

IT IS SO ORDERED.



Dated: June 22, 2007
11:07:27 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 (A) FOR AN *IN CAMERA* REVIEW
BY THE COURT OF CERTAIN DOCUMENTS WITHHELD BY MCKESSON
AND (B) TO DETERMINE THE VALIDITY AND WAIVER OF
THE ASSERTED PRIVILEGE CLAIMS

NOT INTENDED FOR NATIONAL PUBLICATION

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This cause is before the Court on Debtor's (sic) Motion (A) For an In Camera Review by the Court of Certain Documents Withheld by McKesson Under Claims of Privilege, and (B) To Determine the Validity and Waiver of the Asserted Privilege Claims (Doc. # 2758) ("Motion for Review") filed by Debtors Phar-Mor, Inc. LLC, et al. ("Debtors") on May 21, 2007. McKesson Corporation ("McKesson") filed McKesson Corporation's Opposition to the Debtor's (sic) Motion for *In Camera* Review of Certain Documents (Doc. # 2765) ("McKesson's Response") on May 29, 2007. The Court held a telephonic status conference on June 18, 2007 to seek clarification regarding the Motion for Review.

Debtors request the Court to conduct an *in camera* review of: (i) "approximately 100 pages of materials out of 6,415 pages withheld by McKesson and listed on various privilege logs;" (ii) "one page of handwritten notes of a McKesson employee, Jennifer Jenkins;" and (iii) "nine pages of redacted or 'blacked out' documents." (*Id.* at 1.) Debtors state that the purpose of the requested *in camera* review "is to determine whether McKesson's assertion of privilege with respect to the documents is valid in the first instance." (*Id.* at 2.) Debtors further argue that, even if the privilege is valid, McKesson waived the privilege by (i) its blanket assertion of privilege for approximately 6,500 pages of discovery documents without a proper description of such privilege, (ii) submission of its reclamation claim against Debtors' estate, and (iii) turnover of one document (which McKesson had marked privileged) regarding planning by McKesson prior to Debtors' bankruptcy.

McKesson counters that the Motion for Review should be denied because Debtors seek privileged documents solely to establish McKesson's prior knowledge of Debtors' insolvency, which, McKesson argues, is not at issue in this dispute over its reclamation claim. McKesson argues that it has not waived the attorney-client and/or work product privilege because (i) the "at issue" waiver does not apply to a reclamation claim where no party is asserting an advice of counsel defense, (ii) the second revised privilege log was amply specific, and (iii) neither McKesson or its counsel waived the protection of the attorney work product doctrine.

I. ADEQUACY OF PRIVILEGE LOG

Debtors attach to the Motion for Review three separate privilege logs prepared by McKesson. McKesson produced the 65-page Initial Privilege Log (Motion for Review, Ex. A) on March 8, 2007. Debtors objected that the Initial Privilege Log was inadequate and failed to comply with the Federal Rules of Civil Procedure. In response to Debtor's complaint, McKesson submitted a 55-page Revised Privilege Log (*Id.*, Ex. B) to Debtors. In a letter to McKesson's counsel dated April 3, 2007, Debtors complained about the Revised Privilege Log and asserted that McKesson had waived any asserted privilege. McKesson responded the next day with a letter to Debtors' counsel and, thereafter, sent Debtors a Second Revised Privilege Log (*Id.*, Ex. D).

Debtors assert that the Initial Privilege Log was "woefully inadequate" and that the Revised Privilege Log was also inadequate because each failed to include sufficient information for Debtors to determine whether an asserted claim of privilege was valid. (*Id.* ¶ 3.) Debtors apparently do not contend that the Second

Revised Privilege Log continues to be inadequate. With respect to the Second Revised Privilege Log, Debtors merely state that, although McKesson agreed to produce five documents from the log, the "parties reached an impasse regarding the turnover of the remainder of the documents." (*Id.* ¶ 9.)

The Second Revised Privilege Log appears to contain the level of detail that Debtors complained was lacking in the Initial and Revised Privilege Logs by setting forth the Bates page number range; the author of the document, recipient(s) and parties who were copied on the document, the date of the document, the type of document, the subject of the document, the nature of the privilege asserted, and the location of the document. The information in the column for subject matter appears to be sufficiently specific. Accordingly, although McKesson did not provide adequate information in its first two attempts in constructing a privilege log, the Second Revised Privilege Log satisfies the requirements of providing specific information about McKesson's objection to producing those documents and the basis therefor.

