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

FEDERAL TRADE COMMISSION, Petitioner, v. RECKITT BENCKISER PHARMACEUTICALS, INC., Respondent	)	Misc. No. 3:14-mc-005-REP

RESPONDENT RECKITT BENCKISER PHARMACEUTICALS, INC.'S OPPOSITION TO THE FEDERAL TRADE COMMISSION'S MOTION TO ENFORCE CIVIL INVESTIGATIVE DEMAND

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INTRODUCTION

At the conclusion of the October 27th hearing on the FTC's Petition to Enforce its CID, the Court instructed the parties to undertake additional steps to further refine (and perhaps narrow) the scope of their dispute over Reckitt's privilege claims, and to help the Court determine the most appropriate way to resolve this dispute. In response to those instructions, Reckitt identified documents on its privilege log that related to documents that were published, which included drafts of such documents as well as memoranda or other communications related to the published documents. Reckitt also identified for the FTC privilege log entries that related to documents that were originally intended to be published but that were not.[1] The FTC was then to determine which of those documents it actually required, and for those that did not relate to Reckitt's 2012 citizen's petition or Reckitt's negotiations with generic manufacturers regarding shared risk management programs, the FTC was to justify why it believed it was entitled to such documents. The Court envisioned that it (or a Special Master) would review the documents in question (with additional briefing from the parties) to determine which would be turned over, based on the privilege standard stated in *In re Grand Jury Subpoena (United States v. Under Seal)*, 341 F.3d 331, 335 (4th Cir. 2003) (Wilkins, C.J.) (*Under Seal 2003*) (quoting *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (per curiam)).

The FTC has not complied. Instead, it filed this Motion to Enforce, arguing that the Court had ruled in its favor and that the Court does not have the authority to require the FTC to do anything more regarding the dispute. As a a result, the FTC argues, it is entitled to a blanket order requiring Reckitt to produce substantially all of its privileged documents without any

[1] For the latter group, Reckitt also identified whether the lack of publication was merely "fortuitous" or whether it was by conscious decision.

individualized review of the communications at issue to determine whether the privilege has been properly invoked.

In sum, the FTC's Motion to Enforce seeks the same relief sought in its Petition to Enforce, without providing any new law or argument to support it. The FTC has several times disclaimed any desire or intention to dispute the factual assertions underlying Reckitt's claims of privilege on a document-by-document basis. (*See, e.g.*, Dkt. No. 32 at 40; Dkt. No. 4-2 at 7; Dkt. No. 38 at 10-11.) Because Reckitt has complied with the Court's instructions and continues to be prepared to follow the procedure this Court outlined, the FTC's motion should be denied. The FTC should be required to do as the Court instructed and provide a listing of the documents whose privileged status is genuinely in dispute, as well as justify any request for documents beyond those related to the 2012 citizen's petition and the shared REMS.

In the alternative, because the FTC has proven unwilling to comply with this Court's instructions at the hearing or to contest Reckitt's factual showing, its petition should be denied and this case closed.

BACKGROUND

In June 2013, the FTC served a CID on Reckitt's attorneys in Washington, DC. Over the next six months, Reckitt produced—also in Washington, DC—nearly 600,000 documents. (Dkt. No. 4-1 at ¶ 18.) Reckitt withheld approximately 5% of the reviewed documents pursuant to a claim of privilege. (*Id.*) Reckitt prepared and submitted to the FTC a detailed privilege log identifying each document withheld on grounds of privilege and including significant detail regarding each document, such as the grounds for withholding the document, its author and all addressees, and a general description of the subject of the document. (*See, e.g.*, Dkt. No. 4-3.)

This privilege log complied with Federal Rule of Civil Procedure 26(b)(5).[2] Nonetheless, on February 28, 2014, the FTC objected to Reckitt's assertion of privilege because, "*[u]nder Fourth Circuit law*, the attorney-client privilege does not protect documents that a client disclosed, or intended to disclose, to a third party." (Dkt. No. 4-2 at 1 (emphasis added).) The FTC subsequently filed its Petition to Enforce the CID on August 6, 2014.

