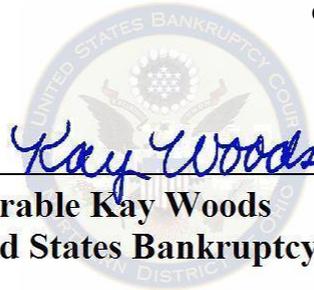


IT IS SO ORDERED.



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
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* CHAPTER 11
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* HONORABLE KAY WOODS
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ORDER (i) DENYING DEBTORS' MOTION IN LIMINE TO EXCLUDE FROM
ADMISSION AT TRIAL EVIDENCE RELATING TO MCKESSON CORPORATION'S
ALLEGED FACSIMILE TRANSMITTAL OF RECLAMATION DEMAND
AND (ii) SCHEDULING TELEPHONIC STATUS CONFERENCE

Before the Court is Debtor's [sic] Motion in Limine to Exclude from Admission at Trial Evidence Relating to McKesson Corporation's Alleged Facsimile Transmittal of its Reclamation Demand ("Motion in Limine") (Doc. # 2840) filed by Debtors Phar-Mor, Inc., *et al.* (collectively, "Debtors") on January 12, 2009. On February 2, 2009, McKesson Corporation ("McKesson") filed McKesson Corporation's Opposition to Debtor's [sic] Motion in Limine to Exclude from

Admission at Trial Evidence Relating to McKesson Corporation's Facsimile Transmittal of its Reclamation Demand ("Opposition Brief") ("Doc. # 2849). In Support of the Opposition Brief, on February 2, 2009, McKesson filed Declaration of Jeffrey K. Garfinkle in Support of McKesson Corporation's Opposition to Debtor's [sic] Motion in Limine to Exclude from Admission at Trial Evidence Relating to McKesson Corporation's Facsimile Transmittal of its Reclamation Demand ("Garfinkle Declaration") (Doc. # 2850). An evidentiary hearing on Debtors' objection to McKesson's reclamation claim is scheduled to begin June 8, 2009 ("Evidentiary Hearing"). (Doc. # 2834)¹

I. ISSUE

Debtors filed Debtors' Reclamation Claims Report ("Reclamation Report") (Doc. # 601) on April 9, 2002. McKesson objected to the Reclamation Report on April 30, 2002, by filing McKesson Corporation's Objection and Statement of Position With Respect to Debtors' Reclamation Claims Report ("Objection to Reclamation Report") (Doc. # 645).² In order to value a reclamation claim, it is necessary to determine when a debtor received the reclamation demand, thus triggering the reclamation period. Debtors and

¹On January 12, 2009, McKesson filed McKesson Corporation's Motion (1) To Exclude Debtor's 9/24/01 PDX Inventory as Inadmissible Hearsay; (2) For Evidentiary Preclusion of 9/24/01 PDX Inventory Based Upon Debtor's Spoliation of Evidence; and (3) For Spoliation Sanctions Deeming that McKesson has Established the "Goods on Hand" Element of its Reclamation Claim (Doc. # 2841). McKesson's Motion will be dealt with by separate order prior to the Evidentiary Hearing.

²The Objection to Reclamation Report states that McKesson sent Debtors' counsel, Michael A. Gallo, a letter on November 20, 2001 ("November 20 Letter"), which included McKesson's "reclamation claim analysis form for the purchase period of September 10, 2001 to September 17, 2001." (Obj. ¶ 4.) The November 20 Letter is attached to the Garfinkle Declaration as Exhibit 8.

McKesson dispute when Debtors received McKesson's reclamation demand letter dated September 17, 2001 ("Demand Letter"). The parties agree that McKesson sent the Demand Letter by overnight courier so that it was received by Debtors on September 18, 2001. McKesson argues that it also transmitted the Demand Letter to Debtors via facsimile on September 17, 2001; however, Debtors dispute this allegation.

As this Court has previously held, "McKesson's reclamation claim should be valued following the majority rule - *i.e.*, valuation on the date the demand was received." (This Court's Memorandum Opinion dated September 21, 2007, regarding the parties cross motions for summary judgment (Doc. # 2785) at 12.) Resolution of the date Debtors received the Demand Letter is necessary to determine (i) the specific ten (10) day period covered by McKesson's reclamation demand and (i) the date for valuing the inventory on hand subject to reclamation.

