

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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FEDERAL TRADE COMMISSION,)	
)	
Petitioner,)	
)	
v.)	Misc. No. 3:14-mc-00005-REP
)	
RECKITT BENCKISER)	
PHARMACEUTICALS, INC.,)	
)	
Respondent.)	
<hr/>)	

**FEDERAL TRADE COMMISSION'S
MOTION TO ENFORCE CIVIL INVESTIGATIVE DEMAND
AND MEMORANDUM IN SUPPORT THEREOF**

The Federal Trade Commission submits this motion to enforce a civil investigative demand ("CID"), a type of administrative compulsory process, issued to Reckitt Benckiser Pharmaceuticals, Inc. ("Reckitt") and to require Reckitt to produce non-privileged documents it has improperly withheld.

At the show-cause hearing on October 27, 2014, the Court agreed with the FTC that its understanding of Fourth Circuit privilege law was "correct," and that Reckitt is likely withholding materials that, under the rule developed in such cases as *United States v. (Under Seal)*, 748 F.2d 871 (4th Cir. 1984) (Ervin, J.), are not privileged. Dkt. 37 at 94. The Court directed Reckitt to provide information that would allow the FTC to identify which documents it believed were wrongfully withheld. *See, e.g.*, Dkt. 37 at 103. In response, Reckitt has twice added columns to its privilege log, but those entries fail to draw any meaningful distinctions among

the documents Reckitt continues to withhold, and instead only confirm that Reckitt has withheld or redacted 22,327 documents somehow related to one or more unidentified published documents. And, though Reckitt acceded to the FTC's specific request that it identify entries on its log reflecting drafts of the 2012 citizen petition – identifying a total of 222 such drafts – it claims that it would be “overly burdensome” to provide more detailed information on its privilege log. Given that Reckitt has not taken any substantive steps toward sustaining its privilege claims, the FTC thus respectfully asks this Court to enter an order directing Reckitt to produce all of the documents it has incorrectly withheld, including, at a bare minimum, the 222 drafts of the citizen petition it published in 2012.

I. Factual Background

1. The FTC filed this petition for enforcement pursuant to 15 U.S.C. § 57b-1 on the grounds that Reckitt had improperly withheld from its response to an FTC CID documents that were not privileged under Fourth Circuit law. Dkt. 2. The Court issued an Order to Show Cause why it should not grant the FTC's petition, and scheduled a show-cause hearing on October 27, 2014. Dkts. 6, 20.

2. During the October 27, 2014 show-cause hearing, the Court stated that Fourth Circuit law was “clear” and that the FTC's position was “correct.” *See* Dkt. 37 at 94. At the hearing, the Court directed Reckitt to, at minimum, provide the FTC with the following two lists:

- (a) “[a list] identify[ing] the documents that were published and the [privilege log] entries that relate to those documents[;]”and
- (b) “[a] list of documents that were prepared with a view to being published . . . but were withdrawn, or the decision to publish was withdrawn, and then why.”

Dkt. 37 at 103. With respect to the first list, the Court made it clear that it expected “a list of all the documents as to which a claim of privilege is made on your privilege log that were, in fact, published, and I want the claim of privilege by number related to the document in such a way that [the FTC] can easily go through here and pull these out and figure out what we're really dealing with.” Dkt. 37 at 97.

3. The Court stated that the FTC should respond to this information by indicating which documents should be produced under applicable Fourth Circuit precedent. *Id.* at 94-95. The Court stated that Reckitt should produce these lists on November 10, 2014, and the FTC should respond today, November 24, 2014. Dkt. 37 at 104-06.

4. On November 10, 2014, Reckitt produced the lists in the form of a revised privilege log. *See* Exh. 1; Exh. 4, ¶¶ 4-5 (Declaration of Garth Huston). This log indicated *whether* a given entry related to a document that was published but, critically, not *which* published document the entry related to.