The Court heard argument on the petition on October 27th. At the conclusion of the hearing, the Court instructed Reckitt to provide "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 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.").)[3] Reckitt provided its list, which included both drafts of documents that were subsequently disclosed as well as all other documents that related to published documents, to the FTC on November 10, 2014. (Dkt. No. 38 at 3-4.)

The Court also instructed the FTC, after the agency received Reckitt's revised privilege log, to determine "related to particular entries what documents you think need to be produced that are subject to the rule." (Dkt. No. 37 at 94-95.) In addition, the Court made plain that the FTC had to identify which documents were genuinely in dispute and provide a justification for seeking any documents beyond those associated with the 2012 citizen's petition and the shared REMS. (Dkt. No. 37 at 94-95 ("You're going to take that information, and you're going to tell

[2] Reckitt did not attempt to tailor the log to the practice in any particular court or circuit, because the privilege log pertained to an agency investigation rather than to a litigation before a particular court. Indeed, the FTC could have brought its petition in nearly any judicial district in the nation. (*See* Dkt. No. 32 at 36.)

[3] Reckitt has not asserted privilege for documents that have themselves been published. Reckitt has claimed privilege for certain drafts of documents later published, but only if the production of those drafts would disclose privileged communications. Reckitt understands the Court's direction to require the identification of all documents on Reckitt's privilege log that relate to documents that were published.

me related to particular entries what documents you think need to be produced that are subject to the rule. . . . And if you're going somewhere beyond the citizen petition and the REMS communication, you need to let us know what you are looking for and how on earth it pertains to your investigation. . . . You haven't justified it at all.").)

Once the FTC complied with these tasks, the Court instructed the parties "to call me and tell me where you are, and we will set a schedule for further proceedings." (*Id.* at 104.) As part of those "further proceedings," the Court stated that it would "give [Reckitt] a chance to meet their burden document by document." (*Id.* at 101.) Specifically, "I'm going to require down the line, *once I hear from you about the numbers and lists* -- when you satisfy this obligation, which I hope you'll do in short order, we're going to develop a way to brief document by document, and you have to do a brief sufficient to show me and them why it's privileged." (*Id.* (emphasis added).)[4]

But the FTC did not provide a list of documents it was interested in. Instead, it requested that Reckitt identify by Bates number which published document each of the over 22,000 entries on the privilege log related to. (Dkt. No. 38-3 at 1.)[5] While explaining that it did not understand the Court to require determining the Bates number for documents associated with each of over

[4] Likewise, the Court repeatedly instructed the parties to pay close attention to the legal standard governing privilege claims, in particular to what constitutes a "legal service." (Dkt. No. 37 at 6-10, 43, 53-56, 99-100 ("Now, you need to all, if you will, please, look carefully at the definition of the privilege as it appears -- that's the rule that I have to look at, and it's as it appears in *Jones* and *In re Grand Jury*, 341 F.3d 331-335. . . . [T]hat then also raises the question of what is a legal service, and I haven't seen either one of you brief what's a legal service in this context, in the context of these cases. So you're going to have to look into that, and I'm going to have to be informed on that.").) But as with every single brief it has filed in this case to date, the FTC once again fails to even cite this standard, much less explain how its position is consistent with it.

[5] The FTC also requested that Reckitt separately identify each privilege log entry that constituted a draft of the 2012 citizen's petition. Reckitt agreed to do so, and provided that list on November 21st.

twenty-thousand other documents, and explaining the extraordinary burden in time and expense associated with such an effort, Reckitt nevertheless provided the FTC with yet another revised privilege log.

This second revised privilege log categorized each document into one of nineteen subject-matters. Included among the categories were the 2012 citizen's petition (approximately 1,400 documents) and the shared REMS negotiations (approximately 1,500 documents). Reckitt has therefore in fact disclosed which entries on the privilege log relate specifically to those topics, which are the two categories for which the Court concluded the FTC had sufficiently established an interest. (*See* Dkt. No. 38-4.) Reckitt invited further discussions with the FTC regarding the categorization if the FTC believed it needed more detailed information regarding the other categories, as to which the Court has said the FTC must justify its interest. Those categories include, for example, communications regarding labeling, product brochures, negotiations with customers or suppliers, or regulatory filings. The FTC never responded to Reckitt, but instead filed this Motion to Enforce, which presents the same arguments—in the same posture—as its Petition to Enforce.