II. DEBTORS' POSITION

Debtors seek to preclude McKesson from offering any evidence relating to the alleged facsimile transmission of the Demand Letter. Debtors point out that discovery closed more than two years ago and, to date, McKesson has failed to produce (i) fax cover sheet showing that the Demand Letter was faxed to Debtors on September 17, 2001; and/or (ii) fax confirmation sheet regarding transmission of the Demand Letter to Debtors on September 17, 2001. Debtors further maintain that the Demand Letter does not indicate that it was sent via fax. As a consequence, Debtors argue that McKesson should be

precluded from offering any evidence relating to the alleged fax transmission of the Demand Letter to Debtors on September 17, 2001.

Debtors contend that preclusion of evidence relating to the alleged facsimile transmission of the Demand Letter is necessary in order to (i) avoid wasting judicial resources, and (ii) keep the three experts retained to testify in this case from preparing valuation testimony based on two separate reclamation periods. Debtors argue, "To require those experts to present substantial, and controverted, testimony regarding the amount of goods on hand on the 17th of September would be a complete waste of judicial resources since McKesson is unable to establish that Phar-Mor received the reclamation demand on that date." (Mot. in Limine at 2.)

III. McKESSON'S POSITION

McKesson counters that failure to produce either a fax cover sheet or a fax confirmation sheet should not preclude it from presenting evidence that McKesson faxed the Demand Letter to Debtors on September 17, 2001. McKesson claims that it has established a rebuttable presumption that it faxed the Demand Letter to Debtors on September 17, 2001, because (i) Debtors admitted to receiving the Demand Letter by fax, although they cannot identify the date of receipt; and (ii) Debtors failed to object to the statement in the November 20 Letter that the Demand Letter had been faxed. In support of its assertion that Debtors have admitted receipt of a fax, McKesson points only to deposition testimony of Martin Seekely, in which he states that he "believe[s] [the Demand Letter] was received by via [sic] fax, originally." (Seekely Depo. at 23, lines

13-14.) A mere four lines later, in interrupting the next question and in what appears to be a continuation of the prior answer, Mr. Seekely recants his statement regarding receipt of a fax. He states, "Oh, I take that - I take that back. I do recall receiving an overnight delivery package with the original of the reclamation demand on [September] 18th." (*Id.*, lines 18-20.) McKesson maintains, "While [Seekely] states that he 'takes it back,' it appears that this statement addressed a prior question as to whether or not Mr. Seekley knew other people who knew when the Reclamation Demand Letter was received." (Opp'n Br. at 7.) McKesson's counsel failed to follow up with further questions on either subject at Mr. Seekely's deposition. The Court does not find McKesson's construction to be a fair reading of Mr. Seekely's testimony. The Court further finds that McKesson has not established through the cited deposition testimony of Mr. Seekley that Debtors admit to having received the Demand Letter by fax on any date.

McKesson also cites to Debtors' failure to object to the November 20 Letter as Debtors' "adoption" of McKesson's statement that the Demand Letter was faxed on September 17, 2001. McKesson alleges Debtors to have adopted the statement: "Reclamation demand for McKesson Corporation was faxed and sent via Federal Express to Phar-Mor Inc. on September 17, 2001." (Garfinkle Decl., Ex. 8.) McKesson argues that Debtors "never objected to this letter and, thus, ha[ve] impliedly admitted that McKesson faxed the Reclamation Demand letter to Phar-Mor on September 17, 2001." (*Id.*)

McKesson cites *United States v. Jinadu*, 98 F.3d 239 (6th Cir.

1996) for the proposition that a party can adopt a statement by silence. *Jinadu* is a criminal case dealing with an alleged violation of constitutional rights. The Sixth Circuit Court of Appeals stated: "When a statement is offered as an adoptive admission, the primary inquiry is whether the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond[.]" *Id.* at 244 (emphasis added). There is no evidence in the record that, under the circumstances that existed at the time, Debtors would have felt obligated to respond or "object" to this one sentence in the November 20 Letter. Although Debtors may not have objected to that single sentence in the November 20 Letter, Debtors did, in fact, respond to the substance by filing the Reclamation Report, which listed McKesson's Demand Letter as having been received on 09/18/01. There is no basis in the record for this Court to conclude that, under the circumstances that existed at that time, Debtors would have felt compelled to separately object to each item in the November 20 Letter. Thus, this Court cannot conclude that Debtors "adopted" the single sentence in McKesson's letter that the Demand Letter had been faxed as well as sent by overnight courier.

