UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In Re:	)	Case No.: 01-44007
Phar-Mor, Inc.,	)	Chapter 11
Debtor.	)	Adv. Pro. No. 03-4069
Phar-Mor, Inc.,	)	Hon. Mary Ann Whipple
Plaintiff,	)	
v.	)	
McKesson Corporation,	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER REGARDING MOTION TO COMPEL DISCOVERY

Plaintiff Phar-Mor, Inc. ("Debtor"), is before the court on its Motion to Compel Production of Documents and Answers to Interrogatories (the "Motion") from Defendant McKesson Corporation ("McKesson"). [Doc. #24]. After reviewing the Motion, the responses and briefs with respect thereto, and the exhibits to the foregoing and hearing the arguments of counsel, the court will grant the Motion in part and deny it in part.

FACTUAL AND PROCEDURAL BACKGROUND

This is an action for damages for McKesson's alleged breach of a written supply agreement with Debtor. The parties' agreement sets forth terms for McKesson's sale of pharmaceutical products to Debtor, including supply terms, and credit and payment terms. As a contract for the sale of goods, the Uniform Commercial Code as enacted in Ohio governs its performance. [*See* Doc. #1, Ex. 1 at p. 19, ¶ 26C (choice of law provision)]; Ohio Rev. Code §§ 1302.01(A)(9), (11), 1302.02.] The complaint contains one count for relief, captioned "Breach of Contract." [Doc. #1 at pp. 14- 17].

The acts that Debtor alleges constitute breach of contract took place in March 2001 when McKesson demanded adequate assurance of future performance from Debtor and suspended its own performance, and then changed the terms of payment by Debtor for McKesson's goods. Under the agreement, McKesson had the right to change the payment terms if there was a "material adverse

change" in Debtor's financial condition. The contract provision that Debtor alleges McKesson has breached is as follows:

> This Agreement is conditioned upon Phar-Mor's maintaining a sound financial condition throughout the term hereof and to that end, Phar-Mor agrees to promptly substantiate in writing, at McKesson's request, the existence of such condition, with publicly available financial and other publicly available supporting information reasonably requested by McKesson.
>
> McKesson reserves the right to change a payment term or limit total credit if there has been either a material adverse change in Phar-Mor's financial condition or a payment default based on the payment terms and conditions specified in this Agreement which remains uncured for more than ten (10) days following notice of such payment default to Phar-Mor by McKesson. Upon the occurrence of either such event, McKesson may require cash payment or appropriate security before shipment of any further Merchandise to Phar-Mor. In the event of such changes by McKesson, Phar-Mor may terminate this Agreement on ten (10) days written notice to McKesson.

[Doc. #1, Ex. 1, pp. 4-5 ¶ 9].

Debtor alleges that McKesson's actions required Debtor to draw down its credit facility by approximately $13.5 million, causing a significant reduction in available credit, impairing Debtor's relationships with other vendors, and causing inventory marketing disruptions. Thus, according to Debtor, McKesson's actions necessitated the filing of a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on September 24, 2001.

Debtor initiated this adversary proceeding on March 4, 2003. After the District Court denied Debtor's motion to withdraw the reference to the bankruptcy court, McKesson filed an answer on July 14, 2003, on which date this court extended the deadline for completing discovery to October 30, 2003. On July 2, 2003, Debtor served on McKesson 25 numbered interrogatories and requests for 86 items or categories of documents. After receiving a 15-day extension of the deadline for responses to and compliance with the discovery requests, McKesson served responses on August 15, 2003, objecting to many of the requests.

Following a telephone conference among counsel on August 21, 2003, McKesson's attorney agreed to produce, by August 26, 2003, most of the documents that its response stated McKesson would produce. Counsel for McKesson also agreed to serve supplemental interrogatory responses the week of September 1, 2003. On August 28, 2003, McKesson produced less than one box of docu-

ments while, according to Debtor, McKesson's former attorney[1] had represented that there were three boxes of documents falling within the categories that McKesson had agreed to produce. By a letter dated September 9, 2003, McKesson's attorney agreed to provide certain supplemental interrogatory answers that week and to produce certain additional documents. McKesson has not done so.

