narrow (28 of which are names of defendants or retailers) and devoid of wildcards (so that terms must hit exactly as listed). *Id.*

Plaintiffs cannot seek compensation due to alleged cancer risks associated with Zantac while categorically rejecting search terms related to cancer risk factors, risky behaviors, and other cancer-related lawsuits. *See id.* The cancer risk factor terms include obvious ones such as "smok*," "diabet*," "fibrosis," etc. **Ex. C**. These terms are critical to explore alternative causation. Defendants have also proposed basic terms, such as "talc*," "roundup," "Zofran," etc., to identify ESI relating to other major cancer litigations. *See id.* If a Plaintiff alleges multiple products may cause her to develop cancer, that information relates to Defendants' defenses and threshold class-certification issues like adequacy and typicality.

Plaintiffs have also refused to run basic search terms related to their economic loss allegations, such as "receipt," "pharmac*," "econom*," "cost," "bill*," "wage*," "damage*," etc. *See* **Ex. D** at 3–4; **Ex. C**. Information related directly to Plaintiffs' claimed economic-loss damages is clearly relevant to available defenses, as well as to Plaintiffs' adequacy and typicality.

Further, Plaintiffs refuse to include certain search terms seeking communications regarding their lawsuits. *See* **Ex. D** at 3–4. These terms include "counsel," "lawyer*," "attorney*," "law firm*," "sue," "court*," etc. *See* **Ex. C**. Each is critical to Defendants' inquiry into, among other issues, whether certain Plaintiffs' claims are time-barred by the applicable statutes of limitations.

Plaintiffs suggest that their medical records are a substitute for an ESI production. *See* Hrg. Tr. at 25:1–19 (Oct. 21, 2021). But relevant information contained in Plaintiffs' ESI does not appear in the medical records produced to date. *See* Section B, *infra*. And even if it did, Defendants are entitled to discovery of separate information, including, for instance, information regarding the extent and timing of Plaintiffs' cancer risk factors. For these reasons, even in cases involving thousands of plaintiffs required to produce their medical records, courts still regularly require

production of ESI.[5] In any event, much of the requested ESI would not appear within Plaintiffs' medical records, such as discussions about other lawsuits.

Just as medical records are not an adequate substitute, Plaintiffs' deposition testimony based on their recollection also cannot replace the requested ESI. *See* Hrg. Tr. at 25:1–19 (Oct. 21, 2021) (Plaintiffs suggesting deposition testimony is an adequate substitute for producing responsive documents); *see, e.g., Reed v. Royal Caribbean Cruises, Ltd.*, No. 19-24668-CIV-LENARD/O'SULLIVAN, 2020 WL 5878814, at *8 (S.D. Fla. Oct. 2, 2020) (noting that deposition answers were not an adequate substitute for ESI); *Sosa v. Carnival Corp.*, No. 18-20957-CIV-ALTONAGA/GOODMAN, 2018 WL 6335178, at *20 (S.D. Fla. Dec. 4, 2018) (same). Plaintiffs should, therefore, apply Defendants' search terms to identify responsive ESI.

B. Plaintiffs Should Not Be Permitted to Disregard Potential Sources.

Plaintiffs have identified several sources of responsive ESI that they refuse even to search. *See* **Ex. D** at 2. To the extent Plaintiffs have potentially responsive photographs or Instagram, Snapchat, TikTok, Facebook Messenger, or Twitter Direct Messages, they should be required to search those sources for responsive information. Plaintiffs' statement that these sources are "unlikely" to contain responsive information strains credulity. *See id.*

Plaintiffs' flat statement that photographs and videos "are not relevant to the issues in the case," *id.*, is particularly concerning. Defendants can demonstrate the importance of such evidence. For instance, Plaintiffs Shirley Magee's and Patricia Hess's publicly available (but not produced) ESI shows them smoking cigarettes. *See* Magee Photo (**Ex. E**). Neither Plaintiff has produced medical records indicating that they smoke. As economic-loss Plaintiffs, their decision to smoke

[5] *See, e.g.*, Order, *Holley v. Gilead Scis., Inc.*, No. 18-cv-06972-JST (N.D. Cal. June 29, 2021) (ECF No. 724) (requiring over 400 plaintiffs to produce their social media: "Plaintiffs' social media ESI is undoubtedly relevant"); Order re: Plaintiff Fact Sheets, ¶ 1.f. and Ex. A, § XI.12–13, *McLaughlin v. Bayer Essure Inc.*, No. 2:14-cv-07315-JP (E.D. Pa. Feb. 15, 2018) (ECF No. 207).

cigarettes is relevant to their willingness to take risks despite product warnings. Plaintiffs should not exclude these sources and information types, but rather should review photographs and videos for responsiveness. Further, Plaintiffs should also review sources like Instagram and TikTok because they contain not only photographs and videos, but also comments and chat conversations. *See* Declaration of Julian Ackert at ¶¶ 14–15 (**Ex. F**).

