

IT IS SO ORDERED.



Dated: June 12, 2007
09:38:08 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

PHAR-MOR, INC., et al.,

Debtors.

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CASE NUMBER 01-44007

HONORABLE KAY WOODS

ORDER DENYING MOTION TO APPOINT AN
INDEPENDENT COMPUTER CONSULTANT TO REVIEW METADATA
NOT INTENDED FOR NATIONAL PUBLICATION

The following order is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnbuscourts.gov is not the result of direct submission by this Court. The opinion is available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This cause is before the Court on McKesson Corporation's Motion to Appoint an Independent Computer Consultant to Review Metadata and Other Electronic Data Supporting Phar-Mor's "9/24/01

PDX Inventory" (Doc. # 2760) ("Motion to Appoint") filed by McKesson Corporation ("McKesson") on May 21, 2007. Debtors Phar-Mor, Inc. et al., (collectively, "Debtors") filed Debtor's (sic) Response to McKesson Corporation's Motion to Appoint an Independent Computer Consultant to Review and Analyze the Debtor's (sic) Computers and Other Electronic Records (Doc. # 2764) ("Debtors' Response") on May 29, 2007.

McKesson asserts that this Court should appoint an independent computer consultant to review the electronic metadata associated with Debtors' September 24, 2001 Inventory ("9/24/01 PDX Inventory") because there are "discrepancies" between the 9/24/01 PDX Inventory and the "other two Phar-Mor inventory computations on which Phar-Mor has thus far relied in this reclamation matter [(a) the 2002 Jeswald Inventory, and (b) Phar-Mor's April 2007 Andrew Finger Expert Report]." (Motion to Appoint at 2.) McKesson argues that it needs "to determine when the data was created and if the data underlying the 9/24/01 PDX Inventory had been altered, modified or tampered with" (*Id.* at 3.) McKesson states that this Court has the authority to appoint an independent computer expert under Federal Rule of Civil Procedure 37(a)(2)(B) and postulates that not only is the forensic inquiry it proposes "very limited in scope," (*Id.* at 7), but that McKesson will pay all costs involved with the computer consultant. (*Id.* at 4 and 10.)

Debtors counter that the Motion to Appoint is yet another attempt by McKesson to conduct additional discovery after the expiration of the discovery cutoff. (Debtors' Response at 1.) Debtors argue that McKesson now seeks "who," "where," and "when" information that it could have obtained during the discovery period

if McKesson had timely reviewed the discovery provided by Debtors. Debtors state that there is no support for McKesson's attempts to paint Debtors as having "corrupted," "concealed," and/or "manipulated" their records. (*Id.* at 13.) Debtors further state that McKesson has misrepresented the record because, among other things, the 2002 Jeswald Report was not an inventory, but was an estimate by Debtors of the McKesson reclamation claim. (*Id.* at 10-11.)

Debtors are correct that the period for the parties to conclude fact discovery expired on February 28, 2007 and has not been extended by the Court. Expert discovery was to be completed by April 30, 2007. This chapter 11 case was filed in September 2001 and the reclamation issue currently before the Court has been in dispute since the beginning of the case. The Court has provided the parties ample opportunity to take and conclude discovery in this case.

Since the conclusion (or what was ordered to be the conclusion) of discovery, the parties have filed several motions complaining about discovery. On March 1, 2007, Debtors filed a motion to require McKesson to produce certain documents by March 8, 2007 (Doc. # 2716). The Court granted this motion by order dated March 2, 2007 (Doc. # 2720). On March 6, 2007, Debtors filed a motion to permit depositions by video conference (Doc. # 2722), which was granted by order dated March 7, 2007 (Doc. # 2726). On March 16, 2007, McKesson filed a motion to modify the deposition deadline regarding one of its witnesses (Doc. # 2734), which was granted by the Court by order dated March 19, 2007 (Doc. # 2739).

The March 19 Order also extended the time for Debtors' rebuttal expert reports until April 18, 2007.

On April 25, 2007, McKesson moved to extend the deadline to complete expert discovery and reschedule a status conference set by the Court for May 7, 2007 (Doc. # 2743). The Court was not able to accommodate the request for an expedited hearing, and since the depositions were scheduled to be conducted prior to the Court's availability for a hearing, the Court denied the motion for an expedited hearing on April 25, 2007 (Doc. # 2751). The Court also granted Debtors' motion scheduling the depositions of all experts for April 30 and May 1, 2 and 9, 2007 (Doc. # 2748).