Debtor filed the Motion on September 19, 2003. Four days later, the court entered an order extending the target date for completing discovery through January 30, 2004. On October 3, 2003, McKesson filed a response to the Motion and, on October 15, 2003, Debtor filed a reply brief. By an agreed order entered December 31, 2003, the court further extended the deadline for completing discovery to 90 days after the entry of a final order resolving the Motion. After conducting a hearing on the Motion on March 15, 2004, the court entered an order holding the Motion in abeyance and directing the parties to provide the disclosure required by Rule 26(a)(1) of the Federal Rules of Civil Procedure (the "Civil Rules") [made applicable in bankruptcy adversary proceedings by Rule 7026 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules")], conduct the conference required by Rule 26(f) of the Civil Rules, and file a report on their conference by April 15, 2004. The order also scheduled a telephonic status conference for April 19, 2004. Debtor filed a supplemental brief in support of the Motion on April 16, 2004, and the court conducted the status conference as scheduled, following which the court entered an order adopting the parties' discovery plan with certain modifications and directing the parties to submit a proposed stipulated order by May 3, 2004, memorializing their agreements regarding issues raised by the Motion. McKesson filed a supplemental brief in opposition to the Motion on May 10, 2004.

On April 2, 2004, Debtor served a second set of document requests on McKesson, requesting an additional 19 items or categories of documents. McKesson served its response thereto on May 5, 2004, again asserting numerous objections. On May 14, 2004, the court entered an order directing McKesson to produce certain of the documents described in the first request for production and serve answers to certain interrogatories (those that McKesson had agreed to produce and answer) by June 27, 2004. On May 26, 2004, Debtor filed a second motion to compel discovery, asserting that McKesson has not adequately responded to or complied with the second set of document requests.

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[1] McKesson filed a notice of substitution of counsel on August 29, 2003.

McKesson has not responded to that second motion. On July 9, 2004, Debtor filed a third motion to compel, this one directed to non-parties who had declined to comply with subpoenas. By an order entered on July 30, 2004, the court extended the deadline for the non-parties to respond to that motion to the date 20 days after a ruling on the Motion, so that matter is not presently before the court for decision. This opinion addresses and resolves the first Motion only, which, to the extent it remains unresolved by the agreed order of May 14, 2004, and not withdrawn by Debtor's supplemental brief of April 16, 2004, seeks to compel the production of the documents described in request nos. 3- 6, 9-10, 12-13, 22-25, 27-29, 41(k),[2] 45-46, 51-56, 59, 61-63, 66-67, 72-73, 76-80, and 82-86 and answers or more complete answers to interrogatory nos. 8, 9, 17, 19, and 23-25.

LAW AND ANALYSIS

A. Requests Related to McKesson's Motive

McKesson objects to numerous interrogatories and document requests relating to its motivation in changing the payment terms on the ground that they exceed the scope of discovery because the only cause of action alleged by Debtor is one for breach of contract. Debtor's averments of the "Factual Background" to the complaint make a number of allegations under the heading "McKesson Changed Phar-Mor's Credit Terms in Bad Faith." [Doc. #1, Ex. 1, pp.12-14, ¶¶ 40-49]. While the complaint contains a single count entitled "Breach of Contract," Paragraph 54 does allege that "McKesson . . . violat[ed] the implied duty of good faith and fair dealing inherent in the Supply Agreement under Ohio common law and the Ohio Commercial Code." The complaint also repeatedly uses words such as "flagrant" and "unilateral" and "bad faith" to characterize McKesson's actions and alleged breach. In its answer, McKesson avers a Fifth Affirmative Defense, captioned "Good Faith." and stating that, "[a]t all times, McKesson acted in good faith with respect to the matters at issue in the Complaint." [Doc. #18, unnumbered p. 12 of 17].