There is also no reason Plaintiffs should forgo searching Facebook Messenger and Twitter Direct Messages when Plaintiffs have said they are searching WhatsApp messages and text messages—consumers regularly use Facebook Messenger and Twitter Direct Messages in the same manner as WhatsApp messages and text messages. Further, Plaintiffs' objection that Facebook Messenger and Twitter Direct Messages "cannot be downloaded" is simply not true. *See* **Ex. D** at 2. Rather, users can download their messages from Facebook Messenger and Twitter usually in a matter of minutes and for free. *See* **Ex. F** at ¶ 18. Plaintiffs are also wrong to suggest that all Snapchat information becomes inaccessible after a short time. In a recent case, a court even sanctioned a party for failing to preserve a Snapchat account and destroying certain images and videos. *Doe v. Purdue Univ.*, No. 2:17-CV-33-JPK, 2021 WL 2767405, at *5 (N.D. Ind. July 2, 2021) (explaining Snapchat's feature to save ESI "indefinitely"). Because these sources likely contain responsive information, Plaintiffs should not be permitted to exclude them.

C. Production of Plaintiffs' ESI is Proportional to the Needs of the Case.

The requested discovery is proportional to the needs of the case. To assess proportionality, courts consider the six Rule 26(b)(1) factors: (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of the discovery in resolving the issues, and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. *See Oxbow Carbon &*

Minerals LLC v. Union Pac. R.R. Co., 322 F.R.D. 1, 7 (D.D.C. 2017). Plaintiffs cannot justify omitting Defendants' search terms using a bald proportionality objection. *See, e.g.*, *In re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2018 WL 3586183, at *6–*9 (N.D. Ill. July 26, 2018).

The application of each factor here supports requiring Plaintiffs to use Defendants' search terms and to search sources Plaintiffs excluded. ***First***, these putative class actions carry significant monetary and reputational stakes for the parties. ***Second***, and relatedly, the amount in controversy is significant with 110 Plaintiffs seeking damages on behalf of far larger consumer classes. *See, e.g.*, *Milliner v. Mutual Secs., Inc.*, No. 15-cv-03354-TEH, 2017 WL 6419275, at *3 (N.D. Cal. Mar. 24, 2017) ("Here, where Plaintiffs are seeking compensatory damages for 'tens of millions of dollars,' the Court finds Plaintiffs' proportionality objections unpersuasive."). ***Third***, only Plaintiffs have access to their e-mail and chat messages, non-public social media, and other personal documents. ***Fourth***, Plaintiffs have the resources to produce this discoverable information. ***Fifth***, the search terms bear on core issues in this case, including, but not limited to, whether Plaintiffs' claims were timely filed and whether Plaintiffs engage in risky behaviors that, e.g., undercut their contention that the alleged risks posed by ranitidine-containing products render them worthless. ***Sixth***, any burden associated with using the search terms and searching additional sources does not outweigh the benefit of potentially case-dispositive information.

Collection and production of e-mail, text messages, and social media in civil litigation is hardly new or unique. Parties have been collecting, reviewing, and producing ESI for many years. There are readily available methods and tools for Plaintiffs to collect their ESI for no to low cost. For instance, Plaintiffs can collect their e-mail in a searchable format at no cost whatsoever. *See* **Ex. F** at ¶ 12.a. And certain social-media sources also can be collected at no cost. *See id.* at ¶ 12.b. Both plaintiffs and defendants regularly use these tools to collect social media and other types of

ESI, with X1 Social Discovery being an example of one such collection tool. *See* Declaration of Brent Botta at ¶ 2 (**Ex. G**). Alternatively, Plaintiffs can enlist the services of a vendor. *See id.* at ¶ 12. While for many Plaintiffs here the cost of collection might be nothing or a negligible amount, courts consistently hold that costs of a few thousand dollars are proportional to the needs of the case where significant damages are sought. *See, e.g.*, *Holley v. Gilead Scis., Inc.*, No. 18-cv-06972-JST (N.D. Cal. June 29, 2021) (ECF No. 724) (finding $4,746 per plaintiff "hardly 'exorbitant' when considered in context with what Plaintiffs estimate to be six- or seven-figure cases.").