In its motion to extend the period for expert discovery (Doc. # 2743), McKesson complained that Debtors had not provided the 9/24/01 PDX Inventory to McKesson in an electronic format, although Debtors' expert, Andrew D. Finger, relied on such electronic data. The declarations McKesson submitted in support of this motion not only failed to establish that Debtors had not produced the 9/24/01 PDX Inventory in an electronic format, but expressly established the opposite premise, *i.e.*, that Debtors had informed McKesson in September 2006 that Debtors had previously produced an electronic version of the 9/24/01 PDX Inventory. (See Declaration of J. Alexandra Rhim (Doc. # 2747), Ex. 2 at Response to Interrogatory 13.)

As set forth above, McKesson failed in its previous attempt to extend the period for expert discovery. It appears that the current Motion to Appoint is another attempt to obtain additional time to conduct discovery and prepare additional expert reports. Debtors point out that McKesson expressly disavowed the reliability of

Debtors' 9/24/01 PDX Inventory and, thus, made a conscious decision to ignore it. (See Debtors' Response at 4-7.) McKesson has filed what is, essentially, a motion to compel discovery that it never requested during the discovery period. Debtors note that the only Federal Rule of Civil Procedure cited by McKesson in the Motion to Appoint is Rule 37, which deals with "Failure to Make Disclosure or Cooperate in Discovery; Sanctions." Despite reliance on Rule 37, however, McKesson cites no conduct of Debtors that appears to be sanctionable. McKesson speculates that Debtors may have altered the data in the 9/24/01 PDX Inventory because McKesson notes discrepancies between such Inventory and (i) the 2002 Jeswald Report and (ii) Debtors' expert report by Andrew D. Finger. Debtors have countered that the 2002 Jeswald Report is not and never was an "inventory," but was, rather, an estimate of certain reclamation claims.

McKesson argues that the disk containing the 9/24/01 PDX Inventory indicates that it was created in March 2007. Debtors answers to Interrogatories in September 2006 stated that an electronic version of the inventory had been provided to McKesson "previously." McKesson never pursued this information, although in April 2007 McKesson claimed it did not receive the earlier produced inventory in electronic format. It appears that McKesson failed to even attempt to determine in September 2006 (or any time thereafter until the April 20, 2007 receipt of Debtors' expert report by Mr. Finger) whether McKesson had received the 9/24/01 PDX Inventory in electronic format. McKesson witnesses stated that, even if an electronic version had been available to them, they would not have

looked at the data because it was unbelievable. (See Debtors' Response at 4-7.)

McKesson seems to rely heavily on the amendments to the Federal Rules of Civil Procedure in arguing that it is entitled to the appointment of a computer consultant to determine the metadata¹ underlying the 9/24/01 PDX Inventory. Amended Rule 34(b)(ii) provides that, if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or a form that is reasonably usable. It appears that Debtors have complied with Rule 34(b)(ii). Rule 34(b)(iii) states that a party need not produce the same electronically stored information in more than one form. Since Debtors have already provided McKesson with an electronic version of the 9/24/01 PDX Inventory, Rule 34 does not provide any basis for granting the Motion to Appoint.

McKesson has offered only conclusory speculation that Debtors may have altered the 9/24/01 PDX Inventory as the reason it needs the metadata. McKesson fails to state that it requested any such data prior to the conclusion of the discovery period or that Debtors refused any timely request for the information. Since Rule 37 deals with sanctions for failing to make disclosure or cooperate in discovery, McKesson has the burden to show that Debtors have

¹ Metadata is information about a particular data set or document, which describes how, when and by whom it was collected, created, accessed, modified and how it is formatted. In other words, metadata is data about data. Metadata can be altered intentionally or unintentionally. The current presumption under the Federal Rules of Civil Procedures is that metadata has to be preserved, but that does not address the question of whether it has to be produced.

failed to produce documents or cooperate in discovery. This McKesson has wholly failed to do.

As a consequence, McKesson has provided no basis for this Court to appoint a computer consultant at this time. McKesson's Motion to Appoint is not well taken and is hereby denied.

IT IS SO ORDERED.

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