ARGUMENT

The FTC's motion four times repeats the argument that this Court held that the agency's position was correct, and that Reckitt should therefore be ordered to produce its privileged documents without any further process. (Dkt. No. 38 at 1, 2, 5-6, 10.) But the FTC ignores the fact that this Court said, at that same hearing, that "the rule may be *neither as broad as the FTC contends* nor as narrow as Reckitt contends." (Dkt. No. 37 at 104 (emphasis added).) And the agency also ignores the procedure that this Court outlined at the end of the October 27, 2014 hearing.

Reckitt has followed that procedure, providing two revised privilege logs with more detail regarding each claim of protection. The FTC should likewise follow this Court's procedure and identify those documents whose privileged status is genuinely in dispute, as well as justify any request for documents beyond those related to the 2012 citizen's petition and the shared REMS. Once the FTC does so, Reckitt is prepared to substantiate its claims of privilege on a document-by-document basis as anticipated by the Court. The FTC's motion to compel the production of Reckitt's privileged documents, without following the Court's procedures, should be denied.

Although submitted in an agency proceeding in Washington, DC, Reckitt's privilege log meets the standards of this Circuit and this District. The factual assertions in that privilege log are sufficient, if credited, to establish a *prima facie* case for protection. Alternatively, therefore, because the FTC vehemently disavows any attempt to challenge those factual assertions, the Court should deny its petition outright. Moreover, even if the FTC had attempted to rebut Reckitt's factual assertions, such an attempt would fail. *In camera* review of the documents—although not justified by the FTC—would support Reckitt's claims of privilege, and would also demonstrate that the FTC's demand for a blanket order requiring the production of thousands of documents should be denied.

I. THE FTC SHOULD FOLLOW THE PROCEDURE THE COURT HAS ALREADY OUTLINED

Reckitt has complied with the Court's instructions, and remains prepared to do so. The FTC should do the same.

This Court's oral instructions following the October 27th hearing provided for a multi-step process. First, the Court required Reckitt to categorize the documents over which it was claiming privilege and provide additional information to permit the FTC to assess that claim.

(Dkt. No. 37 at 94 ("Reckitt is going to give the FTC a list of all the documents that it claims are privileged that 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.").)

Reckitt completed this first step, providing a revised privilege log to the FTC on November 10th that identified all documents on the log that related to published documents, including drafts that were later published as well as memoranda and other communications related to a published document. The revised privilege log included over 22,000 such entries.

The second step envisaged by the Court's instructions was for the FTC, after it received Reckitt's revised privilege log, to determine "related to particular entries what documents you think need to be produced that are subject to the rule." (Dkt. No. 37 at 94-95.) Reckitt's revised privilege log provided more than enough information for the FTC to complete this task. Nonetheless, the FTC refused to do so, instead demanding that Reckitt identify, for every logged document that was not published itself but that related to a published document, the precise public document to which the logged document related.

This Court should stand by its guidance, which is necessary for any document-by-document review to go forward consistent with federal law: "Privileges must be addressed on a document-by-document and question-by-question basis." *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983); *see also Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B,* 230 F.R.D. 398, 416 n.23 (D. Md. 2005) (noting that "all privilege questions" are "resolved only through a painstaking analysis, on a document-by-document basis, considering the context and circumstances."); *United States v. Under Seal*, 902 F.2d 244, 249 n.** (4th Cir. 1990) (remanding for document-by-document privilege analysis); *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 502-03 (4th Cir. 2011) (same).

The FTC provides no excuse for ignoring this Court's instruction. In contrast, the agency does attempt to excuse its noncompliance with this Court's other instruction, namely, for the FTC to provide a justification for seeking any documents beyond those associated with the 2012 citizen's petition and the shared REMS. (Dkt. No. 37 at 94-95 ("You're going to take that information, and you're going to tell me related to particular entries what documents you think need to be produced that are subject to the rule. . . . And if you're going somewhere beyond the citizen petition and the REMS communication, you need to let us know what you are looking for and how on earth it pertains to your investigation. . . . You haven't justified it at all.").)