5. Specifically, Reckitt added two additional columns to its existing log. Reckitt labeled the first column “Related to a document that was published” and indicated “Yes” or “No” for each document on the privilege log. By this column, Reckitt identified 22,327 withheld or redacted documents listed on the privilege log that relate to some document that was published. However Reckitt did not identify – in the new column or otherwise – the related published documents. Reckitt labeled the second column “Related to a document that was intended to be

published but was not” and stated either “Yes” or “No” for each document on the privilege log. Reckitt identified 81 documents on its privilege log that related to a document that was intended to be published but was not. By accompanying letter, Reckitt indicated that for each of these documents, there was a deliberate decision not to publish.¹ *See* Exh. 1; Exh. 4, ¶ 5.

6. On Thursday, November 13, 2014, the FTC asked Reckitt both (1) to revise further the privilege log to identify specifically and by Bates number each published document that related to an entry on the privilege log; and (2) to provide a list of the privilege log entries that reflect a draft of the 2012 citizen petition. Counsel for Reckitt asked for additional time to consider these requests and the parties agreed to a follow-up call on Tuesday November 18, 2014. *See* Exh. 2.

7. On November 18, 2014, with respect to request (1), counsel for Reckitt proposed instead to further annotate the privilege log so as to organize the entries by broad subject-matter categories. Counsel for Reckitt agreed to respond by November 21 to indicate whether this approach would be feasible and what time frame would be required for completion. With respect to request (2), counsel for Reckitt agreed to provide that information by November 21. Exh. 2.

8. On Friday, November 21, Reckitt produced a second revised privilege log. *See* Exh. 3. The second revised privilege log includes a third new column labeled “Privilege subject matter” that contained one of 19 different descriptions of the subject-matter of the document. These subject-matter categories, however,

¹ And thus the documents would retain the requisite confidentiality. *See* (*Under Seal*), 748 F.2d at 876.

simply restate information that was already contained in the privilege descriptions. They do not add any substantive information that would enable the FTC to draw distinctions among the numerous log entries.² Exh. 4, ¶ 7. Reckitt rejected the FTC's request to identify with specificity the published documents that relate to entries on the privilege log, claiming that providing those details would be "overly burdensome." Exh. 3 at 1-2.

9. On Friday, November 22, 2014, Reckitt responded to the FTC's specific request (2) and provided a list of 222 documents on its privilege log – by document ID number only – that are drafts of the 2012 citizen petition. *See* Exh. 3; Exh. 4, ¶ 8.

II. Argument

A. **The Court should order Reckitt to produce the 22,327 withheld or redacted documents it admits are related to published documents.**

Materials related to documents that were ultimately published (such as drafts of the published document or documents containing material necessary to the preparation of the document) are not privileged under Fourth Circuit law. Dkt. 37

² At the same time, Reckitt, without explanation and without consulting with the FTC, reclassified 21 of the documents it had indicated were related to documents that were published from attorney-client privilege to work product privilege. Exh. 4, ¶ 9. This reclassification is untimely and Reckitt has therefore waived any work product claims it may have for these documents. *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B*, 230 F.R.D. 398, 418 (D. Md. 2005) ("The defendants' failure to consistently assert the work product privilege for the 256 documents for which the work product privilege was asserted on [an earlier] privilege log waives the privilege of those documents.") (citing, *inter alia*, *Carey-Canada, Inc. v. California Union Ins. Co.*, 118 F.R.D. 242, 249 (D.D.C. 1986)). Accordingly, the FTC will continue to use the number of documents identified as related to published documents in the November 10, 2014 log – a total

at 94. The Court should therefore order Reckitt to produce those documents unless it can sustain its burden to demonstrate that they are not drafts of published documents or details underlying those documents. Reckitt has not attempted to take even preliminary steps toward making this necessary showing. To the contrary, it has now confirmed that it has withheld or redacted over 22,000 documents that are not privileged under binding Fourth Circuit precedent. Exh. 4, ¶ 4.

