

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: MCKINSEY & CO., INC.
NATIONAL PRESCRIPTION OPIATE
CONSULTANT LITIGATION

Case No. 21-md-02996-CRB (SK)

**ORDER REGARDING OBJECTIONS
TO DISCOVERY ORDER**

Regarding Docket Nos. 520, 530, 537, 538

On March 17, 2023, the undersigned issued a discovery order regarding discovery letter briefs filed by parties on March 3 and 10, 2023. (Dkt. No. 489.) In the March 17, 2023 Order, the undersigned ordered production of documents stored in a repository for a prior relevant MDL – *In re: National Prescription Opiate Litigation*, Case No. 1:17-md-2804-DAP (U.S. District Court, Northern District of Illinois) (the “2804 MDL”). (*Id.*) The undersigned specifically ordered Plaintiffs to share with Defendant McKinsey the documents from 24 of 51 producing parties from the 2804 MDL and ordered that the parties shared the costs, estimated to be \$1.5 million, of creating a new database for this litigation and copying those documents from the 2804 MDL into the database. (*Id.*)

In addition, the undersigned allowed 24 parties from the 2804 MDL whose documents are in the document repository to file objections to the Court’s Order of March 17, 2023. (Dkt. No. 489 at 2.) Parties from the 2804 MDL¹ (the “Objecting Parties”) filed objections on April 14,

¹ The Objecting Parties are the following: Walmart, Inc.; Walgreen Co.; Walgreen Eastern Co.; Walgreens Boots Alliance, Inc.; CVS Indiana L.L.C.; CVS Rx Services, Inc.; CVS TN Distribution, LLC; CVS Pharmacy, Inc.; Ohio CVS Stores, LLC; Rite Aid Headquarters Corporation; Rite Aid of Ohio, Inc.; Rite Aid of Maryland, Inc. d/b/a Rite Aid Mid-Atlantic Customer Support Center; Eckerd Corporation d/b/a Rite Aid Liverpool Distribution Center; Rite Aid of Georgia, Inc.; Rite Aid of North Carolina, Inc.; AmerisourceBergen Drug Corporation; McKesson Corporation; and Cardinal Health, Inc., Endo Pharmaceuticals Inc.; Endo Health Solutions Inc.; Par Pharmaceutical, Inc.; Par Pharmaceutical Companies, Inc.; Johnson & Johnson;

2023 and April 22, 2023. (Dkt. Nos. 520, 530.) Plaintiffs and Defendant McKinsey filed responses to these objections on April 28, 2023. (Dkt. Nos. 537, 538.)

A. Ability to Use Documents from 2804 MDL

The Objecting Parties and Plaintiffs object to the wholesale production of documents that they produced in the 2804 MDL because Plaintiffs in this case do not have possession, custody or control over the documents such that the undersigned can order Plaintiffs to produce them to McKinsey in this litigation and because McKinsey is “forum shopping” by seeking resolution in this Court. However, in the 2804 MDL, the Protective Order was modified to allow coordination between that action and this action. (Dkt. No. 530 (Ex. A).) Plaintiffs moved for and received permission for parties in the 2804 MDL to share documents in the two suits. (Dkt. No. 267.) After briefing (Dkt. Nos. 268, 269, 2809, 286), the Court in the 2804 MDL ruled that Plaintiffs could use documents from that litigation to draft master complaints in this action, “so long as the relevant documents are timely provided to McKinsey.” (Dkt. No. 289-1.)

The Court also noted that the parties should meet and confer to determine the other documents that the parties could use for this litigation but, “[i]f the parties are still unable to reach a resolution, they may return to this Court for assistance or additional ruling. The Court also notes that Judge Breyer may be in a better position to resolve such issues.” (Dkt. No. 289-1.)

Thus, the Court in the 2804 MDL clearly contemplated that the documents produced in that litigation would be used in this litigation and that this Court has the power to determine the scope of that dispute.

B. Relevance

The Objecting Parties and Plaintiffs argue that allowing McKinsey to access all documents from the 2804 MDL is burdensome and overbroad because many of those documents are not relevant to the litigation here. The Objecting Parties provide no specific proposal for narrowing the scope of the access to the 2804 MDL documents. In the previous letter brief, Plaintiffs generally argued that McKinsey’s attempt to gain access to the entire database was not relevant

and Janssen Pharmaceuticals, Inc.

1 and proportional to the case. Plaintiffs, in the previous letter brief, argued that they were willing
2 to meet and confer with McKinsey regarding search terms to narrow the scope of documents from
3 the database in the 2804 MDL. Now, Plaintiffs specifically suggest that the initial search term be
4 limited to the term “McKinsey” and that the parties can then search the 280f MDL documents with
5 additional terms as part of an iterative process.

6 McKinsey argues that the documents from third parties are relevant to this litigation
7 because Plaintiffs accuse McKinsey of conspiring with a large group of parties in the opioid
8 supply chain, including the Objecting Parties.

9 **C. Burden to Third Parties**

10 The Objecting Parties claim that they will suffer undue burden because they will be
11 required to monitor the use of their confidential documents in this litigation. They also argue that
12 they marked their documents in the 2804 MDL without reference to McKinsey, and thus that they
13 might be required to re-visit their designation of confidentiality. However, it was clear from the
14 orders in the 2804 MDL that McKinsey could have some access to documents from that action.

15 **D. Asymmetry of Documents**

16 McKinsey argues again – the same argument proposed in the 2804 MDL – that there is an
17 asymmetry since Plaintiffs already have access to all the documents from the 2804 MDL. There is
18 inherent asymmetry in all litigation, as often one party has access to information that the opposing
19 party does not have. This asymmetry alone cannot justify production of an entire database of
20 information, especially where there is burden to third parties who produced documents in that
21 litigation.

22 **E. Order**

23 Given these competing concerns – relevance and burden to third parties, the Court finds
24 that limits on the production of documents that the Objecting Parties produced in the 2804 MDL is
25 appropriate. The Court thus ORDERS that Plaintiffs and McKinsey meet and confer and choose
26 ten search terms to search the database. Alternately, if Plaintiffs and McKinsey agree to search by
27 using Technology Assisted Review (“TAR”), they may proceed on that basis. Plaintiffs alone
28 must bear the cost of production unless they move for sharing of costs and unless the undersigned

grants that motion. The parties must meet and confer and submit a plan to the undersigned by May 22, 2023. If they are unable to do so, they may submit a letter brief to the undersigned on May 26, 2023.

IT IS SO ORDERED.

Dated: May 9, 2023



SALLIE KIM
United States Magistrate Judge

United States District Court
Northern District of California