At the hearing, the FTC resisted this requirement, arguing that the Court lacked authority to require it to justify any part of the CID. (Dkt. No. 37 at 81-86.) The Court rejected that argument at the hearing: "I'm not going through all these things and fish for the ones that you want me to produce. You have to tell me that." (*Id.* at 82.) The FTC has nevertheless refused to follow the court's instruction, contending that this Court "must defer to [the FTC's] own determinations of relevance." (Dkt. No. 38 at 7.)

But this argument ignores the case-law that the FTC cites, which requires *the Court* to determine whether the information sought "is reasonably relevant," or whether the agency is "obviously wrong." (*Id.* (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *EEOC v. Randstad*, 685 F.3d 433, 448 (4th Cir. 2012)).) To be sure, the FTC asserts that "package labels or product brochures can provide key insights into whether Reckitt's marketing decisions were anticompetitive." (Dkt. No. 38 at 8.) But this *ipse dixit* simply raises the question – How? When this Court asked the FTC's counsel to explain the relevance of these documents, counsel "used these examples that are about as far-fetched as [the Court could] imagine." (Dkt. No. 37 at 95.)

In short, this Court ordered a procedure that would give Reckitt "a chance to meet their burden document by document." (Dkt. No. 37 at 101.) It should not take that chance away without an opportunity to be heard, and without the FTC ever specifying what documents are at issue or justifying why they are relevant. The FTC's motion should be denied for failure to follow this Court's instructions.

II. RECKITT'S PRIVILEGE LOG MEETS THE STANDARDS OF RULE 26(B)(5), THIS CIRCUIT, AND THIS DISTRICT

As a secondary argument, the FTC contends that Reckitt should be compelled to produce all of its privileged documents because it says Reckitt's privilege log is inadequate. The FTC is wrong. Reckitt has provided more than sufficient detail to make a *prima facie* showing that the attorney-client privilege applies to the communications over which Reckitt has claimed protection. Simply put, Reckitt's privilege log meets if not exceeds the standards of Rule 26(b)(5), this Circuit, and this District.

Under Rule 26(b)(5)—the only rule directly applicable to the FTC's CID in proceedings before the agency—Reckitt needed only to "describe the nature of the documents . . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A). The advisory committee notes to this provision further specify the level of detail necessary: "Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories." *Id.*, adv. cmte notes (1993). In other words, under Rule 26(b)(5), the party claiming protection does not need to *substantiate* its claim of privilege with evidence or even describe every document, it simply needs to enable the opposing party to *assess* the claim and decide whether to request further substantiation.

Fourth Circuit caselaw further illuminates how the requirements of Rule 26(b)(5) apply to a privilege log submitted within this jurisdiction, and the level of specificity required. As an initial matter, "the log must 'as to each document set forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed.'" *Interbake*, 637 F.3d at 502 (quoting *Bowne, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 474 (S.D.N.Y. 1993)) (internal alterations omitted). *Interbake* is particularly instructive as to the level of detail required for a claim of privilege in the Fourth Circuit. In that case, the NLRB argued that Interbake's privilege log was not adequately detailed because it only "generically describe[d] the subject of . . . e-mails as the 'Missy Jones [i]nvestigation.'" Br. of Appellant NLRB at 48, *Interbake*, 637 F.3d 492 (No. 09-2245). In support of its challenge, the NLRB submitted Interbake's privilege log to the Fourth Circuit for consideration:

NLRB EXHIBIT 1
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MISSY JONES v. INTERBAKE FOODS LLC

RESPONDENT'S PRIVILEGE LOG

BATES NO.	DATE	ARTICLE	TO	AUTHOR	REGARDING	PRIVILEGE ASSERTED
IBF100001-02	12/29/08	Email w/attachment	Jo Anne Snyder Mark L. Keenan, Esq.	Jill Slaughter	Company Policies	Attorney/Client Privilege; Work Product Doctrine
IBF100003	1/29/09	Email	Mark L. Keenan, Esq.	Jill Slaughter	Company Policies	Attorney/Client Privilege; Work Product Doctrine
IBF100004-06	1/29/09	Email w/attachments	Mark L. Keenan, Esq.	Jill Slaughter	Company Policies	Attorney/Client Privilege; Work Product Doctrine
IBF100113	2/9/09	Email	Chris Michalik, Esq. Mark L. Keenan, Esq. Jo Anne Snyder Nick Kantner	Jill Slaughter	Missy Jones Investigation	Attorney/Client Privilege; Work Product Doctrine
IBF100427	2/9/09	Email	Chris Michalik, Esq. Jo Anne Snyder Mark Keenan, Esq. Nick Kantner	Jill Slaughter	Missy Jones Investigation	Attorney/Client Privilege; Work Product Doctrine

