

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION) MDL 2804
OPIATE LITIGATION)
) Case No. 1:17-md-2804
THIS DOCUMENT RELATES TO:)
) Judge Dan Aaron Polster
City of Rochester v. Purdue Pharma, L.P.,)
No. 19-op-45853 (Track 12)) **ORDER REGARDING OPTUM'S**
) **OBJECTION TO DISCOVERY**
City of Ogdensburg v. Purdue Pharma, L.P.,) **RULING 14, PART 34**
No. 19-op-45852 (Track 22))
)

Before the Court is Optum's Objection to Discovery Ruling 14, Part 34 ("DR 14-34") (docket no. 5957) regarding Optum privilege claims.¹ Docket no. 5994. In DR 14-34, the Special Master overruled privilege claims asserted by Optum over nine documents that Optum contends were created "in connection with" a DEA investigation into one of Optum's pharmacy businesses. See Objection at 2. The PEC filed a Response. Docket no. 6027. For the following reasons, the Court resubmits Optum's privilege claims to the Special Master for further consideration.

In its Objection, Optum protests that the Special Master conducted "virtually no analysis" into the legal or business character of the documents at issue. See Objection at 1. What Optum fails to appreciate, however, is that it never provided the Special Master with sufficient information or context about the documents with which to conduct a more thorough analysis. Although the Special Master, and now the Court, have reviewed these documents *in camera*, nothing in any of the documents appears to tie them to the DEA investigation. It is Optum's burden to make those

¹ Optum's Objection also contains a contingent motion for interlocutory appeal, if the Court affirms the Special Master's Ruling. That motion is **DENIED**.

connections. *See United States v. Dakota*, 197 F.3d 821, 825 (6th Cir.2000) (“The burden of establishing the existence of the privilege rests with the person asserting it.”).

In his ruling, the Special Master is clear that the primary rationale for overruling Optum’s privilege claims was that Optum failed to carry its burden of showing any of its documents are privileged.² The Special Master stressed that Optum did not “provide *any* specifics about the timing or subject matter of the DEA investigation,” and found that Optum had not “carried its burden of showing how *any* of the documents relate to the DEA investigation or that these documents contain distinctly legal, as opposed to business, advice.” DR 14-34 at 3 (first emphasis added, second emphasis in original).

In its Objection, Optum provides—for the first time—some additional factual context missing from its presentation to the Special Master. For example, Optum explains to the Court that it received “various DEA subpoenas and an inspection warrant” “beginning in 2015” and further describes that it was subject to a “multi-year federal investigation . . . which ended in 2024” with Optum having to pay twenty million dollars. *See* Objection at 3; 3 n.3. Optum further adds—again for the first time—that “[a]s the Carlsbad investigation continued, OptumRx’s in-house legal department *directed* parallel investigations and policy changes *in response*.” Objection at 6 (emphasis added). These additional “specifics about the timing or subject matter of the DEA

² The Court is aware that the Special Master has repeatedly admonished all parties that boilerplate recitations and conclusory assertions are insufficient to carry their burden when supporting a privilege claim. After reviewing everything presented to Special Master Cohen, Optum clearly failed to provide sufficient context about these documents to establish its privilege claims before the Special Master. The Special Master’s Ruling, based on the scant evidence and argument before him, is plainly correct and could easily be sustained on that basis alone. However, as described below, the Court is hesitant to potentially compound Optum’s errors through strict adherence to procedural formality.

investigation,” DR 14-34 at 3, were entirely absent from Optum’s arguments before the Special Master.³

For many years, it has been the practice of the MDL Court not to consider “new evidence, case law, or legal theories [submitted] to the Court” in an objection to a discovery ruling that have not first been presented to the Special Master for his consideration. *See* docket no. 1349 at 2; *see also* docket no. 5053 at 3–4 (providing a detailed procedural history of the long-standing practice). Based on this established practice, the Court should disregard Optum’s new details and rule only upon the facts and arguments Optum provided to the Special Master. However, if Optum can show, for example, that these documents were the result of attorney-led investigations conducted in response to the then-ongoing federal investigation or in anticipation of possible legal action, that material fact would almost certainly establish the existence of the privilege.⁴

The Court recognizes the importance of the attorney-client privilege to the proper administration of justice. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It is critically important to protect from disclosure documents which are properly subject to the attorney-client privilege. The Court does not want to make a mistake just because Optum has made one. The Court is, therefore, reluctant to simply ignore evidence that might establish the existence of the privilege, solely because Optum failed to adhere to this Court’s long-established procedures.

Instead, the Court will permit Optum to provide—this one *final* time—to Special Master Cohen, the detail and context he needs to undergo the analysis of the documents that Optum seeks. Going forward, the parties shall provide evidence and factual background sufficient to support

³ In its arguments before the Special Master, Optum asserts only that, “these audits were conducted during and as a result of a now-public Drug Enforcement Administration (DEA) investigation.” *See* Das letter dated January 7, 2025 at 2; *see also* DR 14-34 at 2–3.

⁴ At this time, the Court cannot conclude, based solely on the evidence before it, that Optum could make such a showing. Even with the new details presented in Optum’s Objection, it is not clear Optum can carry its burden of establishing the privilege.

their privilege claims and carry their burden; and they must do so at the earliest opportunity, not wait until after the Special Master has made his ruling to supply it. This is the last time the Court will give any party a second opportunity to support an overruled privilege claim with new evidence not first submitted to the Special Master.

Accordingly, the Special Master's Ruling is **SUSTAINED** on the grounds on which it was made, without prejudice. If Optum chooses, it may present new evidence to Special Master Cohen so he can conduct a meaningful privilege analysis with respect to these documents. Should Optum pursue this approach, it must provide much greater detail of the DEA investigation (*i.e.*, the nature, scope, dates, etc.) and *explain* to the Special Master how the challenged documents pertain to that investigation. Optum's contingent motion for interlocutory appeal **DENIED** for the reasons provided in docket nos. 5832 & 5053.

IT IS SO ORDERED.

/s/ Dan Aaron Polster March 19, 2025
DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE