

**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.**

**SUPPLEMENT TO SECOND INTERIM REPORT  
AND RECOMMENDATIONS OF SPECIAL MASTER**

On February 9, 2016, the undersigned submitted the Second Interim Report and Recommendations of the Special Master (“Second Interim Report”).<sup>1</sup> On that same date, an order issued directing the parties to take steps to clarify their positions on certain matters raised in the Second Interim Report. (Doc. No. 70) The parties have complied with the order, and this supplemental report provides the final recommendations of the Special Master with regard to the two tranches of documents that are the subject of the Second Interim Report.

**I. Items Listed on Appendix 3 to the Second Interim Report**

Appendix 3 listed a group of documents that, in the view of the Special Master, did not qualify in their entirety for the protection of the attorney-client privilege. However, it was not self-evident that the subject matter of the documents listed on Appendix 3 fell within the scope of the specifications in the Civil Investigative Demand

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<sup>1</sup> The Second Interim Report was submitted under seal. No docket number has been assigned to the report on the PACER system.

issued by the Federal Trade Commission. The parties were directed to meet and confer, and to determine whether they could reach agreement on the responsiveness of the Appendix 3 documents to the FTC's Civil Investigative Demand.

The parties reported to the Special Master by electronic mail message, dated February 29, 2016, that they had conferred and reached agreement on the Appendix 3 documents. The parties agreed that all of the documents listed on Appendix 3 are responsive to the Civil Investigative Demand. The Special Master recommends that Respondent be ordered to produce all documents listed on Appendix 3, with redactions to the extent indicated.

## **II. Identification and Correction of Clerical Inconsistencies**

The Special Master informed the parties prior to the submission of the Second Interim Report that (1) given the volume of material reviewed, it was foreseeable that there would be clerical errors suggesting inconsistent treatment of the recommended document redactions, and (2) the Court need not be burdened with objections over non-substantive errors or inconsistencies. The February 9, 2016, order directed the Respondent to submit a list identifying material variances in the Special Master's recommendations concerning communications that appear in more than one document.

Respondent made a timely submission of its list as required by the order. The Special Master has reviewed the submission, and notes the following corrections to the previously-submitted recommendations and related entries in the appendices, all of which are intended to maximize consistency in the recommended redaction of documents.

**A. Documents to Be Conformed to Initial Recommendations**

RBP identified certain redactions that, in the view of the Special Master, had already been recommended. These redactions appear on the master set of redacted documents retained by the Special Master, but as a result of clerical error may not have been similarly redacted on the document set delivered to RBP (and perhaps the set delivered to the Court). The Special Master hereby confirms that the following documents identified by RBP were intended to be redacted in the precise manner suggested by RBP: SM\_03282, SM\_03062, SM\_03263, SM\_03475, SM\_01899, and SM\_03644.

The Special Master will schedule a convenient time to visit chambers and ensure that the Court's copies are conformed to those of the Special Master and RBP.

**B. Comparison Document Not Recommended for Redaction**

Similar to the instances just described, RBP recommends that five documents, SM\_02463, SM\_02883, SM\_03300, SM\_03664, and SM\_03673, be redacted to be consistent with document SM\_02603. The redaction to SM\_02603 located and reported by RBP was not recommended by the Special Master, and is not found in the set of control documents retained by the Special Master. The redaction to SM\_02603 that appears in the set of documents delivered to RBP is a clerical error. Thus, the Special Master recommends (1) that no changes be made to the original proposed redactions of documents SM\_02463, SM\_02883, SM\_03300, SM\_03664, and SM\_03673; and (2) that the redaction to SM\_02603 found in the RBP set of documents be disregarded. The Special Master will review document SM\_02603 in the Court's document set to ensure

that the communication is not designated for redaction, rendering SM\_02603 consistent with the other five documents in the group.

**C. Proposed Redactions That Are Non-Substantive in Nature**

Many of the redaction inconsistencies identified by Respondent are non-substantive content such as salutations or closings to email correspondence.<sup>2</sup> Specifically, the following documents are noted: SM\_02020, SM\_02160, SM\_02219, SM\_02288, SM\_02673, SM\_02861, SM\_03001, SM\_03421, SM\_03449, SM\_03468, SM\_03476, SM\_03695 (proposed redaction of “Best” at the end of an email); SM\_01554 (proposed redaction of “Hi Dave” at the beginning of email correspondence); SM\_02047, SM\_02284, SM\_02324, SM\_02541, SM\_03361 (proposed redaction of “Phil” at the end of email correspondence); SM\_02629, SM\_02630, SM\_03679 (proposed redaction of “Best regards” at the end of email correspondence); SM\_02455, SM\_02532 (proposed redaction of “Javier” in email correspondence). Content of this type is not privileged and does not require redaction. To the extent this content was designated for redaction on other documents within the families of documents related to those listed above, the Special Master recommends that such designations be disregarded when producing a final set of redacted documents.

**D. Corrections to Document(s) Used for Comparison Purposes**

In a small number of instances, the document identified by RBP as the baseline document for comparison purposes requires correction, and the documents identified as inconsistent with the baseline document do not. Specifically:

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<sup>2</sup> To be clear, this is not a criticism of Respondent’s submission. RBP simply identified all inconsistencies without regard to their substantive significance.

(1) RBP identified inconsistencies in the content designated for redaction within a family of documents containing content found in document SM\_02680. The Special Master initially categorized document SM\_02680 as privileged and subject to withholding by RBP in its entirety. Given the designation of SM\_02680 as an entirely privileged document, RBP proposes that all other documents containing the same content as SM\_02680 be designated for redaction. The Special Master's initial determination of privilege was not based on the content of SM\_02680, but on the fact that document SM\_02680 contains a statement from RBP's outside counsel, Josephine Torrente, that she had forwarded that particular message inadvertently prior to its completion. Upon further consideration, the Special Master has determined that the recommendation to withhold SM\_02680 was incorrect, as the same content was communicated repeatedly in other documents that were not the subject of an inadvertent transmission. The Special Master recommends that SM\_02680 be produced in redacted form consistent with the proposed redactions designated on the family of documents identified by RBP as Group 0011. Corrections to the appendices reflecting this recommendation appear on the table attached as Exhibit A to this supplemental report. The Special Master will supplement the Court's document set with a copy of document SM\_02680 that conforms to these recommendations.

(2) RBP recommends corrections to documents SM\_01236, SM\_01486, and SM\_01660, in order for the content designated for redaction on those documents to be consistent with document SM\_01802. The Special Master previously

identified documents SM\_01236, SM\_01486, SM\_01660 on Appendix 2 as privileged and subject to withholding in their entirety. No changes are required to these documents. The Special Master recommends that SM\_01802 be corrected and designated for redaction to render it consistent with the treatment of SM\_01236, SM\_01486, and SM\_01660. The Special Master will supplement the Court's document set with a corrected copy of document SM\_01802.

- (3) RBP recommends corrections to documents SM\_00268, SM\_00670, SM\_00973, SM\_01048, SM\_01434, and SM\_01817 to conform the content recommended for redaction to the treatment of document SM\_01409. The Special Master previously placed document SM\_01409 on Appendix 2, reflecting the recommendation that it be withheld as privileged in its entirety, and placed documents SM\_00268, SM\_00670, SM\_00973, SM\_01048, SM\_01434, and SM\_01817 on Appendix 3, as non-privileged documents that reveal no nexus with the subject matter of the Citizen Petition or the Shared REMS process. As noted above in Part I of this supplemental report, the parties have since determined that all documents identified on Appendix 3 are responsive to the Civil Investigative Demand. The Special Master therefore recommends (1) that document SM\_01409 be redacted to render it consistent with SM\_00268, SM\_00670, SM\_00973, SM\_01048, SM\_01434, and SM\_01817; and (2) that the redacted version of document SM\_01409 be produced along with the items listed on Appendix 3. The necessary corrections to the appendices are noted on Exhibit A to this supplemental report. The Special Master will provide both RBP and the Court with a corrected copy of document SM\_01409.

(4) RBP recommends corrections to documents SM\_02334 and SM\_02959, to render them consistent with the treatment of document SM\_02098. The Special Master previously identified document SM\_02098 on Appendix 2 as privileged and subject to withholding in its entirety. Upon review, the Special Master recommends that SM\_02098 be produced in a form consistent with SM\_02334 and SM\_02959. The required corrections to the appendices are noted on Exhibit A to this supplemental report.

(5) RBP recommends corrections to documents SM\_00048 and SM\_00370, to render them consistent with the treatment of document SM\_01149. The Special Master previously placed document SM\_01149 on Appendix 2 as privileged in its entirety and documents SM\_00048 and SM\_00370 on Appendix 3, as non-privileged documents that reveal no nexus with the subject matter of the Citizen Petition or the Shared REMS process. The parties have since determined that all documents identified on Appendix 3 are responsive to the Civil Investigative Demand. The Special Master recommends the production of document SM\_01149 along with the other items listed on Appendix 3. Necessary corrections to the appendices are noted on Exhibit A to this supplemental report.

