

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION)	CASE NO. 1:17-MD-2804
OPIATE LITIGATION)	
)	SPECIAL MASTER COHEN
THIS DOCUMENT RELATES TO:)	
<i>“Track One Cases”</i>)	
)	DISCOVERY RULING NO. 14, PART 2,
)	REGARDING MALLINCKRODT
)	PRIVILEGE LOG

During Track One discovery, defendant Mallinckrodt withheld production of certain documents based on attorney-client privilege, the work product doctrine, or other assertions, and produced a privilege log. Plaintiffs believed Mallinckrodt’s non-productions were in many instances inappropriate; accordingly, plaintiffs chose 20 sample documents from Mallinckrodt’s privilege log and requested the Special Master undertake *in camera* review. Mallinckrodt responded by withdrawing its invocation of privilege as to 6 of the sample documents, and providing the other 14 documents to the undersigned *in camera*. Mallinckrodt also submitted a letter explaining in detail its bases for non-production of each of the 14 documents.

On February 7, 2019, the Special Master issued a ruling by email, holding that 6 of the 14 documents were not protected by attorney-client privilege or the work-product doctrine, and must be produced; attached is the document-by-document ruling chart. The Special Master also offered the following general observations, to guide the parties:¹

¹ The language in the bullet-points below is slightly amended in comparison to the language used in the email ruling, for greater clarity.

- Even if a certain document is appropriately withheld, other documents referred to in that withheld document may still need to be produced. For example, while a withheld email might solicit legal advice on a draft marketing brochure, the final version of the brochure must still be produced (if it has not already).
- Where an email regarding a business matter is sent to a group of folks, one or a few of whom are attorneys, for the purpose of keeping everyone in the loop (my phrase), and without requesting or containing legal advice, the email is not privileged. This is true even if the email asks generically and simply for everyone's "approval," when the information is simply business information. Simply including an attorney's email in the recipient list does not make the email privileged.
- Many of the emails I reviewed are actually innocuous. I understand Mallinckrodt's desire to assert attorney-client privilege as fully as possible, and to be careful about waiver, but it is also worth considering whether a fight over any particular document is even worth it.

Mallinckrodt then timely requested this ruling be formalized. *See Appointment Order* (docket no. 69) at 5 ("If a Special Master issues an informal ruling or order that is not on the record (such as the resolution of a discovery dispute) either orally, via email, or through other writing, and a party wishes to object to that ruling or order, the party shall ask the Special Master to formalize the ruling or order by filing it on the docket or appearing before a court reporter."). The Special Master fills this request with this Ruling.

Given the substantial letter briefing already submitted on the topics addressed below, if any party chooses to object to any aspect of this Ruling, it must do so on or before 5:00 p.m EST on February 13, 2019.

RESPECTFULLY SUBMITTED,

/s/ David R. Cohen

David R. Cohen
Special Master

Dated: February 9, 2019

Mallinckrodt LLC Excerpted Privilege & Redaction Log (as of December 26, 2018)				SM Ruling
Priv No.	Unique ID	Custodian	Date	SM Ruling
11	MNKCTRL0000104085	Chick, Stacy	1/7/2015	Privilege applies and document may be withheld, but Mallinckrodt must produce discovery showing the underlying facts related to this employee sales contest, if it has not already done so.
16	MNKCTRL0000228305	Brendel, Diane; Chick, Stacy; Falcone, Melissa; Grelle, Ed; Webb, Kevin	12/9/2013	
18	MNKCTRL0000562633	Webb, Kevin; Wickline, Ron	9/14/2010	Mallinckrodt must produce this document, which neither contains nor requests legal analysis.
19	MNKCTRL0000567440	Webb, Kevin; Wickline, Ron	5/6/2010	Privilege applies and document may be withheld, but Mallinckrodt must produce the final version of this FAQ document.
22	MNKCTRL0000492061	Falcone, Melissa; Terifay, Terrence; Webb, Kevin	3/9/2012	
43	MNKCTRL0000608155	Webb, Kevin	3/8/2010	Privilege applies and document may be withheld.
50	MNKCTRL0000556872	Webb, Kevin	9/10/2010	Mallinckrodt must produce this document, which neither contains nor requests legal analysis. The mere reference to counsel's having agreed to the business process outlined is insufficient to invoke privilege.

55	MNKCTRL0000559947	Webb, Kevin; Wickline, Ron	8/12/2010	Mallinckrodt must produce this document, which neither contains nor requests legal analysis. The mere reference to counsel's having approved certain agreements is insufficient to invoke privilege.
70	MNKCTRL0000698731	Chick, Stacy	12/19/2014	Privilege applies and document may be withheld, but Mallinckrodt must produce discovery showing the final version of the slide show regarding the "Jan 5th [2015] POA call" regarding which advice is solicited.
85	MNKCTRL0000702746	Chick, Stacy	6/19/2014	Mallinckrodt must produce this document. It does not contain legal advice and arguably requests it from one recipient, but the email is sent to numerous non-attorney recipients and simply asks them to "provide approval." The mere reference to seeking approval is insufficient to invoke privilege, and receipt by non-attorney's undercuts the claim of privilege.
109	MNKCTRL0000703893	Chick, Stacy; Falcone, Melissa	4/15/2014	
115	MNKCTRL0000705188	Chick, Stacy	2/6/2014	Privilege applies and document may be withheld.
128	MNKCTRL0000716917	Brendel, Diane; Chick, Stacy; Falcone, Melissa; Terifay, Terrence; Wickline, Ron	9/10/2013	Mallinckrodt must produce this document, which neither contains nor requests legal analysis. The mere listing of facts disclosed at a press conference to numerous employees, one of whom is an attorney, is insufficient to invoke privilege.

129	MNKCTRL0000748825	Falcone, Melissa; Webb, Kevin	2/16/2014	Mallinckrodt must produce this document, which neither contains nor requests legal analysis. The mere recitation of the results of a medication-inactivation study to numerous employees, some of whom are attorneys, is insufficient to invoke privilege.
144	MNKCTRL0000772406	Chick, Stacy; Falcone, Melissa	9/4/2014	
149	MNKCTRL0000777403	Wickline, Ron	4/28/2010	Privilege applies and document may be withheld.
153	MNKCTRL0000783912	Brendel, Diane; Wickline, Ron	6/7/2012	
188	MNKCTRL0001079372	Webb, Kevin	6/25/2014	Privilege applies and document may be withheld, but Mallinckrodt must produce discovery showing the final version of the Medsaway Guide, if it has not already done so.
200	MNKCTRL0001219203	Webb, Kevin	9/3/2013	Privilege applies and document may be withheld.
207	MNKCTRL0001219594	Brendel, Diane; Webb, Kevin	6/6/2013	