

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION)	CASE NO. 1:17-MD-2804
)	
)	SPECIAL MASTER COHEN
THIS DOCUMENT RELATES TO:)	
“All Cases”)	
)	
)	DISCOVERY RULING NO. 14,
)	PART 34-A REGARDING OPTUM’S
)	RESUBMITTED PRIVILEGE CLAIMS

I. Procedural Background.

During Track 12 discovery, defendant OptumRx (“Optum”) invoked attorney-client privilege and withheld from production certain documents—specifically, reports of Optum internal compliance reviews, papers listing talking points for communications with customers, and related records. The PEC challenged a number of these privilege designations. The parties agreed to submit a bellwether sampling of the challenged documents to the Special Master for *in camera* review, and submitted letter briefs in support of their positions.¹

On February 19, 2025, the Special Master ruled on these privilege claims, overruling each one. *See* Discovery Ruling No. 14, Part 34 (“DR 14-34”), docket no. 5957. Optum filed an objection, docket no. 5994, and the PEC filed a response, docket no. 6027. On March 19, 2025, the Court sustained the Special Master’s rulings. Docket no. 6031 at 4. However, the Court’s Order was entered without prejudice. *Id.* at 3. The Court noted it was “established practice” for it to rule on Optum’s objection based “only upon the facts and arguments Optum [originally] provided to the Special Master;” but the Court decided to allow Optum, “this one *final* time,” to submit “new

¹ Letters from Pearl Robertson to Special Master (Nov. 14, 2024, Dec. 31, 2024); Letters from Debolina Das to Special Master (Nov. 22, 2024, Jan. 7, 2025).

evidence” that was “missing from its presentation to the Special Master.” *Id.* at 3, 4, 2 (emphasis in original).

The new evidence that Optum presented to the Court with its objection, but which it had not presented originally to the Special Master, concerned a multi-year federal investigation—the “Carlsbad Investigation”—conducted by the DEA. *Id.* at 2. Accordingly, the Court allowed Optum to resubmit the matter to the Special Master for reconsideration, and stated Optum could “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.” *Id.* at 4.

On March 28, 2025, Optum submitted to the undersigned two declarations to bolster its evidentiary showing in support of the claimed connection between the Carlsbad Investigation and the withheld documents.² On April 1, 2025, the PEC submitted a letter brief in opposition (“Irpino Letter”).³ Having considered the new submissions carefully, the Special Master now rules as follows.

II. Legal Standards.

The Special Master has applied the legal standards and authorities set out in all prior “Discovery Rulings No. 14, Part x,” and incorporates them by reference herein.⁴

² Letter from Brian Boone to Special Master (Mar. 28, 2025).

³ Letter from Anthony Irpino to Special Master (Apr. 1, 2025).

⁴ *See, e.g.*, docket nos. 5767, 5053, 1321, 1353, 1359, 1380, 1387, 1395, 1498, 1593, 1610, and 1666.

III. The Documents.

The nine documents at issue fall into three groups. The first group (Optum-Priv_00000128, -131, -131 (redacted), -269, and -296) are all iterations of a document Optum describes as “talking points”⁵ prepared to assist Optum personnel with external messaging related to the dispensing of opioids through Optum’s mail order channels.⁶ For example, Optum-Priv_00000128 discusses new, stricter reviews of opioid prescriptions and suggests messages an Optum pharmacist should deliver to a patient and her doctor if the pharmacist decides not to fill the patient’s oxycodone prescription.

Optum describes the two documents in the second group (Optum-Priv_00000134 and -137) as “PowerPoint presentations that contain summaries of similar internal audits.”⁷ These presentations contain the background analysis and findings from which Optum derived the “talking points” in the Group 1 documents.

The third group consists of two documents (PL_02578 and PL_08082) titled “Internal Review Reports” relating to “E-Prescribing Controlled Substances” and “Home Delivery Pharmacy Controlled Substance Pharmacist Verification Process,” respectively. For example, PL_02578 at 4 discusses Optum’s performance of a “review to validate the effectiveness of [its] processes and controls for dispensing electronic prescription controlled substances.”

⁵ Letter from Debolina Das to Special Master (Jan. 7, 2025) (“Das Letter”) at 2.