During the October 27, 2014, show-cause hearing, the Court raised the question whether some of the documents improperly withheld are less directly relevant to the FTC's investigation than documents relating to Reckitt's 2012 citizen petition or single shared REMS negotiations with its competitors. *See, e.g.*, Dkt. 37 at 74, 95. However, as counsel explained, Reckitt has not claimed that the FTC's CID is overbroad, burdensome, or requests irrelevant information. Dkt. 37 at 81-82. Indeed, Reckitt has produced non-privileged materials in response to each of the CID's specifications, including documents that relate to labeling and product inserts. In failing to raise any objection to the scope of the CID, Reckitt has waived this claim and this Court may not consider it. *United States v. Morton Salt Co.*, 338 U.S. 632, 653-54 (1950); *EEOC v. Cuzzens of Georgia, Inc.*, 608 F.2d 1062, 1063 (5th Cir. 1979) ("Generally, one who has neglected the exhaustion of available administrative remedies may not seek judicial relief.").

Furthermore, in ruling on a petition to enforce agency process, courts must defer to the agency's choice of its investigative goals. Under longstanding

of 22,327 entries. Exh. 4, ¶ 4.

precedent, the Commission is entitled to any document that is reasonably related to the purpose of the investigation so long as it is not unduly burdensome. *Morton Salt*, 338 U.S. at 652 (a court must enforce an agency’s investigative subpoena “if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant.”); *Solis v. Food Employers Labor Relations Ass’n*, 644 F.3d 221, 226 (4th Cir. 2011) (citing, *inter alia*, *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 475-75 (4th Cir. 1986)); *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 499 (4th Cir. 2011). Thus, a district court’s role in a proceeding to enforce an administrative subpoena is “sharply limited.” *Solis*, 644 F.3d at 226 (citing *EEOC v. City of Norfolk Police Dept.*, 45 F.3d 80, 82 (4th Cir. 1995)); *see also FTC v. Texaco, Inc.*, 555 F.2d 862, 871-72 (D.C. Cir. 1977) (*en banc*).³ Indeed, “the scope of issues which may be litigated in an enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity.” *Texaco*, 555 F.2d at 872.

Further, while the FTC must show that its requests are reasonably relevant to its investigation, a district court must defer to an agency’s own determinations of relevance. *EEOC v. Randstad*, 685 F.3d 433, 448 (4th Cir. 2012) (“[W]e ‘defer to an agency’s own appraisal of what is relevant so long as it is not obviously wrong.’”) (quoting *EEOC v. Lockheed Martin Corp., Aero & Naval Systems*, 116 F. 3d 110, 113 (4th Cir.1997)).

³ This Court has noted that, because of the large number of cases involving challenges to agency actions in the District of Columbia, decisions of the United States Court of Appeals for the D.C. Circuit are given “substantial deference.” *Reich v. Muth*, No. 2:93CV372, 1993 WL 741997, *3 n.3 (E.D. Va. Jul 28, 1993).

Such deference is warranted here. An investigation into potentially anticompetitive conduct such as this one is complex. Documents such as package labels or product brochures can provide key insights into whether Reckitt's marketing decisions were anticompetitive, especially when considered in context with Reckitt's public representations to the FDA or its competitors, many of which relate to the safety and packaging of drugs. The Court should not second-guess the FTC's own legitimate determinations of the information it needs for its investigation. Further, the Court should not do so *sua sponte* where Reckitt itself has raised no such challenge. Reckitt has not moved to quash that CID, nor has it argued that the withheld documents are not responsive to the CID. Accordingly, the FTC is entitled to *any* withheld documents that are responsive to the CID and not privileged, regardless of the subject-matter.