Under Civil Rule 26(a), the scope of discovery is limited to "any matter, not privileged, that is relevant to the claim or defense of any party." At its foundation, the only claim in this action is for

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[2] The agreed order of May 14, 2004, resolved the parties' dispute regarding "Document Request No. 41, including subparts (a) through (j)." Despite the use of the word "including," it appears from Debtor's brief that the order did not resolve the dispute regarding request no. 41(k).

breach of contract directed at one specific provision of a written agreement. A fundamental, long-standing principle of Ohio contract law is that "the motive of a breaching party is irrelevant to a contract action." *Wolfe v. Continental Cas. Co.*, 647 F.2d 705, 709 (6th Cir. 1981) (citing *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922)). The gratuitous use of language of bad faith and motivation in the Complaint does not change the cause into anything other than a breach of contract action. *Ketcham v. Miller*, 104 Ohio St. at 377-78, 136 N.E. at 146; *see Salvation Army v. Blue Cross & Blue Shield of N.W. Ohio*, 636 N.E.2d 399, 403 (1993); *Resource Title Agency, Inc. v. Morreale Real Estate Servs., Inc.*, 314 F. Supp. 2d 763, 774 (N.D. Ohio 2004). Nor, therefore, does the use of such language entitle Debtor to discovery under Rule 26(a) regarding the motive and purpose of the perpetrator of the alleged breach.

Debtor points to the obligation of good faith contained in the Uniform Commercial Code as a basis for variance in this case from the basic principle that a breaching party's motive is irrelevant. Section 1301.09 of the Ohio Revised Code, which is Ohio's version of Uniform Commercial Code § 1-203, provides: "Every contract or duty within Chapter 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., and 1310. of the Revised Code imposes an obligation of good faith in its performance or enforcement." This argument is unavailing, because "[i]n Ohio, a [party]'s decision to enforce its contract rights is not considered an act of bad faith" under the Ohio Uniform Commercial Code. *Bennco Liquidating Co. v. Ameritrust Co. Nat'l Ass'n*, 83 Ohio App. 3d 646, 649, 621 N.E.2d 760, 762 (1993); *accord, Ed Schory & Sons, Inc. v. Soc'y Nat'l Bank*, 75 Ohio St. 3d 433, 443-44, 662 N.E.2d 1074, 1082-83 (1996); *Needham v. Provident Bank*, 110 Ohio App. 3d 817, 831-32, 675 N.E.2d 514, 523-24 (1996); *Salem v. Cent. Trust Co., N.A.*, 102 Ohio App. 3d 672, 678, 657 N.E.2d 827, 832 (1995); *Metropolitan Life Ins. Co. v. Triskett Ill., Inc.*, 97 Ohio App. 3d 228, 237-38, 646 N.E.2d 528, 534 (1994) (citing, *inter alia, First Fed. Sav. & Loan Ass'n of Akron v. Cheton & Rabe*, 57 Ohio App. 3d 137, 143, 567 N.E.2d 298, 304 (1989)); *Jim White Agency Co. v. Nissan Motor Corp. in U.S.A.*, 126 F.3d 832, 834-35 (6th Cir. 1997) (affirming grant of summary judgment to defendant based on this principle and citing *Ed Schory & Sons*). One federal court, interpreting § 1301.09 in the context of a Uniform Commercial Code Article 9 security agreement, observed that "Ohio law is crystal clear that an actor does not act in 'bad faith' when it decides to enforce its contractual rights." *Oak Rubber Co. v. Bank One, N.A.*, 214 F. Supp. 2d 820, 833 (N.D. Ohio 2002).

As explained by the Seventh Circuit, in a case quoted with approval in several of the cases cited above (and other Ohio cases):

> Firms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of "good faith." Although courts often refer to the obligation of good faith that exists in every contractual relation, this is not an invitation to the court to decide whether one party ought to have exercised privileges expressly reserved in the document. "Good faith" is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties. When the contract is silent, principles of good faith . . . fill the gap. They do not block use of terms that actually appear in the contract. . . .[K]nowledge that literal enforcement means some mismatch between the parties' expectation and the outcome does not imply a general duty of "kindness" in performance, or of judicial oversight into whether a party had "good cause" to act as it did. Parties to a contract are not each others' fiduciaries; they are not bound to treat customers with the same consideration reserved for their families. Any attempt to add an overlay of "just cause" . . . to the exercise of contractual privileges would reduce commercial certainty and breed costly litigation. . . ."[I]n commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves."