Despite the NLRB's challenge (and Interbake's two-to-three word description of the subject matter), the Fourth Circuit affirmed the privilege claims because the log "identifie[d] the nature of each document, the date of its transmission or creation, the author and recipients, the subject, and the privilege asserted," even though "the log is not detailed." 637 F.3d at 502.

Finally, this Court's standard scheduling order—like *Interbake*—requires a party claiming privilege to submit only a "brief description of the document", "the date", "the author", "the identity of each recipient", and the "basis" for the privilege. Scheduling Order, *James v. Experian Info. Solutions, Inc.*, No. 3:12-cv-902-REP (E.D. Va.) (ECF No. 14).

Reckitt's privilege log not only meets but exceeds the requirements of Rule 26(b)(5), *Interbake*, and this Court's standard scheduling order:

Control ID	Family ID	Production Status	Date	Author	Addressee	Other Recipients	Privilege Asserted	Privilege Description	Bates Range	Page Count
RBPPRIV2_00112	FamilyID2_000005 9	Privileged - Withheld	9/20/2012	Clissold, David*; Stubbs, Delia*			Attorney-Client	Draft Memorandum providing legal advice regarding Citizen Petition FDA Docket No. 2012-P-1028.		56
RBPPRIV2_00125	FamilyID2_000006 6	Privileged - Withheld	4/2/2009	Malkin, Brian*			Attorney-Client	Draft Memorandum providing legal advice regarding other Reckitt Benckiser Citizen Petitions.	RBP-02926511 - RBP-02926511	1

(Dkt. No. 4-3 at 8.) This log provides all of the information necessary for the FTC to assess claims, including the date, author, addressee, other recipients, privilege asserted, privilege description, bates range, and page count. The first six of these fields alone would satisfy the requirements of *Interbake* and this Court's scheduling order; the last two are entirely unnecessary but would help the FTC in determining whether a document is substantial or relevant enough to litigate a privilege dispute.

Moreover, each of the above entries contains sufficient facts that, if credited, would satisfy every element of the claimed privilege. The fact that the documents are in Reckitt's custody or control indicates that (1) the communication was made to a client; the asterisks show that (2) the communication was from an attorney; the description that each document "provide[s] legal advice" demonstrates (3) that the documents relates to a fact of which the attorney was informed for the purpose of securing legal services, and (4) the entry itself shows that the

privlege has been claimed. *See Jones*, 696 F.2d at 1072 (setting forth the "classic" four-prong test for assertions of the attorney-client privilege).

The FTC's sole argument that Reckitt's privilege log is somehow insufficient is based on its assertion that Reckitt had to disclose whether each communication on its privilege log was in some way related to a document that was published, and then to identify by Bates number the published document to which the privileged document related. (*See* Dkt. No. 37 at 32-33; *see also id.* at 24.) That requirement certainly is not in Rule 26(b)(5), and it finds no support in *Interbake* or any other Fourth Circuit or Eastern District case describing what must be in a privilege log.

Nonetheless, when this Court directed Reckitt to provide "the FTC a list of all the documents that it claims are privileged that were published," (Dkt. No. 37 at 94), Reckitt modified its privilege log and provided that information, identifying all of the entries that were in some way related to a published document. Reckitt subsequently did identify for the FTC which entries related specifically to the 2012 citizen's petition and which related to the shared REMS negotiations, along with seventeen other categories of documents.

In sum, Reckitt's log provides more than enough factual information to enable the FTC to assess Reckitt's claims of privilege. Indeed, as shown above, the assertions in Reckitt's privilege log are sufficient, if credited, to create a *prima facie* showing that the claimed protection applies.