Moreover, even if the Court required the FTC to categorize the 22,327 documents by topic, Reckitt's updated log does not provide enough information to do so. At the October 27 hearing, the Court directed Reckitt to "identify the documents that were published and the entries that relate to those documents." Dkt. 37 at 103. Reckitt failed to comply with this instruction. Its revised log indicates *whether* an entry relates to a published document, but does not indicate *which* published document. Nor does the log indicate *how* an entry is related to a published document (*i.e.*, whether it is a draft of that document or whether it contains material necessary to the preparation of the document). Exh. 4, ¶ 4. Thus, an entry related to a published document and described as "regarding the risk of pediatric exposure to Suboxone" might be a draft of Reckitt's 2012 citizen petition, might

constitute “the details underlying the data” of the petition, or might relate to an unidentified and wholly separate published document (such as a label or a brochure). The second revised log provided on November 21, 2014, which purports to provide additional information in the form of a “privilege subject matter” description, actually does no such thing and simply repeats, for each document, information already available in the existing entry. Exh. 4, ¶ 7. Thus, in its present form, the log offers no meaningful way to distinguish among the 22,327 listed documents.⁴

Indeed, the fact that Reckitt’s privilege log remains opaque is confirmed by Reckitt’s belated admission that its privilege log describes no fewer than 222 separate drafts of the 2012 citizen petition. These drafts appear variously as “draft exhibits,” “draft letters,” “draft reports,” or “draft memoranda,” among others, but never as “draft of 2012 citizen petition.” Exh. 4, ¶ 8. If Reckitt had not responded to the FTC’s specific request and identified these entries as drafts of the published 2012 citizen petition – as the Court directed it to do across its log – the FTC would have been unable to identify these documents for any further scrutiny. Indeed, some of the privilege log descriptions for these drafts do not identify them as related

⁴ According to Reckitt’s November 10, 2014, log, 5,939 documents are not related to a document that was intended to be published. The privilege descriptions for some of these entries, however, are inconsistent with Reckitt’s categorization. For example, the privilege descriptions for 273 of these entries clearly state that they are “related to” filed citizen petitions. This suggests that these documents were inaccurately categorized, and raises the concern that the log may contain other inaccuracies. At a minimum, if Reckitt cannot explain this contradiction, these documents should be reviewed *in camera*. Moreover, Reckitt claims work product protection for approximately 50 of these documents. The FTC is not challenging these work product claims, so those 50 documents would not need to be reviewed.

to the 2012 citizen petition, but instead describe them more generally as related to communications with the FDA. Exh. 4, ¶ 8. As a result, the burden must remain on Reckitt to produce the documents required by the Court's application of Fourth Circuit law.

B. There is no need for a special master to review the 22,327 documents related to published documents at this time.

The FTC does not believe that *in camera* review of the 22,327 documents by a special master is necessary at this time. The role of a special master is to resolve factual disputes about documents that are relevant to their privileged status. There is no factual dispute here. Reckitt has never challenged the FTC's assertion that it is withholding documents that are drafts of, or contain material necessary to the preparation of, publicly disclosed documents. And Reckitt has now identified 22,327 such documents. Reckitt's only basis for withholding these documents was its position that Fourth Circuit law did not require their production. Since the Court has now clarified that Reckitt's position is "not correct," Reckitt should be required to either produce the documents, or explain why they are nonetheless privileged under Fourth Circuit law.

The FTC respectfully requests that the Court structure further proceedings as follows. The Court has already indicated that it will issue an opinion explaining how the Fourth Circuit's law applies to drafts of documents intended to be published and the details underlying those documents. The FTC respectfully requests that, consistent with that opinion, the Court also issue an order requiring

See Exh. 4, ¶ 6.

Reckitt to produce to the FTC the types of documents its opinion describes as not privileged.

Reckitt would then re-review the 22,327 documents and produce those to which no privilege applies. For any it continues to withhold, it would provide new information on its privilege log sufficient to explain why the documents are privileged in light of the Court's ruling. After this process is complete, if there are disputes between the parties about whether Reckitt has complied with the Court's order, a special master could be retained (at Reckitt's expense) to resolve those conflicts on a document-by-document or category-by-category basis. In the FTC's view, having a special master review all of the documents now when many of them likely do not involve a true factual dispute would be unnecessarily expensive and time-consuming.