Kham & Nate's Shoes No. 2, Inc. v. First Bank, 908 F.2d 1351, 1357 (7th Cir. 1990) (citations omitted). There is likewise a specific contract provision at issue in this adversary proceeding. Accordingly, there can be no breach of the duty of good faith, as a matter of Ohio law, because McKesson's right to change the credit terms is governed by the express terms of the supply agreement.

Debtor also asserts that McKesson acted in bad faith in demanding adequate assurance of future performance and suspending its own performance. Section 2-609 of the Uniform Commercial Code authorizes a seller to demand adequate assurance of due performance when reasonable grounds for insecurity arise, and to suspend performance pending receipt of such assurances if it is commercially reasonable to do so. Ohio Rev. Code § 1302.67(A). "Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards." *Id.* § 1302.67(B). According to the official comment to this UCC provision, "[t]he express reference to commercial standards carries no connotation that the obligation of good faith is not equally applicable here." U.C.C. § 2-609 off. cmt. 3 (1961); *accord, Am. Bronze Corp. v. Streamway Prods.*, 8 Ohio App. 223, 230, 456 N.E.2d 1295, 1303 (1982). "'Good faith' means honesty in fact in the conduct or transaction concerned." Ohio Rev. Code § 1301.01(S).

"'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *Id.* § 1302.01(A)(2).

Some courts have adopted a subjective test to measure the "honesty in fact" prong of "good faith." *See, e.g., Auto-Chlor System of Minn., Inc. v. JohnsonDiversey*, 328 F. Supp. 2d 980 (D. Minn. 2004) (court contrasts Ohio and Tennessee standards of honesty in fact). But Ohio courts have determined that both prongs must be analyzed under an objective standard. As the Sixth Circuit has explained:

> The Ohio Supreme Court has held that honesty in fact does not exist when the actions at issue are "commercially unjustifiable." The merchant definition of "good faith" applicable to this case incorporates the honesty in fact definition from § 1301.01(S) and adds an additional requirement—"the observance of reasonable standards of fair dealing in the trade." . . . These are two distinct issues, and both involve an *objective* analysis of the merchant-seller's conduct.

Tom-Lin Enters., Inc. v. Sunoco, Inc. (R&M), 349 F.3d 277, 281-82 (6th Cir. 2003) (citing *Master Chem. Corp. v. Inkrott*, 563 N.E.2d 26, 31 (Ohio 1990); *Needham*, 675 N.E.2d at 523; *Jim White Agency*, 126 F.3d at 834). The court thus rejected the subjective/objective test applicable under Texas law, concluding that "[i]t is not within the province of this Court . . . to similarly interpret Ohio's counter-part where the Ohio courts already have passed on the issue." There is no question that McKesson and Debtor are or were "merchants," Ohio Rev. Code § 1302.01(A)(5), so an objective standard controls the application of UCC Section 2-609. Section 1302.67 therefore does not expand the scope of discovery to include McKesson's subjective motives for invoking its rights under paragraph 9 of the contract.[3]

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[3] The court is admittedly unclear from the pleadings and arguments how the adequate assurance issue relates to the claims and defenses of the parties. The gravamen of Debtor's complaint is the change in credit terms. That is what Debtor alleges caused its injury, forcing it into bankruptcy. [Doc. #1, Ex. 1, ¶¶ 63, p.17]. Indeed, the Joint Adversary Status Report filed by the parties on October 27, 2004, appears to acknowledge that reading of the complaint, stating that "[t]he complaint sets forth a claim for breach of contract. Phar-Mor contends that McKesson breached their pharmaceutical supply agreement and that as a result of the breach it suffered damages which caused Phar-Mor to file for bankruptcy." The report indicates that Debtor contends McKesson had no right to alter the payment terms because there was no "material adverse change" in Debtor's financial condition, and that McKesson contends it had such a right because there was such a change in financial condition. (continued...)