III. *IN CAMERA* REVIEW OF RECKITT'S PRIVILEGE CLAIMS WILL SHOW THAT THE FTC'S DEMAND FOR A BLANKET ORDER COMPELLING DISCLOSURE IS WRONG

At the October 27th hearing, the Court set forth a procedure that would permit the necessary individualized analysis of Reckitt's privilege claims. The FTC rejects that procedure, arguing yet again that it is entitled to a blanket ruling that none of Reckitt's privilege claims are valid. While we continue to contend that the FTC is wrong, we expect that the Court believes it

has read and heard enough from the parties on broad legal principles and is trying to move the dispute toward resolution using procedures and standards courts in this Circuit typically apply.[6]

Rather than repeat all of its legal arguments, Reckitt therefore suggests that the Court might benefit from *in camera* review of a document from Reckitt's privilege log in conjunction with this opposition. If the Court believes such a review would be helpful, Reckitt will provide the Court with a document discussing the 2012 citizen's petition, which was filed with the FDA. The reason for suggesting the Court review such a document is straightforward: The FTC contends that no attorney-client communication in such document can be privileged, because it relates to a published document. Reckitt asserts that the document is privileged because it meets every element necessary to claim attorney-client privilege in the Fourth Circuit. Reckitt believes that *in camera* review of the document will therefore show that the FTC's demand for a blanket rejection of attorney-client privilege is improper, and that the individualized review of each attorney-client communication contemplated by the Court is necessary.

Reckitt would make such an *in camera* submission with a short memorandum establishing that the document meets the requirements for application of the attorney-client privilege set forth in *Jones*, 696 F.2d at 1072, and repeated in *Under Seal 2003*, 341 F.3d at 335. Those requirements are:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or is his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of

[6] Of course, if the Court wishes further briefing on any issue Reckitt will be happy to respond.

> committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Jones, 696 F.2d at 1072.

Reckitt does not believe that any of these facts are seriously disputed. The FTC does not contest that Reckitt was a client, nor that its attorneys were lawyers. Most importantly, The FTC does not contest that Reckitt's attorneys were providing legal advice. In the FTC's words: "Reckitt's privilege log shows that Reckitt communicated with its counsel *for the purpose of advice* on disclosures to third parties." (Dkt. No. 24 at 17 (emphasis added); *see also id.* at 9, 13 (acknowledging that the FTC is seeking "attorney advice"); Dkt. No. 37 at 89 ("[E]ven if it's legal advice, it's not privileged.").)

Better Government Bureau, Inc. v. McGraw, 106 F.3d 582 (4th Cir. 1997)—a leading Fourth Circuit case for evaluating what constitutes "legal services"—is particularly instructive. Reversing both the magistrate judge and the district court, the Fourth Circuit held that a factual investigation conducted by an attorney can constitute legal services because "clients often do retain lawyers to perform investigative work because they want the benefit of a lawyer's expertise and judgment. As *Upjohn* and its progeny demonstrate, if a client retains an attorney to use her legal expertise to conduct an investigation, that lawyer is indeed performing legal work." *Id.* at 604; *see also, e.g.*, *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 806 (Fed. Cir. 2000) (invention record submitted to attorney was privileged because providing opinion on patentability and preparation of patent application both constitute legal services).

Here, as in *Better Government*, Reckitt hired lawyers to review factual information regarding Suboxone "with an eye to the legally relevant" for inclusion in the citizen's petition. 106 F.3d at 601 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 390-91 (1981)). And, as in *Spalding,* the attorneys then provided legal advice to Reckitt as to what facts to present to the

FDA, and how, as the document would demonstrate. Reckitt used this legal advice to guide its own conduct, and retained ultimate control over what the published petition would say—accepting some of its lawyer's suggestions, while rejecting others.

Thus, as the Fourth Circuit recognized in *Under Seal 2003*, communications which underlie the preparation of documents for public dissemination—"such as court pleadings"—constitute legal services, and are protected by the privilege. 341 F.3d at 336; *see also, e.g.*, 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 7:13 ("[C]lient communications which precede the final approved draft of any document destined for third-party distribution should be protected by the attorney-client privilege if confidentiality is desired and expected by the client. The attitude of judges toward the confidentiality of information included in any document drafted by an attorney for ultimate dissemination to third parties should be no different than it is toward formal complaints drafted by attorneys to commence a lawsuit."). And that is especially true in the regulatory context of the pharmaceutical drug industry, where nearly every public statement could raise potential liability issues. *Cf. In re Vioxx Product Liability Litigation*, 501 F. Supp. 2d 789, 800 (E.D. La. 2007) ("[C]ommenting on and editing television ads and other promotional materials, could, in fact, be legal advice within the context of the drug industry.").