Further, the FTC respectfully requests that, at a minimum, the Court should order Reckitt to produce the 222 documents identified as drafts of its 2012 citizen petition before proceeding to a special master's review. As drafts of a publicly filed petition, these documents fall squarely within the rule announced in (*Under Seal*). Further, the Court has already stated that the FTC has demonstrated a need for documents related to the citizen petition. Dkt. 37 at 95. Accordingly, Reckitt has no basis for continuing to withhold these documents.

Finally, the FTC notes that the Court stated during the show-cause hearing that it wished to hold a further telephone conference to discuss the status of the case. Dkt. 37 at 105. The FTC remains available for such a conference.

III. Conclusion

For the reasons stated above, the Court should issue an opinion and order directing Reckitt to produce documents that are not privileged under Fourth Circuit law as applied by this Court, including, at a minimum, the 222 documents identified as drafts of the published 2012 citizen petition.

Respectfully submitted,

STEPHEN WEISSMAN
Deputy Director
Bureau of Competition

BRADLEY S. ALBERT
Deputy Assistant Director

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AMANDA HAMILTON
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Dated: November 24, 2014

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s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following:

William V. O'Reilly (woreilly@jonesday.com)

Mark R. Lentz (mrlentz@jonesday.com)

Jones Day

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s/
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EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

_____)	
)	
FEDERAL TRADE COMMISSION,)	
)	
Petitioner,)	
)	
v.)	Misc. No. 3:14-mc-00005-REP
)	
RECKITT BENCKISER)	
PHARMACEUTICALS, INC.,)	
)	
Respondent.)	
_____)	

DECLARATION OF GARTH HUSTON

Pursuant to 28 U.S.C. § 1746, I declare as follows:

1. I am an attorney employed by the U.S. Federal Trade Commission ("FTC" or "Commission") in Washington, DC. I am assigned to the FTC's investigation of Reckitt Benckiser Pharmaceuticals, Inc. ("Reckitt") for potentially anticompetitive conduct related to its Suboxone drug products.
2. I am authorized to execute a declaration verifying the facts that are set forth in the FTC's Motion to Enforce Civil Investigative Demand. I have read the motion and exhibits thereto (hereinafter referred to as "Exh."), and verify that Exhs. 1 to 3 are true and correct copies of the original documents or have been prepared from true and correct copies.
3. The facts set forth herein are based on my personal knowledge or information made known to be in the course of my official duties, including documents and narrative responses submitted by Reckitt that I have reviewed.

4. On November 10, 2014, Reckitt produced a revised version of its privilege log. This revised version is an Excel spreadsheet that enables a user to sort and filter entries by the columns provided. This revised privilege log adds two columns. Reckitt labeled the first column "Related to a document that was published" and indicated "Yes" or "No" for each withheld or redacted document on the privilege log. By sorting this column, I determined that Reckitt identified 22,327 withheld or redacted documents listed on the privilege log that relate to some document that was published. However Reckitt did not identify – in the new column or otherwise – the related published documents.
5. Reckitt labeled the second column "Related to a document that was intended to be published but was not" and stated either "Yes" or "No" for each withheld or redacted document on the privilege log. By sorting this column, I determined that Reckitt identified 81 documents on its privilege log that related to a document that was intended to be published but was not. By accompanying letter, Reckitt indicated that for each of these documents, there was a deliberate decision not to publish.
6. This November 10, 2014, log indicates that 5,939 documents are not related to a document that was intended to be published. In reviewing these log entries, I have determined that the privilege descriptions for some of them are inconsistent with Reckitt's categorization. For example, the privilege descriptions for 223 of these entries clearly state that they are "regarding"

filed citizen petitions and reflect a claim of attorney-client privilege. (This figure does not include documents that bear similar inconsistencies but for which for which Reckitt claims work product privilege. The FTC is not challenging Reckitt's claim of work product protection.)