II. WAIVER OF PRIVILEGE BY MCKESSON

Debtors argue that, even if McKesson has a valid basis for asserting that a document is privileged, McKesson has waived that privilege by its conduct in (i) making a blanket assertion of privilege, (ii) putting the issue of its knowledge of Debtors' insolvency at issue by filing the reclamation claim, and (iii) producing one document that deals with McKesson's pre-bankruptcy planning.

The Federal Rules of Civil Procedure specifically limit the scope of discovery to information that is "not privileged" and

"relevant to the claim or defense of any party." (See FED. R. CIV. P. 26(b)(1) regarding scope of discovery.) The privilege a client has with its counsel is well established and should not be disregarded lightly.

"An independent judiciary and a sacrosanct confidential relationship between lawyer and client are the bastions of an ordered liberty." Enda Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 2 (3rd ed. 1997). Of all the testimonial privileges, the attorney-client privilege is the oldest. It is grounded in the fundamental concept that free expression of a client to one's legal advisors requires that the ability to compel disclosures must be removed except upon the client's consent. 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2291, at 545 (McNaughton rev. 1961).

Dehart v. Enos (In re Metropolitan Metals), 206 B.R. 85, 87 (M.D. Pa. 1997).

The Court notes that a waiver of privilege may be express or implied. However, waiver of privilege should be narrowly construed.

The attorney-client privilege may be waived expressly or by implication. *In re Lott*, 424 F.3d 446, 452 (6th Cir. 2005). "Implied waivers are consistently construed narrowly. Courts 'must impose a waiver no broader than needed to ensure the fairness of the proceedings before it.' A broad waiver rule would no doubt inhibit the kind of frank attorney-client communications and vigorous investigation of all possible defenses that the attorney-client and work product privileges are designed to promote."

Clevenger v. Towers, Perrin, Foster & Crosby, Inc., 2007 WL 127978 at *4 (S.D. Ohio 2007) (quoting *In re Lott* at 722, internal citation to *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003) omitted).

A. Blanket Assertion of Privilege

Debtors allege that "McKesson waived the privilege by virtue of its overreaching blanket assertion of privilege for approximately 6,500 pages of discovery documents and its failure to properly describe the assertion of its privileges with respect thereto." (Motion for Review at 2.) Although there may have been some validity to this argument with respect to the Initial Privilege Log and/or the Revised Privilege Log, the Second Revised Privilege Log does not contain a blanket assertion of privilege. The Initial Privilege Log was 65 pages in length and failed to provide the detail included in the Second Revised Privilege Log, which is 17 pages in length.

In response to Debtors' complaints, McKesson reviewed and revised its privilege log and, in so doing, pared down the list as well as provided additional information about each document that McKesson claimed as privileged. For this reason, the Court finds that the initial assertion of privilege, whether or not characterized as "blanket," has been refined to a more specific assertion of privilege in the Second Revised Privilege Log. As a consequence, this Court does not find that McKesson has waived the attorney-client or attorney work product privileges by its early assertion of privilege in the Initial Privilege Log and/or the Revised Privilege Log.

B. Waiver as a Result of Filing the Reclamation Claim

Debtors assert that McKesson has waived the privilege by filing the reclamation claim. Debtors' argument concerning the "at issue" waiver appears to relate only to McKesson's knowledge concerning Debtors' insolvency prior to Debtors' bankruptcy filing.

Debtors state categorically that "McKesson waived any [attorney-client] privilege by submitting its \$8.5 million dollar (sic) reclamation claim against the Debtor's (sic) bankruptcy estate, and asserting that the Debtor (sic) was insolvent during the reclamation period." (Motion for Review at 14-15.) Debtors postulate that, because the issue of Debtors' insolvency and McKesson's knowledge about such insolvency prior to the reclamation period is an issue in the case, even privileged documents need to be produced based upon the "at issue" waiver doctrine.

McKesson notes that Debtors do not cite any authority for their broad interpretation of the "at issue" waiver doctrine. McKesson counters that Debtors either misunderstand or misinterpret the applicability of the "at issue" waiver of the attorney-client privilege. Since it has not asserted advice of counsel as a defense, McKesson reasons that there has been no waiver and that the "at issue" doctrine does not apply.