⁶ Optum produced to the PEC a version of Optum-Priv_00000131 with the first two pages redacted. The Special Master could not discern, and Optum did not supply, any meaningful rationale for the redactions.

⁷ Das Letter at 2.

IV. Analysis.

The Group 1 and Group 2 Documents.

In Optum's original January 7, 2025 letter brief to the Special Master supporting its claims of privilege over the documents in Groups 1 and 2, Optum stated that the documents, or at least -134 and -137, contain summaries of internal "audits that were conducted *during and as a result of* a now-public Drug Enforcement Administration (DEA) investigation into OptumRx's home delivery pharmacy in Carlsbad, California. ... In-house counsel used information from that investigation to assess company programs and practices."⁸ Among the reasons the undersigned earlier denied Optum's privilege claims on these documents was that Optum had not provided "any specifics about the timing or subject matter of the DEA investigation." DR 14-34 at 3.

In Optum's objection to the Court, it stated that all of the documents under review (not only -134 and -137) were created in direct response to the Carlsbad Investigation: "The nine documents at issue (the "Privileged Documents") relate to internal reviews conducted at the direction of OptumRx's Legal Department *in connection with the DEA's investigation into OptumRx's home-delivery pharmacy business.*" Docket no. 5994 at 2 (emphasis added). Optum also made other representations connecting the documents at issue to the Investigation, including that, "as the Carlsbad [I]nvestigation continued, OptumRx's in-house legal department directed parallel investigations and policy changes in response." *Id.* at 6.

Optum now supplements this argument by presenting two declarations: one from Tina Prassas, Director in the Compliance Department at Optum, and one by Phong Ly, "Director of Pharmacy Operations at the Oveido [sic] Optum Pharmacy."⁹ The reader should carefully note below the declarants' use of the terms "investigation" and "inspection."

⁸ Das Letter at 2-3 (emphasis added).

⁹ Ly Declaration at 1.

Ms. Prassas clarified for the first time that the Carlsbad Investigation began, at the earliest, on April 10, 2015, when “OptumRx received a Drug Enforcement Administration (DEA) inspection warrant for its Carlsbad, California Home delivery pharmacy location.” Prassas Declaration at ¶ 2. Ms. Prassas further explained that the “DEA and U.S. Attorney for the Southern District of California subsequently served subpoenas on OptumRx as part of a multi-year federal *investigation* into OptumRx’s Home Delivery Pharmacy. In-house and outside counsel led the response to the *investigation*, which concluded in 2024.” *Id.* (emphasis added).

Mr. Ly added that, in 2013, “OptumRx’s in-house legal department initiated a review of OptumRx’s controlled substances dispensing practices at its Home Delivery Pharmacy in Carlsbad, California. The review focused on ensuring that OptumRx’s pharmacists were following applicable state and federal laws and regulations in anticipation of a DEA *inspection*.” Ly Declaration at ¶ 2 (emphasis added).

The Ly Declaration was short on detail and left the Special Master with no explanation of precisely how the Group 1 and 2 documents were related to or created “in connection with the DEA’s *investigation* into OptumRx’s home-delivery pharmacy business,”¹⁰ as Optum had previously argued. Specifically, Mr. Ly’s statements left wide open the possibility that the DEA *inspection* he referred to was routine and/or unconnected to the DEA’s Carlsbad *Investigation*.

The detail required to understand the connection, or lack thereof, came via the Irpino Letter, which conveyed the PEC’s response to Optum’s March 28 supplemental submission. The Irpino Letter spelled out in careful detail the timeline for the creation of the Group 1 and 2 documents and their temporal relation to the Carlsbad Investigation. This timeline reveals that *all of the Group 1 and 2 documents were created between April 16 and December 18, 2013*—at least 15 months

¹⁰ Das Letter at 2 (emphasis added).

before the initiation of the Carlsbad Investigation. Optum’s earlier statements that these documents were created “*during and as a result of*” the Carlsbad Investigation were false.¹²

In DR 14-34, the Special Master ruled that the Group 1 and 2 documents “do not contain legal advice, but rather business advice related to regulatory compliance.” Docket no. 5957 at 3. The Special Master further ruled 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.” *Id.* (emphasis in original). Nothing in Optum’s subsequent submissions, including the two declarations, give the Special Master any reason to rule differently on the Group 1 and 2 documents. Indeed, the timeline provided by the PEC makes it even *more* clear that Optum’s representations are entirely without evidentiary support: the Group 1 and 2 documents discussing the DEA *inspection* bear *no* relationship to the Carlsbad *Investigation* whatsoever, as these documents pre-date that investigation by well over a year. Ultimately, Optum did not merely fail to carry its burden of showing the documents in Groups 1 and 2 are privileged; its arguments for privilege are alarmingly spurious and misleading.