7. On November 21, 2014, Reckitt provided a second revised version of its privilege log. This version adds a third new column labeled "Privilege Subject Matter" that contained one of 19 different descriptions of the subject-matter of the document. These descriptions include such categories as "Related to 2012 Citizen Petition; "Related to Acquisition of Other Products;" and "Related to BPMG and Shared REMS." I compared this new column to the existing privilege descriptions and found that the new column did not add new information that was not already incorporated in the existing privilege description – instead, the new "Privilege Subject Matter" column simply summarized the already-existing privilege description entry.
8. On November 21, 2014, Reckitt also produced a list of documents identified on its privilege log that are drafts of the 2012 citizen petition it filed with the FDA. This list identifies 222 such documents by document control ID only and provides no other information. We have cross-referenced this list to the privilege log to identify the complete entries for this draft. In doing so, we have determined that the log variously describes these drafts as "draft exhibits," "draft letters," "draft reports," or "draft memoranda," but does not specifically describe them as "drafts of the 2012 citizen petition." Further, we

have identified that for 200 of these 222 draft documents, the "Privilege Subject Matter" description states that they are "Related to the 2012 Citizen Petition," but for 22 of the 222 draft documents, the description states only that the draft is "Related to FDA Communications."

9. In reviewing the revised log provided on November 21, 2014, I determined that Reckitt had reclassified 21 documents from a claim of attorney-client privilege to a claim of work product protection.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on November 24, 2014.



Garth Huston
Staff Attorney
Federal Trade Commission

EXHIBIT 1

JONES DAY

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November 10, 2014

CONFIDENTIAL

VIA Electronic Mail and Overnight Courier

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Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: *Reckitt Benckiser Pharmaceuticals, Inc.*, FTC File No. 131-0036
FTC v. Reckitt Benckiser Pharmaceuticals, Inc., No. 14-mc-00005 (E.D. Va.)

Dear Burke:

On behalf of Reckitt Benckiser Pharmaceuticals, Inc. (“Reckitt”), we submit this letter and the enclosed CD in response to the Civil Investigative Demand (“CID”) issued on June 17, 2013¹ in the above referenced FTC investigation.

The enclosed CD labeled “RBP016” contains an electronic copy of Reckitt’s revised log of privileged documents. As directed by Judge Payne in the above-referenced litigation, this revised log adds two columns specifying whether the communication reflected in the privileged document appears to be related to a document that was published (additional column one), or was related to a document intended to be published at the time of the communication, but that ultimately was not published (additional column two). For each of the communications in additional column two, our understanding is that the decision not to publish the related documents was deliberate, rather than fortuitous.

The production of this revised privilege log is not intended to waive any claim of privilege with respect to any of the documents reflected on the log. In order to comply with the court’s direction that we provide you this list today (two weeks after the October 27 hearing), we have used our best efforts to identify the documents that fit into the two categories above, but we reserve the right to modify the revised privilege log to the extent that further proceedings in this matter demonstrate that any of the classifications above were made in error (and to the extent those classifications are determined to have any significance with respect to particular documents).

Reckitt is submitting this highly confidential information to the Federal Trade Commission pursuant to the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, and 57b-1,

¹ As modified by letters dated July 16, August 15, September 3, September 19, September 30, October 23, November 13, and November 19, 2013.

JONES DAY

Burke William Kappler
November 10, 2014
Page 2

as amended, and requests confidential treatment for these materials under all applicable statutes and regulations. Please let me know if you have any questions or difficulties with the file.

Sincerely,

A handwritten signature in black ink, appearing to read "W. O'Reilly", written in a cursive style.

William V. O'Reilly

Enclosure

cc: Phillip A. Proger
Michael H. Knight
Javier Rodriguez, Esq.

EXHIBIT 2



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Burke W. Kappler
Attorney
Office of General Counsel

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November 20, 2014

BY E-MAIL

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Re: Federal Trade Commission v. Reckitt Benckiser Pharmaceuticals, Inc.,
3:14-mc-00005-REP

Dear Bill:

I write to summarize our telephone calls of November 13 and November 18, 2014. These followed your letter of November 10, 2014, enclosing a revised privilege log wherein Reckitt identified 22,327 documents that relate to a published document, but nevertheless continue to be withheld or redacted by Reckitt.