#### **E. Special Master's Agreement with Proposed Corrections**

The Special Master agrees with RBP's proposed corrections to certain documents that were either initially produced in a redacted form by RBP or are subject to recommended redactions by the Special Master. One group of documents in this category was produced initially by RBP in redacted form. The Special Master recommends that these documents be produced consistent with RBP's original

redactions: SM\_00145, SM\_00570, SM\_00931, SM\_01734, SM\_00132, SM\_00528, SM\_01036, SM\_01097, SM\_01132, SM\_01242, SM\_01383, SM\_01565, SM\_01609, SM\_01748, SM\_01922, and SM\_02003. A second group of documents in this category includes documents produced by RBP in redacted form, or withheld entirely. The Special Master recommends that they be redacted to conform to the recommendations set forth in the Second Interim Report: SM\_03481, SM\_02205<sup>3</sup>, SM\_02971, SM\_03107, SM\_02677, SM\_02113, SM\_03089, SM\_01868, and SM\_02085. To ensure consistent categorization of these documents, the Special Master clarifies the appendix entries as noted on Exhibit A to this supplemental report. The Special Master will supplement the Court's document set with all corrected proposed redactions.

With the submission of this supplement to the Second Interim Report, all recommendations of the Special Master set forth in that report have become final and are subject to action by the Court and the parties as provided in Rule 53(f) of the Federal Rules of Civil Procedure.

Dated: March 31, 2016

Respectfully submitted,

Craig T. Merritt  
*Special Master*

/s/ Craig T. Merritt

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<sup>3</sup> RBP recommends that SM\_02205 be designated for redaction consistent with document "SM\_03512." It appears that RBP intended to reference SM\_03513, as document SM\_03512 does not contain the relevant content.



**CERTIFICATE OF SERVICE**

I hereby certify that on the 31st day of March 2016, I will electronically file the foregoing Supplement to Second Interim Report and Recommendations of the Special Master with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) via email to the following:

Burke W. Kappler, Esquire  
W. Ashley Gum, Esquire  
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/s/ Craig T. Merritt

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**Exhibit A to Supplement to Second Interim Report  
and Recommendations of Special Master**

<u>Document</u>	<u>Appendix</u>	<u>Page</u>	<u>Correction</u>	<u>Reason for Correction</u>
SM_00145 SM_00570 SM_00931 SM_01734	1 2	38 1-4	Remove SM_00145, SM_00570, SM_00931, SM_01734 from Appendix 2 and keep on Appendix 1	SM_00145, SM_00570, SM_00931 SM_01734 recommended for production consistent with RBP's original redactions to this family of documents
SM_00132 SM_00528 SM_01036 SM_01097 SM_01132 SM_01242 SM_01383 SM_01565 SM_01609 SM_01748 SM_01922 SM_02003	2	1-4	Remove SM_00132, SM_00528, SM_01036, SM_01097, SM_01132, SM_01242, SM_01383, SM_01565, SM_01609, SM_01748, SM_01922, SM_02003 from Appendix 2 and add to Appendix 1, pgs. 37-38	SM_00132, SM_00528, SM_01036, SM_01097, SM_01132, SM_01242, SM_01383, SM_01565, SM_01609, SM_01748, SM_01922, SM_02003 recommended for production consistent with RBP's original redactions to this family of documents
SM_01149	2	3	Remove SM_01149 from Appendix 2, pg. 3, and add SM_01149 to pg. 5 of Appendix 3, "relate to verification supplementation to FDA"	SM_01149 recommended for production

SM_01409	2	3	Remove SM_01409 from Appendix 2, pg. 3, and add SM_01409(R) to pg. 5 of Appendix 3, "email transmitting draft of correction to the reply to Amneal"	SM_01409 recommended for production in redacted format consistent with SM_00268
SM_01868	1	18	Replace SM_01868 with SM_01868(R)	SM_01868 recommended for production in redacted format consistent with SM_00165(R)
SM_02085	1	51	Replace SM_02085 with SM_02085(R)	SM_02085 recommended for production in redacted format consistent with SM_02473(R)
SM_02098	2	9	Remove SM_02098 from Appendix 2, pg. 9, and add SM_02098 to pg. 52 of Appendix 1, "Communications regarding notification of Shared REMS process"	SM_02098 recommended for production
SM_02113	1	43	Replace SM_02113 with SM_02113(R)	SM_02113 recommended for production in redacted format consistent with SM_02921(R)
SM_02205	1	48	Replace SM_02205 with SM_02205(R)	SM_02205 recommended for production in redacted format consistent with SM_03513(R)
SM_02677	1	47	Remove SM_02677 from Appendix 1, pg. 47, and add SM_02677(R) to pg. 54 of Appendix 1, "Names"	SM_02677 recommended for production in redacted format consistent with SM_03231(R)
SM_02680	2	9	Remove SM_02680 from Appendix 2 and add SM_02680(R) to Appendix 1, pg. 53, "Update Regarding Legal Team Meeting"	SM_02680 recommended for production in redacted format consistent with family of documents

SM_02971	1	50	Replace SM_02971 with SM_02971(R)	SM_02971 recommended for production in redacted format consistent with SM_03355(R)
SM_03089	1	43	Replace SM_03089 with SM_03089(R)	SM_03089 recommended for production in redacted format consistent with SM_02921(R)