

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

FILED

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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.)	

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

**MEMORANDUM OF DECISION AND ORDER REGARDING
PLAINTIFF'S SECOND MOTION TO COMPEL DISCOVERY**

Plaintiff Phar-Mor, Inc. ("Debtor"), is before the court on its Motion to Compel Production of Documents Responsive to Phar-Mor's Second Request for Production of Documents [Doc. #50] (the "Second Motion"). After reviewing the Second Motion and counsel's arguments with respect thereto, the court will grant the Motion in part and deny it in part.

This is an action for damages for the alleged breach of a written supply agreement between McKesson Corporation ("McKesson") and Debtor. 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 Debtor's terms of payment. 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. The pertinent facts are set forth in greater detail in the memorandum of decision and order entered on April 13, 2005, which granted Debtor's first motion to compel discovery in part and denied it in part.

Debtor initiated this adversary proceeding on March 4, 2003. On July 2, 2003, Debtor served on McKesson 25 numbered interrogatories and requests for 86 items or categories of documents. Debtor filed a motion to compel on September 19, 2003. Four days later, the court entered an order extending the target date for completing discovery through January 30, 2004. 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 to compel. 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 (made applicable in bankruptcy adversary proceedings by Rule 7026 of the Federal Rules of Bankruptcy Procedure), conduct the conference required by Rule 26(f), and file a report on their conference. On April 19, 2004, the court entered an order adopting the parties' discovery plan with certain modifications.

Meanwhile, on April 2, 2004, Debtor had 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, 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. On May 26, 2004, Debtor filed the Second Motion, asserting that McKesson has not adequately responded to or complied with the second set of document requests. McKesson did not respond thereto.

On July 9, 2004, Debtor filed a third motion to compel, this one directed to non-parties who had declined to comply with its subpoenas. By an order entered on July 30, 2004, the court deferred the deadline for the non-parties to respond to that motion until after a ruling on the first motion to compel discovery. As indicated above, on April 13, 2005, the court entered an opinion granting the first motion to compel in part and denying it in part. Among other things, the court declined to order compliance with the following document requests, finding that they were irrelevant to any claim or defense of a party and therefore outside the scope of permissible discovery:

76. Any Documents Relating To presentations made by Snyder's, The Katz Group, Katz, and/or Drug Emporium to McKesson in connection with . . . the acquisition of Drug Emporium and/or its assets by Snyder's and/or The Katz Group
.....

.....

80. Any and all business or strategic plans Relating To The Katz Group, Snyder's and/or Drug Emporium.

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82. Any and all business or strategic plans Relating To any other proposed acquisitions by The Katz Group, Katz, Snyder's and/or Drug Emporium.

83. All Documents evidencing, referring to or Relating To any and all discussions or plans for the acquisition or purchase or other disposition of the assets of Drug Emporium by Snyder's and/or The Katz Group.

84. Any and all Documents Relating To growth strategies, strategic plans, market forecasts, and/or any other similar economic projections for Snyder's, The Katz Group, and/or Drug Emporium.

The order also required the parties to confer in an attempt to resolve the Second Motion and file a report on the conference by May 4, 2005, which deadline was subsequently extended to May 17, 2005. The order also afforded the subpoenaed third parties 20 days within which to respond to the third motion to compel, which deadline was subsequently extended to May 31, 2005, but no responses have been filed to date.

On May 17, 2005, the parties filed a joint status report, indicating that they have resolved all issues raised by the Second Motion except for document request nos. 9 and 10, which read as follows:

9. Any agreement that required Snyder's, Katz and/or The Katz Group to obtain McKesson's approval or agreement for certain transactions, including without limitation any agreement that required Snyders [*sic*] to obtain McKesson's approval to acquire the business, stock, and/or assets of Drug Emporium.

10. All Documents Relating To McKesson's approval of Snyder's acquisition of the business, stock, and/or assets of Drug Emporium.

The joint status report sets forth each party's arguments as to Request nos. 9 and 10. Debtor argues that the documents are relevant to damages, because they might rebut evidence that Debtor anticipates McKesson will present, that Debtor's "deep discount" business model was not viable. If McKesson authorized or supported other entities' entry into the deep discount retail market in or near March 2001, Debtor argues that McKesson cannot then reasonably or effectively contest at trial

the continued viability of Debtor's business model thereafter. McKesson argues that the documents are relevant only to its subjective intentions, which the court previously ruled are not pertinent to Debtor's breach of contract claim.

The parties' status report also requested an extension of the discovery deadline through November 30, 2005, and that all pretrial deadlines based on the discovery cutoff be extended accordingly.

At the outset, both requests are excessively broad. Request no. 9's request for documents requiring McKesson's approval or agreement for "certain transactions" is so vague and ambiguous that it would be impossible to formulate a response or to comply therewith. Accordingly, the court will strike the first clause of the request and read it as a request for "any agreement that required Snyder's to obtain McKesson's approval to acquire the business, stock, and/or assets of Drug Emporium." Request no. 10's use of the defined term "Relating To," which is defined in the same manner as in the first set of document requests, renders that request overbroad as explained on Page 10 of the memorandum of decision and order entered in this proceeding on April 13, 2005. Accordingly, the court will construe "Relating To" to mean "directly pertaining to."

Under Rule 26(a) of the Federal Rules of Civil Procedure, the scope of discovery is limited to "any matter, not privileged, that is relevant to the claim or defense of any party." As set forth above, the court has previously held that discovery requests seeking the same documents as the two requests presently before the court are irrelevant, because they relate to McKesson's subjective motivation, which may not be considered in an action on the contract under Ohio law. The court does not see any reason to alter its decision as a result of Debtor's recharacterization of the requests as seeking documents pertinent to damages, rather than liability. The viability of *Debtor's* business model would be relevant to the value of Debtor's business, which it alleges was destroyed as a result of McKesson's actions. McKesson's *opinion* of the value of Debtor's business and the viability of its business model may even be relevant, although McKesson's opinion would, at best, be remotely related to Debtor's actual value. But the documents Debtor seeks are even more tangential, as those documents would reflect McKesson's evaluation of the value and business model viability, not of Debtor, but of a competing drug store chain. McKesson's opinion of Drug Emporium's business model, or its opinion of the viability of the "deep discount" business model in general, is irrelevant

to Debtor's viability and value as a going concern. What is relevant is whether Debtor's business was in fact viable, not whether McKesson thought it was viable, and certainly not whether McKesson thought some other similar drug store chain was viable.

The court therefore agrees with McKesson that request nos. 9 and 10 of the second set of document requests represent an attempt to have a "second bite at the apple," i.e., to obtain documents that the court has previously ruled are outside the scope of permissible discovery. Indeed, Debtor itself acknowledges that the court's opinion of April 13, 2005, held that "documents containing third parties' views on Phar-Mor's operations and financial condition are not relevant or discoverable. . . . In so doing, the Court rejected Phar-Mor's arguments that such documents are relevant to (i) commercial standards of good faith and (ii) Phar-Mor's damages claims."

THEREFORE, for the foregoing reasons,

IT IS ORDERED that McKesson serve supplemental responses to and comply with request nos. 1, 2, 12, 13, and 14 of Debtor's second request for the production of documents to the extent that it has agreed to do so, as stated in the May 17 joint status report, but that the Second Motion is otherwise denied, and it is

FURTHER ORDERED that the deadline for completing discovery in this proceeding is extended through November 30, 2005, and all other pretrial deadlines based on the discovery cutoff are extended accordingly.



Mary Ann Whipple
United States Bankruptcy Judge