Accordingly, the Special Master reaffirms his prior rulings with respect to all of the Group 1 and 2 documents.

The Group 3 Documents

The group three documents are reports of internal audits relating to Optum’s dispensing of controlled substances through its e-prescribing and home delivery channels. These documents were created in 2016 and 2019. Thus, they were created during the pendency of the Carlsbad Investigation. Optum argues the documents were also created *in connection with* that

¹² Das Letter at 2; *see also* docket. no. 5994 at 2.

investigation. The challenge for the Special Master is to determine whether Optum has carried its burden of establishing these documents were sufficiently connected to the Carlsbad Investigation to warrant attorney-client privilege.

On this score, Optum's submissions remain far too thin. Ms. Prassas provides only this detail about the timeline and circumstances relating to these three documents:

3. As the investigation continued, OptumRx continued to conduct a variety of internal reviews at the direction of in-house counsel to ensure legal requirements under the Controlled Substances Act were being followed.

4. PL_2578 is an internal review initiated by in-house legal counsel conducted in connection with the DEA's investigation; the review concluded in 2016 and evaluated dispensing practices for the period of May 1, 2015 through October 2015.

5. PL_08082 was another review initiated by in-house counsel in connection with the DEA's investigation; the review concluded in 2019 and evaluated monitoring processes at Carlsbad and other home delivery pharmacy locations.

6. The internal reviews were performed under attorney-client privilege and at the direction of in-house counsel in response to and during the DEA's various investigations into OptumRx's home delivery pharmacy practices at Carlsbad. In-house attorneys William Otteson, Aaron Bukofzer, Garret Heenan, Gina Cesaretti, and Karen Peterson, among others, were highly involved in both the Carlsbad investigation as well as parallel audits to assess compliance with the Controlled Substances Act and federal and state laws and regulations.

Prassas Declaration at ¶¶ 3-6.

These factual contentions provide some helpful detail, but contain many conclusory statements that do not, by themselves, satisfy the burden Optum must carry to establish the existence of privilege. Specifically, the Special Master must take care to ensure that documents that are standard, routine compliance audit reports do not take on the cloak of privilege merely because they were created *concurrently* with a nearly decade-long investigation. Rather, Optum has the burden of showing the documents were created *in response to or in connection with* the Carlsbad Investigation, so that they are legal advice and not simple business advice related to

regulatory compliance. To demand less would risk conferring privilege inappropriately on a swath of documents simply because they were created during the pendency of the Carlsbad Investigation.

The Irpino Letter provides further context that casts doubt on Optum's assertions that the Group 3 documents were created *in response to or in connection with* the Carlsbad Investigation. As noted, Ms. Prassas asserts PL_02578 (dated March 17, 2016) "is an internal review initiated by in-house legal counsel conducted *in connection with* the DEA's investigation." Declaration at ¶ 4 (emphasis added). But the PEC submitted a March 17, 2016 Optum email transmitting PL_02578 stating that, "[a]s part of the *annual* Internal Review project plan, the OptumRx Audit Department performed an E-prescribing Controlled Substance (EPCS) Internal Review. Please find attached the final report detailing the results of our review."¹³ This strongly suggests the review was actually routine, would have taken place regardless, was related to regulatory compliance, and was not connected to the Carlsbad Investigation.

Similarly, Ms. Prassas states PL_08082 (dated February 4, 2019) "was another review initiated by in-house counsel in connection with the DEA's investigation; the review concluded in 2019 and evaluated monitoring processes at Carlsbad and other home delivery pharmacy locations." Declaration at ¶ 5. But the PEC submitted a February 4, 2019 Optum email transmitting PL_08082, which read: "[t]he objective of the audit was to provide reasonable assurance that the applicable wholly-owned delivery pharmacies have fully transitioned to dispensing opioids, in accordance with current CDC guidelines. We identified opportunities to strengthen existing processes related to documentation of pharmacist verification and monitoring controls. Also, please note that the audit was performed under privilege. Please do not distribute without prior approval."¹⁴ The PEC points out that this email, while purporting to be privileged, was distributed

¹³ Irpino Letter, Exh. D (emphasis added).