As we discussed in the first call, Reckitt revised its log to indicate whether an entry related to a published document but did not indicate which document a given entry related to. As a result, staff remains unable to draw meaningful distinctions between the documents Reckitt has chosen to withhold. Thus, while we continued to review the revised privilege log, we asked that Reckitt (1) revise further the privilege log to identify specifically, and by Bates number, each published document that related to an entry on the privilege log; and (2) provide a list of each of the privilege log entries describing a draft of the citizen petition Reckitt submitted to the FDA in 2012. You asked for additional time to consider these requests (and other possible solutions), and we scheduled a follow-up call on November 18, 2014.

During the follow-up call, you responded to our first request by proposing to revise the privilege log further in order to subcategorize the entries by subject matter. Further, you invited input from the FTC regarding what subcategories the privilege log would contain. You agreed to indicate, by the end of this week, whether, and within what time frame, this approach would be feasible. Finally, you agreed to provide information responsive to our second request, also by the end of this week.

Please contact me as soon as Reckitt has determined how it wishes to proceed. In the

meantime, and in order to facilitate these ongoing discussions, the FTC intends to prepare a Motion for Extension of Time for filing on Monday, November 24, 2014.

Sincerely,

s/ Burke W. Kappler

Burke W. Kappler
Attorney, Federal Trade Commission

cc: W. Ashley Gum, FTC Office of General Counsel
Rob McIntosh, Assistant United States Attorney

EXHIBIT 3

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November 21, 2014

CONFIDENTIAL

VIA Electronic Mail and Overnight Courier

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Federal Trade Commission
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Re: *Reckitt Benckiser Pharmaceuticals, Inc.*, FTC File No. 131-0036
FTC v. Reckitt Benckiser Pharmaceuticals, Inc., No. 14-mc-00005 (E.D. Va.)

Dear Burke:

On behalf of Reckitt Benckiser Pharmaceuticals, Inc. (“Reckitt”), I write in response to your letter of November 20, 2014. Also, further to our telephone calls of November 13 and November 18, 2014, Reckitt submits the enclosed CD in response to the Civil Investigative Demand (“CID”) issued on June 17, 2013¹ in the above referenced FTC investigation.

As your November 20, 2014 letter acknowledges, Reckitt complied with Judge Payne’s oral instruction in the above-captioned litigation by producing a revised privilege log which provided “the FTC a list of all the documents that it claims are privileged that were published.” (Dkt. No. 37 at 94; *see also id.* at 96 (“[T]he respondent has to make a list whether documents were published.”); *id.* at 97 (“I want you to give him a list of all the documents as to which a claim of privilege is made on your privilege log that were, in fact, published.”).)

Once it received Reckitt’s revised privilege log, the FTC was to determine “related to particular entries what documents you think need to be produced that are subject to the rule.” (*Id.* at 94-95.) The FTC responded to Reckitt’s revised privilege log by requesting additional information; specifically, the FTC requested that Reckitt provide both the Bates number for each published document related to every entry on the privilege log, and a separate list of each privilege log entry describing a draft of Reckitt’s 2012 Citizen Petition.

While not obligated to do so, Reckitt has endeavored to respond to these requests in good faith. Reckitt explained that relating every privilege log entry to a Bates number for a published document would be burdensome, given that many of the privilege log entries may relate to one-off communications such as letters. Especially in light of Judge Payne’s statement that the FTC had not “justified” or “made a credible case” for documents “beyond the citizen petition and the

¹ As modified by letters dated July 16, August 15, September 3, September 19, September 30, October 23, November 13, and November 19, 2013.

Burke William Kappler
November 21, 2014
Page 2

REMS communication,” (Dkt. No. 37 at 95), the cost and expense of providing such an individual list is overly burdensome.