This Court agrees with McKesson concerning the applicability of the "at issue" doctrine of waiver. McKesson has not asserted reliance on advice of its counsel as a defense. Nor has McKesson claimed that factual determination of Debtors' insolvency can or may be determined by what McKesson thought, understood, or knew at any time prior to the Petition Date. In order for the "at issue" doctrine of waiver to apply, one party must assert some kind of argument, claim, defense, etc. that is so intimately entwined with communications by and between the party and its counsel that the other side is entitled access to such communications. It is on that basis that the attorney-client privilege is waived.

In the instances where the privilege is found to be waived, a party's "pleading places at issue the subject matter of a privileged communication in such a way that the party holding the privilege will be forced to draw upon the privileged material at trial in order to prevail." *Lott*, 424 F.3d at 453, quoting *Developments in the Law-Privileged Communications, Implied Waiver*, 98 *Harvard L. Rev.* 1629, 1638 (1985); see also *U.S. Fire Insurance Co. v. Asbestospray, Inc.*, 182 F.3d 201, 212 (3d Cir.1999) (party waives the privilege only when he or she "has made the decision and taken the affirmative step in the litigation to place the advice of the attorney in issue."); *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175 (7th Cir.1995). ("[T]he attorney-client privilege is generally waived when the client asserts claims or defenses that put his attorney's advice at issue in the litigation."). An attorney-client communication is placed at issue "when a party affirmatively uses privileged communications to defend against or attack the opposing party." *Beery v. Thomson Consumer Electronics, Inc.*, 218 F.R.D. 599, 604 (S.D. Ohio 2003) (citations omitted). "Waiver therefore stops a party from manipulating an essential component of our legal system - the attorney client privilege - 'so as to release information favorable to it and withhold anything else.'" *Beery*, 218 F.R.D. at 604 (quoting *Kelsey-Hayes Co. v. Motor Wheel Corp.*, 155 F.R.D. 170, 171 (W.D. Mich. 1991)).

Clevenger, 2007 WL 127978 at *4.

As set forth above, a party cannot assert that it relied on advice of counsel in taking the action at issue and then attempt to invoke the attorney-client privilege to shield that advice from discovery. That is not the situation here. McKesson has merely filed a reclamation claim and, in doing so, has put Debtors' solvency at issue; McKesson's understanding or knowledge of Debtors' solvency is not, however, at issue.¹

¹ Since Debtors have taken the position that they were solvent, which is a factual matter, they cannot simultaneously take the position that McKesson knew that they were insolvent when McKesson shipped goods during the reclamation

Debtors' argument here is similar to the one made by the debtor in *In re Adelphia Communications Corp.*, 2007 Bankr. LEXIS 660 (Bankr. S.D.N.Y. 2007) when Adelphia objected to the proof of claim filed by Lucent Technologies, Inc. ("Lucent") on the basis that the claim was not supported by Adelphia's books and records. Lucent's proof of claim was based upon debts owed in connection with Devon, a limited partnership formed by Adelphia and Lucent. Adelphia asserted that Lucent was required to produce otherwise-privileged documents pursuant to the "at issue" waiver of privilege doctrine. Adelphia argued:

Lucent's reasonable belief as to whether Adelphia was participating in the control of Devon has been directly injected into this litigation by Lucent's claim. . . . [I]n Lucent's view, Adelphia is obligated to Lucent as if it were Devon. . . . [D]uring the course of its relationship with Devon, Lucent embarked on a course of conduct to manufacture a factual basis for its alleged "reasonable belief" that Adelphia was the *de facto* general partner of Devon. The documents Lucent alleges are privileged . . . are relevant to this issue.

Id. at *10-11.

Lucent responded by submitting a non-exclusive list of facts upon which it would rely to establish that Adelphia controlled Devon and the Lucent reasonably believed that Adelphia was acting as the general partner of Devon.

The bankruptcy court held that Lucent had not affirmatively placed its actual knowledge or belief at issue and that Lucent would make its case based on Adelphia's conduct.

period. Section 546(c) requires Debtors to be insolvent before reclamation is available.