¹⁴ Irpino Letter, Exh. E.

to numerous non-attorneys, and that none of the attorneys listed in the Prassas Declaration were copied on the transmission.

Documents created specifically to respond to a government investigation are likely privileged, even when related to what the Special Master and the Court have consistently determined to be regulatory matters of a business nature. But Optum has not carried its burden of showing the Group 3 documents were in fact created to respond to any government investigation, as opposed to being created during routine regulatory compliance audits and reviews performed for primarily a business purpose. And the documents, themselves, carry no indicia they were *not* routine. To the contrary: they do not mention the Carlsbad Investigation at all. PL_02578 is a “review of 60 electronic prescriptions for New York controlled substances written for greater than 30 day supply”¹⁵ The Corrective Action Plan recommended by the report was to implement a new “rules engine for the State of New York.”¹⁶ And, as Optum’s own transmitting email explains, the review was performed as “part of the *annual* Internal Review project plan.”¹⁷ The greater weight of the evidence, therefore, indicates PL_02578 was not created to respond to the Carlsbad Investigation, but rather as part of Optum’s normal compliance processes, including annual internal reviews.

Similarly, PL_08082 is a review undertaken to assure that “Optum’s home delivery pharmacies (HDP) have fully transitioned to dispensing opioids, in accordance with current CDC guidelines.”¹⁸ The document itself nowhere suggests Optum undertook the review to respond to the Carlsbad Investigation. In addition, the review was transmitted by Vonneta Graham (Optum’s Senior Director of Audit and Recovery Services—a non-lawyer) to numerous non-attorney

¹⁵ PL_02578 at 2.

¹⁶ *Id.* at 6f.

¹⁷ Irpino Letter at Exh. D (emphasis added).

¹⁸ PL_08082 at 4.

business personnel; and later by Shawn Bjorndal (Optum's Pharmacist-in-Charge for Home Delivery—a non-lawyer) to David Calabrese (Senior Vice President & Chief Pharmacy Officer—a non-lawyer) and Ketan Patel (Vice President of Pharmacy Professional Practice—a non-lawyer).¹⁹ Neither Graham's nor Bjorndal's transmitting emails make any reference to the Carlsbad Investigation. Again, Optum has not sustained its burden of showing PL_08082 was created to respond to the Carlsbad Investigation.

To tie the documents to the investigation, despite the facts recited above, Optum offers a conclusory statement from Ms. Prassas that the Group 3 documents are “connected” to the Carlsbad Investigation. That is not enough. Moreover, after the PEC offered the evidence discussed above tending to rebut Optum's showing of a “connection,” Optum declined to respond, despite the Special Master's specific invitation to do so.²⁰

Accordingly, the Special Master concludes yet again that Optum has failed to carry its burden of establishing privilege with respect to PL_02578 and PL_08082.

Summary

As the Special Master has repeatedly noted: (1) the burden to establish that a privilege applies is on the party asserting the privilege; (2) whether the privilege exists is a fact-intensive inquiry; and (3) because the attorney-client privilege obstructs the truth-finding process, it is construed narrowly. *See* Discovery Ruling No. 14, Part 33 at 2 (docket no. 5767) (citing case law for these propositions). Even when given a second chance, Optum has not carried its burden of

¹⁹ *See* Irpino Letter at Exh. E, F.

²⁰ *See* email from Special Master Cohen to Debolina Das (April 8, 2025) (asking, after the PEC submitted the Irpino Letter, “have I received all submissions regarding the Judge's Order at docket 6031 re DR 14-34, so that it is fully ripe for reconsideration?”); email response from Debolina Das to Special Master Cohen (April 8, 2025) (confirming Optum had “no further submissions”).

showing with particularized facts and non-conclusory argument that the documents at issue fall within the confines of attorney-client privilege.

V. Objections.

Any party choosing to object to any aspect of this Ruling must do so on or before May 7, 2025.

RESPECTFULLY SUBMITTED,

/s/ David R. Cohen
David R. Cohen
Special Master

Dated: April 30, 2025