In so deciding, the court has considered Debtor's extensive arguments based on *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 145-46 (6th Cir. 1983). An earlier decision of the Sixth Circuit, applying Ohio law, *Roth Steel Products* imposed a subjective/objective test in determining whether a party modified a contract in good faith under Ohio Revised Code §1302.12 [Uniform Commercial Code Section 2-209(1)]. However, the Sixth Circuit cited only a Tennessee case in support of that proposition. *Id.* at 146. To the extent that *Roth Steel Products* accurately reflects Ohio law, it should be limited to its facts and is not applicable here, where the parties expressly agreed that McKesson could modify payment terms in the future under certain circumstances.

The court has also considered whether McKesson's Fifth Affirmative Defense of good faith makes Debtor's discovery requests as to motive "relevant to . . . the defense of any party" within the scope of Civil Rule 26(b). To the extent that McKesson asserts its defense as a broad equitable defense of good faith, or would intend to introduce in affirmative defense of its actions evidence that it has always acted with a pure heart (i.e., it was not seizing an opportunity to improve the profitability of the contract or trying to help Debtor's competitors or retaliating against Debtor's officers or any of the motives Debtor alleges), then Debtor's requests are properly within the scope of Civil Rule 26(b). But given McKesson's arguments in opposition to the motion to compel, it is a reasonable assumption that McKesson asserts the affirmative defense of good faith within the confines of the Uniform Commercial Code – i.e. based on an objective standard. In ruling on the motion to compel, the court will assume that McKesson is asserting the defense in such limited fashion, unless it indicates otherwise on the record. To the extent it does not, evidence at trial will also be so limited.[4]

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[3] (...continued)
McKesson does not, however, argue that the adequate assurance issue is irrelevant, as the court might otherwise be inclined to find based on the pleadings. Perhaps that is because McKesson will assert defensively that, even if there was no material adverse change under the contract, it had statutory "reasonable grounds for insecurity" under Ohio Rev. Code § 1302.67 as a separate and presumably lesser standard alternatively entitling it to suspend its contract performance if commercially reasonable to do so. [*Cf.* Doc. #18, Sixth Affirmative Defense, "Excuse for Nonperformance," unnumbered page 12 of 17].

[4] The court makes no ruling here as to which party has the burden of proof on any good faith issues in the case as a result of McKesson's assertion of an affirmative defense of good faith.

To the extent that good faith is relevant to this litigation, the Sixth Circuit has held that good faith between merchants requires the consideration of the business practices in the industry, not those of the specific defendant alleged to have acted in a commercially unjustifiable manner. *Tom-Lin*, 349 F.2d at 282-84. The defendant's own internal policies are irrelevant unless it was obligated to comply with those policies. *Jim White Agency*, 126 F.3d 832, 835. There is no provision in the contract between the parties that obligated McKesson to comply with its internal policies regarding changes in payment or credit terms, and Debtor has directed the court to no other source for such an obligation. Accordingly, the court concludes that discovery requests related to McKesson's general business practices regarding changes in payment or credit terms (requests relating to contracts with other customers, litigation with other customers, or internal policies, rules, and guidelines) fall outside the scope of permissible discovery.

Debtor's cause of action is one for breach of contract and, under Ohio law, the enforcement of an express contractual right cannot constitute bad faith. Thus, if there was a "material adverse change" in Debtor's financial condition, the alteration in payment terms was proper; and, if there was no such change in Debtor's financial condition, the alteration was improper unless McKesson was entitled to invoke Ohio Rev. Code § 1302.67. The bottom line is that Debtor has not averred any basis in the complaint upon which it can recover damages from McKesson if there was a material adverse change in Debtor's financial condition, whatever McKesson's motivations in exercising that provision of the contract were. McKesson was entitled to enforce the terms of the contract "to the letter," even to Debtor's "great discomfort." The court cannot, under Ohio law, relieve Debtor from its failure to protect itself in the negotiation of the contract. It follows, therefore, that all discovery requests designed to elicit information and documentation relevant to McKesson's subjective motivation are not "relevant to the claim or defense of the claim or defense of any party" and so are beyond the scope of permissible discovery. Fed. R. Bankr. P. 7026; Fed. R. Civ. P. 26(b)(1). All that is relevant is whether McKesson had the right to change the credit terms under the written agreement between the parties. Accordingly, the court will sustain McKesson's objections to document request nos. 3-6, 61-63, and 66-67 (communications between McKesson and Debtor's competitors), 22 and 23 (contracts with other customers authorizing changes in credit terms), 45, 46, 51, 52, 72, 73, and 76 (McKesson's financial commitments to Debtor's competitors), 48, 83, 85, and 86 (acquisition of Debtor by its