Plaintiffs have not demonstrated, ***based on actual testing, data, and experience***, that Defendants' proposed terms would (a) materially increase the number of documents requiring review, or (b) generate overwhelmingly non-responsive documents. Plaintiffs' proportionality objection thus boils down to generalized complaints about basic discovery burdens.

D. Plaintiffs Must Conduct a Reasonable Inquiry to Identify Responsive ESI.

Plaintiffs' search methodology does not comply with their obligation to conduct a Rule 26(g) "reasonable inquiry." Plaintiffs' counsel are relying on their clients' recollections to determine *whether even to search* ESI. *See* **Ex. C** at 2–4. Courts regularly reject such an approach because it is unrealistic to expect individuals to recall years' worth of ESI. *See, e.g., Younes v. 7-Eleven, Inc.*, 312 F.R.D. 692 (D.N.J. 2015) (reliance on client's "faulty recollection" does not satisfy Rule 26(g)); *Bernal v. All Am. Inv. Realty, Inc.*, 479 F. Supp. 2d 1291, 1334 (S.D. Fla. 2007) (same). Counsel are not searching *any* e-mail accounts for multiple Plaintiffs, even though they were disclosed. *See* **Ex. D** at rows 3:E, 24:E, 25:E, 47:E, 48:E, 178:E. Plaintiffs' counsel are disregarding those e-mail accounts as well as social-media accounts based on their clients' recollection. *See, e.g., id.* at rows 7:L, 17:L, 83:L. To comply with their Rule 26(g) obligations, Plaintiffs' counsel cannot depend on their clients' recollections, but need to conduct their own investigation.

Plaintiffs' counsel also rely on Plaintiffs to search their own ESI. *See* **Ex. D** at 3. Plaintiffs are not lawyers or e-discovery experts and surely have varying degrees of technological competence. Courts have rejected this approach. *See, e.g.*, *E.E.O.C. v. M1 5100 Corp.*, No. 19-cv-81320-DIMITROULEAS-MATTHEWMAN, 2020 WL 3581372, at *1–*5 (S.D. Fla. July 2, 2020) (unsupervised self-collection by interested parties does not satisfy Rule 26(g)).

Plaintiffs' counsel compound the problem by having their clients search at the source—i.e., using whatever unsophisticated search features each source has, instead of collecting from the source and loading Plaintiffs' ESI into a review platform for searching. The tools available at the source for text messages, social media, and e-mail do not facilitate wildcard searches or terms and connectors. *See* **Ex. F** at ¶ 12.a.–c. They are often unreliable and miss responsive documents. *Id.* For some e-mail accounts, a search at the source may not hit on attachments or even the bodies of e-mail messages. *Id.* at ¶ 12.a. And even where the search does turn up responsive information, Plaintiffs are likely to produce screenshots in direct violation of PTO 29 ¶ III.1.iii.

Plaintiffs should instead use the standard approach litigants across the country use to identify responsive ESI, which is to collect the ESI from the source, upload it to a review platform, apply the search terms on the review platform, and then review the culled ESI. *See* **Ex. F** at ¶ 13.

IV. CONCLUSION

The Court should compel Plaintiffs to (1) collect their e-mail and social-media accounts, as well as other sources of ESI, including those Plaintiffs have been excluding; (2) apply Defendants' search terms to their ESI and then review the culled ESI, as well as review all photographs and videos, for responsiveness and privilege; and (3) produce the responsive and non-privileged ESI, along with a Rule 26(g) certification for each Plaintiff at the conclusion of each Plaintiff's production or lack thereof. *See* **Ex. A**.

Dated: November 2, 2021

Respectfully submitted,

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LOCAL RULE 7.1 CERTIFICATION

Pursuant to Local Rule 7.1, the undersigned certifies that the Brand Defendants made reasonable efforts to confer with all parties who may be affected by the relief sought in a good faith effort to resolve by agreement the issues raised in this motion and have been unable to do so.

/s/ Patrick Oot
Patrick Oot

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 2021, I electronically filed the foregoing DEFENDANTS' MOTION TO COMPEL CLASS PLAINTIFFS' PRODUCTIONS through the CM/ECF system, which will provide automatic notification to all CM/ECF participants.

/s/ Patrick Oot
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