

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

FEDERAL TRADE COMMISSION,

Petitioner,

v.

Misc. No. 3:14mc5

INDIVIOR, INC.,

Respondent.

MEMORANDUM OPINION

This matter is before the Court on the SECOND INTERIM REPORT AND RECOMMENDATIONS OF SPECIAL MASTER (Docket No. 71) and the SUPPLEMENT TO SECOND INTERIM REPORT AND RECOMMENDATIONS OF SPECIAL MASTER (Docket No. 73) (collectively referred to as

BACKGROUND

The Federal Trade Commission ("FTC") issued a Civil Investigative Demand ("CID") to Reckitt Benckiser

proceedings Reckitt was acquired by Indivior, Inc. and, pursuant to an ORDER entered herein on May 23, 2016 (Docket No. 100), Indivior, Inc. was substituted as the party respondent in place of Reckitt. However, because the documents and most of the

appellation will be retained.

Pursuant to the CID, the FTC sought to determine whether Reckitt had engaged in unfair methods of competition with

24,000 documents on the ground of attorney-client privilege.¹

privileged and sought production of those documents. MEMORANDUM
IN SUPPORT OF PETITION OF THE FEDERAL TRADE COMMISSION FOR AN
ORDER ENFORCING CIVIL INVESTIGATIVE DEMAND (Docket Nos. 23 and
24). The FTC contended therein that, under the law of the
Fourth Circuit, Reckitt was improperly withholding, as
privileged documents that were not at all privileged because

By Memorandum Opinion issued on March 10, 2015 (Docket No. 42) ("March 10 Opinion"), the Court rejected the arguments made

preparation of the citizen's petition and other documents that

certain public relations documents concerning the citizen's petition and the withdrawal of Suboxone tablets from the market and documents relating to the negotiations between Beckitt and

the manufacturers of generic competing drugs to establish a Joint Risk Evaluation and Mitigation Strategy (the "shared REMS" documents) for the 1,695 documents. Those documents were selected to be reviewed first by the Special Master because they

are the focus of the FTC's Initial Petition.

The Special Master made rulings on the privilege claims of

of documents in the 'Citizen's Petition' and
'Shared REMS' electronic folders invites the

additional documents.

Third, many documents fail to evidence any
privileged communications; some contain
substantial non-privileged material along
with privileged communications. If the non-
privileged portion of the first tranche of
3,704 documents is representative of the

and argued for adoption of the Special Master's Report. Alternatively, the FTC urged that Reckitt should be ordered to

Report established that the privilege law does not sufficiently

support the claims of privilege.

Reckitt filed its OBJECTIONS AND RECOMMENDATIONS (Docket

Nos. 78 and 83) as well as its opposition to the FTC's MOTION TO

Next, Reckitt proposed that, in Step 2, the Special Master would review Reckitt's "proposed treatment of these 19,000 documents in order to confirm that it accords to the Court's legal rule as the Special Master would apply it, a process

[Reckitt] estimates would take another two months, subject of course to the Special Master's availability during that time." Thirdly, in Step 3, the Special Master would issue a Report and Recommendation as to the remaining 19,000 documents.

In support of these recommendations, Reckitt represented that it:

expects that it will be in a similar position after the Special Master issues recommendations on the second set of documents as [Reckitt] is now with respect to the first set, i.e. that [Reckitt] disagrees with the legal rule underlying the

Special Master's recommendations but will not dispute the recommendations. If [Reckitt's] expectation is correct, it would therefore not object to the Special Master's second set of recommendations and it would also withdraw the present objections as to

the first set of documents that are filed for preservation purposes.

relief. On June 22, 2016, counsel for Reckitt advised that Step 1 of its process has been completed.

DISCUSSION

Resolution of Reckitt's objections to the Special Master's Report proceeds from the fundamental premise that the objection must identify with specificity that part of the Special Master's Report to which objection is taken and must clearly articulate

the objection that is made. Only if those requisites are satisfied can there be meaningful review by the district court. Those fundamental precepts are of a special importance where, as here, the Special Master has conducted a document-by-document review of more than 3,700 documents and has specified the documents that must be produced, many of which must be redacted in part before being produced and where, as here, the Special Master has made findings respecting the individual documents that are the subject of the Special Master's Report.

In reality, Reckitt has made but two objections. First

Reckitt challenges the legal standard applied by the Special Master in making the privileged review. However, in fact, that challenge is simply a re-argument of the legal position previously advanced by Reckitt (and previously rejected by the Court) respecting the applicable law that controls the issues of

fully in the March 10 Opinion. A review of the Special Master's Report reflects that the Special Master faithfully and carefully applied the principles set forth in the March 10 Opinion in conducting the review of these case's 2,700 documents. As

objection to the fact that the Special Master did what his charter required him to do is simply a way of re-arguing the matters as to which Reckitt did not prevail in the motion that was resolved by the March 10 Opinion and its implementing Order.

Second, Reckitt raised objections to two documents: SM_03676 and SM_00156. Reckitt says that these documents are

"representative examples" of the point that it makes. However, where, as here, the Special Master has made individual findings

involved email strings, one relating to the 2012 Citizen
Petition, and the other related to the REMS negotiation.
Applying the test established by the Court, the Special Master

and in order to allow some messages in the string to remain

8, 2015 evidentiary hearing (Docket No. 63 at 26-27, 34, 36).

Reckitt's argument overlooks two other essential points

First, it ignores the settled principle in this circuit that an intent to disclose a document includes the "details underlying the data" therein. United States v. Under Seal, 748 F.2d at 875 and n. 7. Thus, the contention made by Reckitt that the Special Master erred in looking for an intent to publish the facts communicated rather than the intent to publish the communication

constitute a waiver as to all privileged claims advanced by Reckitt. Those questions will be resolved as set forth below.

Having reviewed the MOTION TO ADOPT/PRODUCE and the OBJECTIONS AND RECOMMENDATIONS, as well as the Special Master's Report, the Court is of the view that, to some extent, Reckitt's suggestion for further proceedings have merit. To begin, Step 1 ~~as suggested by Reckitt, has been completed~~ therefore the

parties shall proceed forthwith to communicate with the Special

Master as to how, if at all, to proceed with Steps 2 and 3 of Reckitt's recommendations. The Special Master may well desire to suggest another approach that may ease the burden of reviewing the other 19,000 documents. And, the Special Master

Special Master's Report constitutes a waiver of any claim of privilege as respects the remaining 19,000 documents. That agreement will be reflected in an Order to be entered herein, and, the FTC will be required not to disclose those documents to any person or entity (other than the FTC's lawyers or the staff working on the CID) without further order from this Court.

Finally, the Court will continue to assess the validity of the alternative argument made by the FTC in its MOTION TO ADOPT/PRODUCE. To that end, the Court requests that the Special Master supplement the Special Master's Report describing the extent to which the privilege log herein is inadequate so that the Court can assess the FTC's argument that the defect in the privilege log itself constitutes a waiver of the privileges claimed therein. The principal problem appears to be not so much that the descriptions in the log are per se defective

11. [REDACTED] Special Master about a schedule for this

conferred respecting further review of the remaining 19,000 documents.

CONCLUSION

For the foregoing reasons, the objections in RESPONDENT
INDIVIDUAL INC /S CORRECTED OBJECTIONS TO THE SPECIAL MASTER/S