competitors), 53 (credit terms extended to others), 54 (litigation with Avatex), 56 (insiders common to Avatex and Debtor), 55 and 59 (litigation with other customers regarding changes in credit terms), 77-80, 82, and 84 (strategic or business plans of McKesson and Debtor's competitors), and 78 (internal credit policies); and interrogatory nos. 17 and 19 (acquisition of Debtor by its competitors), 23 (McKesson's financing of Debtor's competitors), and 24 (litigation with other customers regarding changes in credit terms).[5]

B. Overbroad Requests

McKesson objects to document request nos. 10, 13, and 24 on the ground of overbreadth. The requests seek "all notes, correspondence, or Communications Relating To" the supply agreement or the amendment thereto and "all Documents Relating To Phar-Mor that were or are kept by any credit department at McKesson." After the modification effected by Debtor's counsel's letter of August 30, 2003, "Relating To" is defined to mean"constituting, identifying, referring to, referencing, describing, mentioning, analyzing, discussing, or evaluating." The court will sustain the objections to these requests, because "relating to" (even without the expansive definition) is overly broad. *See Vardon Golf Co. v. BBMG Golf Ltd.*, 156 F.R.D. 641, 648 (N.D. Ill. 1994); *Mead Corp. v. Riverwood Natural Res. Corp.*, 145 F.R.D. 512, 523 (D. Minn. 1992); *Williams v. E.I. du Pont de Nemours & Co.*, 119 F.R.D. 648, 651 (W.D. Ky. 1987). Consistent with Debtor's request (Motion ¶¶ 99-100), however, the court will require the production of (i) summaries of the volume of Debtor's purchases from the inception of the supply agreement through September 24, 2001, and Debtor's payment history during that period, or (ii) if such summaries do not exist, all purchase orders, invoices, payment records, and receipts for that period, and any other documents directly pertaining to McKesson's right to change the payment terms under the supply agreement, as amended.[6]

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[5] Debtor can probably obtain the pleadings and other papers filed in litigation between McKesson and Avatex or other customers by reviewing the court files if it desires to do so.

[6] McKesson's initial response to the Motion (at p. 12) indicates that summaries are available from some point in 1999 forward. Although McKesson is correct that, for the period with respect to which summaries are unavailable, it would be required to produce "every invoice, purchase order, payment, and receipt for hundreds of millions of dollars of goods sold to Phar-Mor," such documents are relevant to whether there was a material adverse change in Debtor's financial condition or whether (continued...)

McKesson also objects to document request no. 25 on the ground of overbreadth. The request seeks "all phone logs, diaries, calendars, and/or appointment books of any Person identified in responses to [certain] Interrogatories." The court has sustained McKesson's objections regarding interrogatory nos. 15, 17-19, and 21, so McKesson need not identify any individuals in response thereto and, therefore, need not produce any documents kept by any such individuals. The court agrees that not all of the specified documents maintained by persons identified in response to interrogatory nos. 1, 4-8, 10, and 12 are "relevant to the claim or defense of the claim or defense of any party." Fed. R. Bankr. P. 7026; Fed. R. Civ. P. 26(b)(1). Accordingly, the court will require compliance with document request no. 25 only to the extent that the documents described therein include references to Debtor, its agents, or employees.

McKesson also objects to document request no. 41(k) on the ground that it is overbroad, apparently due to the use of the term "internal tracking reports." In subsequent correspondence, Debtor defined that term as "any Documents Relating To the monitoring of Phar-Mor's financial performance by McKesson's credit department." For the reasons set forth above, the use of the term "Relating To" does render the request overbroad. The court will, however, require the production of all documents constituting, memorializing, containing, or evidencing analyses by McKesson of Debtor's financial performance.

