

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

CareToLive, et al.,

Plaintiff,

vs.

Andrew von Eschenbach,
FDA et al.,

Defendants.

Case No. 2:07 CV 729

Judge Frost

Magistrate Judge King

**IN CAMERA HEARING
WITH TRANSCRIPT
REQUESTED UNDER SEAL**

**PLAINTIFF’S REPLY TO DEFENDANT’S
MEMORANDUM IN OPPOSITION TO DISQUALIFY
THE DEPARTMENT OF JUSTICE FROM REPRESENTATION
OF DEFENDANTS**

The Defendants’ memorandum in opposition attempts a complete end around most of the issues raised in Plaintiffs Motion to Disqualify. Defendant’s responded by stating:

“References to criminal procedure notwithstanding..”.

Plaintiff is not entirely clear on Defendants meaning and suggest a hearing under seal be conducted to discuss this in an appropriate context. Plaintiffs take no position with regards to whether the Department of Justice investigates or pursues any possible criminal conduct of individual wrong doers in this case. Plaintiffs seek justice, pure and simple. That justice can only be received by the patients still living by getting Provenge to them immediately. The Plaintiffs goal is and always will be an undoing of the injustice as quickly as possible.

However, it was and remains the duty of counsel for Plaintiff to advise this Court that the US Attorneys office cannot and should not be representing the individuals in this matter. While the actions of the individuals herein taken in conspiracy with each other could be found to be

misconduct to such an extreme that it has negatively affected tens of thousands of AIPC patients, the goal remains one of Provenge for the patients, now. It's a remedy that looks to the future, rather than dwells in redress of the past.

At this time the allegations of Plaintiffs complaint and the facts set forth in the various memorandum and motions before this court must be taken as true. The true facts indicate that the United States Attorneys office has no business representing these Defendants.

Plaintiffs suggest that this court hold an in camera hearing or meeting with a court reporter present that can be sealed thereafter to discuss further the potential inequities in the DOJ representing individuals accused of intentional torts done with constitutional malice and other issues better addressed in private before the court in this regards.

This case is so much more than an APA case. While it is true that Plaintiffs might prevail even just under an APA review (this due to the compelling, and truly historical, one of its kind "AC meeting transcript") which would enable this case to be decided in Plaintiffs favor without going further, it is also true that the United States own clients are likely not to be forthcoming even with their own counsel, because of the other role of their office, which is as law enforcement officials. Based on the history of the FDA, when it comes to producing an administrative record, there is likely to be disagreement about what is or isn't in the record and that issue alone may require some minimal discovery even under the APA (to define and determine appropriateness of that record).

The US Attorneys role as a prosecutor's office and as counsel for those that the same agency may later decide could be or should be prosecuted because of evidence that should come to light during this case, are clearly in conflict. The US Attorneys office routinely and

quickly moves for separate counsel in criminal cases such as drug cases involving multiple Defendants so that they can deal directly with each co-conspirator. In this case Howard Scher, if he does not plead the Fifth (which may then only be avoided by a grant of immunity from the DOJ) can by his testimony seriously damage the FDA and/or fellow conspirator, OOD chief Richard Pazdur. The US Attorneys office by keeping Dr. Scher in the umbrella of their representation can insure that Dr. Scher rather than working in his own best interest, actually works in the best interest of the agency and Defendant Richard Pazdur. They are also unlikely to have any reason to offer him immunity from prosecution if he talks or cooperates with the DOJ, as the FDA's best interest might be silence, while the best interest of the Nation, that the DOJ is also supposed to protect, is that he provides truthful testimony under oath. If the DOJ is not counsel in this case they would thereafter be in a position, should the needs and over all good of the public dictate it to be appropriate, that they should offer a witness immunity to cooperate and/or testify in a manner of such great public importance as this.

Defendants, repeatedly throughout their memorandum in opposition hereto, and throughout its other motions, assert the Plaintiffs lack evidence. All the evidence the Plaintiff may ever need can be spoken by Defendant Howard Scher. However, this evidence will be evidence that may threaten the very foundation of the FDA. The US Attorneys office could question Defendant Howard Scher and has the power to grant him immunity from prosecution, or obtain a proffer. If they have already done this then it should be discussed at the suggested hearing. So long as it is in the FDA's best interest (DOJ's other client) to keep Defendant Scher silent without regards to whether it is in Defendants Scher's best interest, a conflict is present.

The governments contention that because Scher and Pazdur are alleged to be co-conspirators that they cannot be adverse witnesses to each other flies in the face of most every multi defendant robbery or drug case or conspiracy case that the DOJ regularly prosecutes. Those cases do not generally go to trial because one of the co-conspirators usually cuts a deal to testify against the others and then the jig is up, so to speak.

Plaintiffs are not advocating for any criminal prosecution of anyone and in fact quite the opposite, Plaintiffs want the evidence to come to light as quickly as possible so that the Patients that have been wrongly denied Provenge can get it now. If giving anyone or everyone immunity gets the injustice undone and Provenge to the patients now, then Plaintiffs seeks that for the patients. It is one thing for the FDA to make a mistake and quite another to keep compounding it as they are by ignoring and refusing to be responsive and refusing to provide any kind of rationale for their behavior (despite the requirement that such explanation be forthcoming within 90 days of the AC hearing). (The back of the line mentality suggested by the Defendants responses thus far in this matter, are seriously insensitive to terminal patients).

An attorney representing multiple conflicting interests thus undermines and subverts the nature of the adversarial system and prevents it from operating properly. *In re Cleveland Trinidad Paving Co.* 218 B.R. 385, *388 (Bkrtcy.N.D.Ohio,1998).

Because this case involves serious intentional and constitutional torts against individuals in addition to the APA, Constitutional and FOIA claims against the government, this court has to guard against conflicts that will arise as the case proceeds.

Plaintiffs move this court for an order that the US Attorney and/or other representatives of the Department of Justice be prohibited from representing any and/or all Defendants in this matter.

Respectfully submitted,

S/Kerry M. Donahue

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CERTIFICATE OF SERVICE

It is understood that since this document was e-filed with the court that the clerk will transmit a copy by e-mail to all counsel of record in this matter this 2nd day of November, 2007.

S/Kerry M. Donahue

Kerry M. Donahue