In the spirit of compromise, Reckitt proposed providing the FTC with a listing of subject matters for each of the entries on its privilege log which were related to published documents. Contrary to your November 20, 2014 letter, Reckitt did not “invite[] input from the FTC regarding what subcategories the privilege log would contain.” Rather, Reckitt recognized that the FTC may have some questions regarding the subcategories, and welcomed further discussion of this issue after the subcategories were disclosed. Since the FTC seemed amenable to Reckitt’s proposal, the enclosed CD labeled “RBP017” contains an electronic copy of Reckitt’s revised log of privileged documents, with a new column to describe the general subject-matter of each entry related to published documents. Again, we welcome whatever questions or discussions you may wish to have regarding these subject-matter descriptions.

The production of this revised privilege log is not intended to waive any claim of privilege with respect to any of the documents reflected on the log. As before, Reckitt reserves the right to modify the revised privilege log to the extent that further proceedings in this matter demonstrate that any of the classifications above were made in error (and to the extent those classifications are determined to have any significance with respect to particular documents). Indeed, upon reviewing the enclosed revised privilege log, Reckitt has amended the entries related to several documents whose subject matters relate to the private antitrust litigation to assert work-product protection as well as the attorney-client privilege.

Turning to the FTC’s second request, for a listing of all privilege log entries describing “drafts” of Reckitt’s 2012 Citizen Petition, Reckitt has likewise agreed to cooperate and assist the FTC. The listing is also on the enclosed CD. During our phone calls, we said that this listing would include documents reflecting earlier drafts of the petition, with or without redlining or hand-written comments, but exclude communications regarding word choice or inserts for the version of the petition under consideration. Reckitt provides this listing without waiving any claim of privilege with respect to the documents reflected therein. As Reckitt has previously explained, Reckitt did not claim privilege with respect to drafts of documents “unless the drafts were communicated in a privileged context.” (Dkt. No. 4-2 at 37.) Indeed, as the definition of draft envisages, these “preliminary” writings were “subject to revision” before publication, and so did not reflect an intent that their entire content be shared outside of the privileged context where legal advice was requested and received. *See* <http://dictionary.reference.com/browse/draft/>. Thus, consistent with *United States v. Under Seal*, 341 F.3d 331 (4th Cir. 2003), and like authority, Reckitt maintains that “[t]he[se] underlying *communications* . . . are privileged, regardless of the fact that th[e]se communications may have assisted [Reckitt]” in preparing “a public document.” *Id.* at 336.

Two final matters were not addressed in your letter, or addressed only briefly. First, during our phone calls, we explored the possibility of using a consent Rule 502(d) order to

JONES DAY

Burke William Kappler
November 21, 2014
Page 3

narrow our dispute. While we both agreed that disclosure of all of the documents over which Reckitt is claiming privilege in this matter may raise a waiver issue, we do believe that entering into a consent Rule 502(d) order could assist in further negotiations and discussions. Please let us know if you would like to propose language, or would prefer that Reckitt do so.

Lastly, you indicated that “the FTC intends to prepare a Motion for Extension of Time for filing on Monday, November 24, 2014.” Reckitt expects that it would consent to such a motion if it was shared with us in advance so that we could review and confirm our consent. More broadly, Reckitt does not view such a filing as necessary. Once Reckitt had provided its revised privilege log and the FTC responded to Reckitt by identifying which entries the FTC wanted to contest, Judge Payne instructed the parties “to call [him] and tell [him] where [we] are, and we will set a schedule for further proceedings.” (Dkt. No. 37 at 104; *see also id.* at 105 (“I will set a date in an order for a conference call for you to report.”).) In light of this instruction, we are happy to participate in a brief telephone conference to apprise the Court of our ongoing discussions.

Reckitt submits the enclosed CD labeled “RBP017” to the Federal Trade Commission pursuant to the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, and 57b-1, as amended, and requests confidential treatment for these materials under all applicable statutes and regulations. Please let me know if you have any questions or difficulties with the file.

Sincerely,



William V. O'Reilly

Enclosure

cc: Phillip A. Proger
Michael H. Knight
Javier Rodriguez, Esq.