McKesson also objects to interrogatory nos. 8 and 9 as overbroad. They seek the identification and roles of individuals who were involved in the decision to make the "Compliance Payment" and the facts and documents upon which McKesson relied in making that decision. The court does not believe that these interrogatories exceed the scope of permissible discovery, and will overrule the objections thereto.

C. Privileged Documents

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[6] (...continued)
McKesson had "reasonable grounds for insecurity" under Ohio Rev. Code § 1302.67. They may be made available to Debtor's attorneys or agents at their present locations (such as in warehouses) and in whatever form the documents are maintained (such as digital image files or microfilm or microfiche). If such an "as is, where is" production is not feasible (e.g., if the documents are commingled with those of other customers), McKesson may move the court for a protective order. *See* Fed. R. Bankr. P. 7026; Fed. R. Civ. P. 26(c).

McKesson objects to document request nos. 9, 12, and 27-29 and interrogatory nos. 6 and 8-14 to the extent that they seek documents or information protected by the attorney-client privilege or the work-product doctrine. Of course, privileged information and documents need not be provided, Fed. R. Bankr. P. 7026; Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged . . . ."), and a party may obtain trial preparation materials "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means," Fed. R. Bankr. P. 7026; Fed. R. Civ. P. 26(b)(3). Debtor has not attempted to make such a showing, so these objections will be sustained. McKesson will be required to produce the requested documents and information – as it has agreed to do – only to the extent that they are not subject to the attorney-client privilege or the work-product doctrine. It must, however, provide a privilege log complying with the requirements of Civil Rule 26(b)(5), made applicable in bankruptcy adversary proceedings by Bankruptcy Rule 7026.

D. Premature Requests

McKesson objects to interrogatory no. 3 on the ground that it is premature. The interrogatory seeks essentially the information required to be provided at least 30 days before trial (or as otherwise ordered by the court) by Rule 26(a)(3) of the Civil Rules, made applicable in adversary proceedings by Rule 7026 of the Bankruptcy Rules. The court will not require that this information be provided at this time.

McKesson also objects to interrogatory nos. 4-14 on the ground that they are premature because the litigation was then in an early stage and McKesson had just changed attorneys. While that contention may have had some merit when the responses were served in August 2003, it is not a valid objection at this time – now more than two years into the adversary proceeding. These objections will be overruled.

McKesson also objects to interrogatory no. 25 as premature. The court does not understand this objection, because interrogatory no. 25 requests information about individuals who "provided information or otherwise assisted in the preparation of McKesson's responses to these interrogatories": certainly McKesson was aware, by the time it completed the interrogatory responses, which individuals participated in the preparation thereof. This objection will be overruled.

THEREFORE, for the foregoing reasons,

IT IS ORDERED that the Motion is granted in part and denied in part as set forth above, with McKesson to serve supplemental responses to the discovery requests consistent with this memorandum and order within 28 days after the entry of this order, and it is

FURTHER ORDERED that such supplemental responses shall include a privilege log complying with the requirements of Civil Rule 26(b)(5), made applicable in bankruptcy adversary proceedings by Bankruptcy Rule 7026, and it is

FURTHER ORDERED that nothing in this memorandum and order shall affect McKesson's obligation to answer the interrogatories that it has heretofore agreed to answer to the extent that it has agreed to answer them or to produce the requested documents that it has heretofore agreed to produce to the extent that it has agreed to produce them, McKesson's supplemental responses to be served within 28 days of the entry of this order, and it is

FURTHER ORDERED that counsel for the parties shall promptly confer in an attempt to resolve the disputes relating to Debtor's second set of requests for the production of documents and, within 28 days of the entry of this order, shall file a report identifying all unresolved disputes and proposing a procedure (or procedures, if counsel cannot agree) for resolving the motion to compel discovery filed by Debtor on May 26, 2004, and it is

FURTHER ORDERED, consistent with the order entered in this proceeding on July 30, 2004, that non-parties objecting to subpoenas issued by Debtor shall have 20 days from the entry of this order within which to file and serve written responses to the motion to compel that Debtor filed on July 9, 2004.

Mary Ann Whipple
United States Bankruptcy Judge