McKesson argues that it should be able to offer evidence at the Evidentiary Hearing in the form of testimony from Alan Pearce that the Demand Letter was faxed. In an eleventh hour attempt to bolster this testimony, McKesson asserts that it will offer one sentence from an otherwise redacted e-mail that was previously withheld from production on the claim of attorney-client privilege. McKesson

acknowledges that it failed to inform Debtors' counsel of its intent to use the redacted e-mail until January 29, 2009. In support of this position, McKesson states that "the e-mail presents no new facts in this dispute because Mr. Pearce already testified that he faxed the Reclamation Demand Letter on September 17." (Opp'n Br. at 4, n.5.)

IV. ANALYSIS

Debtors' Motion in Limine is an attempt to streamline the Evidentiary Hearing and avoid wasting time and money by removing the dispute regarding whether Debtors received the Demand Letter on September 17 or 18, 2001. Although the Court applauds the sentiment, it finds that an order precluding McKesson from offering any evidence about whether it faxed the Demand Letter on September 17, 2001, is not the appropriate vehicle to conserve those resources. That being said, the Court agrees that it is not in the best interest of either party to have this issue remain in dispute prior to the Evidentiary Hearing. Early resolution of the date Debtors received the Demand Letter will enable each of the experts to prepare more efficiently.

As a consequence, the Court finds that the Motion in Limine should be denied. However, the Court further finds that a preliminary evidentiary hearing ("Preliminary Hearing") for the sole purpose of determining whether Debtors received the Demand Letter by fax on September 17, 2001, is not only appropriate, but will conserve resources of this Court and each of the parties.

Therefore, in the interest of judicial economy, the Court will

conduct a Preliminary Hearing for the specific and limited purpose of determining whether Debtors received the Demand Letter by fax on September 17, 2001. Toward that end, the Court sets the following parameters for the Preliminary Hearing.

Rebuttable presumption: McKesson alleges that Debtors have admitted receiving a fax of the Demand Letter. As a consequence, McKesson maintain that it has established a rebuttable presumption of the fax transmission. As set forth above, this Court finds that neither the cited deposition testimony of Martin Seekely nor Debtors' alleged failure to "object" to the statement in the November 20 Letter constitutes an admission by Debtors that they received the Demand Letter by fax. This Court finds that McKesson has not alleged sufficient facts to establish a rebuttable presumption that McKesson faxed the Demand Letter to Debtors on September 17, 2001. As a consequence, McKesson continues to bear the burden of proof by the preponderance of admissible evidence that Debtors received the Demand Letter on September 17, 2001.

Alan Pearce's September 19, 2001 e-mail. As noted above, McKesson now wants to offer into evidence a single sentence from a September 19, 2001, internal e-mail from Alan Pearce. As McKesson concedes, the e-mail adds nothing to Mr. Pearce's deposition testimony. (Opp'n Br. at 4, n.5.) Furthermore, there is no allegation that the e-mail is a document kept in the ordinary course of McKesson's business nor does it appear to be that kind of document. More significantly, there is no dispute that McKesson did not previously produce this document, based on a claim of privilege,

and did not provide a copy of the redacted e-mail to Debtors' counsel until January 29, 2009. (*Id.*) Because McKesson has shielded the e-mail from discovery by Debtors on the grounds that the document is privileged, McKesson cannot now be allowed to use one selected line from the otherwise redacted document to attempt to prove a critical element of its case. As a consequence, the Court will not permit McKesson to offer this e-mail into evidence or otherwise use this e-mail at the Preliminary Hearing or the Evidentiary Hearing.

V. CONCLUSION

The Court denies Debtors' Motion in Limine. In addition, the Court hereby schedules a **telephonic status conference for Wednesday, February 11, 2009, at 3:30 p.m. to set a Preliminary Hearing**, for the limited purpose of permitting the parties to submit evidence regarding the issue of Debtors' receipt of the Demand Letter on September 17, 2001. In accordance with this Court's practice, the Court will call each of the parties, as set forth herein.

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