In sum, *in camera* review—although it should be unnecessary given the FTC's inability to contest Reckitt's factual assertions in its privilege log—would further substantiate Reckitt's claim of privilege, and would undermine the FTC's demand for a blanket ruling. At the very

least, then, the FTC's motion should be denied and Reckitt should be given "the chance to meet their burden document by document," as the Court promised. (Dkt. No. 37 at 101.)[7]

IV. THE FTC'S UNWILLINGNESS TO CONTEST RECKITT'S FACTUAL SHOWING SHOULD END THIS CASE

The FTC has never had any interest in participating in the individualized analysis necessary to determine the validity of Reckitt's privilege claims. From the outset of this proceeding, it has sought only a blanket order requiring Reckitt to produce all privileged communications that "relate to" documents that were published.[8] Neither the Fourth Circuit nor any district court in the circuit has ever issued such an order, and this Court should not be the first to do so.

Instead, this court set out a procedure that would permit the parties to narrow their dispute and submit whatever remained to the type of process courts in this circuit as in others have relied on to make the sometimes difficult determinations of whether individual communications are privileged. The FTC has again confirmed that it does not challenge the factual assertions in Reckitt's privilege log. (Dkt. No. 38 at 10 ("There is no factual dispute

[7] Such a document-by-document process would allow the FTC to properly litigate its waiver argument (*cf.* Dkt. No. 38 at 5 n.2) by attempting to demonstrate prejudice, just as it would allow Reckitt to explain that a "citizen's petition" is a "communication[] with the FDA." (*Cf. id.* at 9-10.)

[8] To support this position, as well as its secondary argument that the Court should at least order the production of all drafts of the 2012 citizen's petition, the FTC relies on footnote 7 of *United States v. (Under Seal)*, 748 F.2d 871 (1984) (Ervin, J.) (*Under Seal 1984*). But, as Reckitt has previously explained (*see* Dkt. No. 37 at 64-66), the FTC's argument skips the necessary first step of *Under Seal 1984*'s analysis. The first question that this Court must resolve is whether the attorney's "services would reasonably be expected to entail the publication of the clients' *communications*" *Id.* at 875 (emphasis added), not whether the client merely intended that *something* be published. Only if that question is answered in the affirmative will the so-called "details underlying the data" be disclosed. *Id.* at 876. But here, there is no basis to conclude that any lawyer's services were expected to entail publication of any specific communication between Reckitt and its lawyers.

here.").) And it has given no indication that it wishes to challenge Reckitt's privilege claims on any other grounds that might be resolved through the document-by-document analysis required in this circuit and contemplated by the Court's statements at the end of the October 27th hearing.

The FTC's motion, given its unwillingness to take the steps necessary for appropriate privilege review, presents the Court with an all or nothing choice – either the Court orders the production of all privileged communications that "relate to" published documents, or it has no record on which to order the production of any of the communications. Because there is no precedent for the blanket relief the FTC demands, and because the FTC is unwilling to follow the procedure necessary to resolve privilege disputes appropriately, this motion should be denied and its petition dismissed.

CONCLUSION

Reckitt remains willing to comply with the procedure this Court previously outlined, which will permit Reckitt to further substantiate its claims of privilege on a document-by-document basis. The FTC's motion should be denied, and the Court should require the FTC to follow the procedures the Court previously outlined, by requiring the FTC to produce a list of documents genuinely in dispute and to justify any request for documents beyond the 2012 citizen's petition and the shared REMS. In the alternative, because Reckitt's assertions of attorney-client privilege are fully consistent with Rule 26(b)(5), and the standards of this Circuit and this District, and because the FTC has disavowed any intention of challenging those assertions, its petition and this motion should be denied outright.

Respectfully submitted,

December 8, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this the 8th day of December, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will then send a notification of such filing (NEF) to the following:

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