Lucent will bear the burden (and the risk) of proof at trial and will be precluded from presenting any testimony or documents that relate to the subjective belief or reliance of Lucent employees unless Adelphia has previously had an opportunity to examine those witnesses and documents on that subject matter. Adelphia can attempt to rebut Lucent's claims by showing that Lucent "at all times knew that it was dealing exclusively with the limited partnership, Devon," but Adelphia is not entitled, pursuant to the "at issue" doctrine to discovery of protected communications in aid of its defense.

Id. at *17.

As in the *Adelphia* case, McKesson has not affirmatively put its knowledge of Debtors' insolvency at issue. Debtors have taken the position that, as a matter of fact (as opposed to a legal theory), Debtors were solvent at all relevant times. As a consequence, the question of McKesson's knowledge or subjective understanding of Debtors' pre-petition [in]solvency is not an issue in this factual context. Having taken the position that its subjective belief is not at issue, however, McKesson cannot use its belief of Debtors' pre-petition financial state to attempt to establish Debtors' insolvency.

This Court holds that filing a reclamation claim - standing alone - does not result in a waiver of the attorney-client privilege or work product privilege. The Court does not dispute that one of the elements necessary to establish a reclamation claim is the insolvency of the debtor. Simply because the issue of insolvency needs to be decided to determine McKesson's right to reclaim goods, however, does not put the matter "at issue" for purposes of waiving privilege. Privileged communications between

an attorney and client are not waived merely because a factual matter is at issue in the judicial process.

C. Production of MC-PRIV0001590

Last, Debtors argue that McKesson has waived all privilege by producing a letter from Alan Pearce (a Vice President of McKesson) dated September 19, 2001 (Bate-stamped MC-PRIV0001590). (Motion for Review, ¶ 31.) Debtors argue that because this document, which was dated a week before Debtors filed for bankruptcy protection, deals with the subject of "preference actions against McKesson under the Bankruptcy Code, and McKesson's pre-bankruptcy planning," McKesson has waived its "right to assert a privilege with respect to the subject matter of its pre-bankruptcy planning and preference payments and reclamation claims in connection with the Debtor's (sic) bankruptcy estate." (*Id.* ¶ 33.) It appears that the document in question is one of the five that McKesson agreed to produce after extensive negotiations with Debtors concerning the Second Revised Privilege Log. (*Id.* ¶¶ 9 and 18.)

Debtors' assertion that McKesson has waived all privilege concerning "pre-bankruptcy planning," "preference payments" and "reclamation claims" goes too far and does not appear to be grounded in fact. McKesson does not address this argument in its Response. Despite McKesson's silence, however, there is no indication that, in producing this one document, McKesson made a knowing or implicit waiver of attorney-client or work product privilege. Although McKesson originally claimed that the document was privileged, it agreed to produce the document to Debtors after twice revising its privilege log and after extensive negotiations with Debtors.

The document in question was not drafted by an attorney and appears to be a recital of a non-attorney's understanding of a portion of the Bankruptcy Code. Although one of the parties who is copied on the document is an attorney, production of this document, alone, does not constitute a whole-sale waiver of the attorney-client and attorney work product privileges. It does not appear that any privilege attaches to the document in question; however, in knowingly producing this document, McKesson has waived any privilege with respect to this particular document. McKesson cannot argue that the production of this document was inadvertent. Since the document does not request legal advice and, because it is not authored by an attorney, it cannot provide legal advice, there is no blanket waiver of the attorney-client or attorney work product privileges.

III. CONCLUSION

Debtors have not established a need for an *in camera* review of the documents on McKesson's Second Revised Privilege Log. The Second Revised Privilege Log contains adequate information to comply with the Federal Rules of Civil Procedure and case law. Any "overreaching assertion of blanket privilege" was cured by McKesson's submission of the Second Revised Privilege Log. Because McKesson has not asserted advice of counsel or any similar type of argument as a defense, the "at issue" doctrine of waiver of privilege does not apply. McKesson's production of a document that deals with a layperson's interpretation and/or understanding of a portion of the Bankruptcy Code does not waive the attorney-client or attorney work product privilege with respect to all documents that relate to the same subject covered by the produced document.

This Court finds that the Second Revised Privilege Log adequately asserts privilege for the documents set forth therein. Debtors have not provided any basis for finding that McKesson has waived the attorney-client and/or the attorney work product privileges.

As a consequence, this Court hereby denies the Motion for Review.

IT IS SO ORDERED.

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