

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MERISANT COMPANY,	:	CIVIL ACTION
Plaintiff,	:	
	:	
vs.	:	
	:	
McNEIL NUTRITIONALS, LLC, AND	:	
McNEIL-PPC, INC.	:	
	:	
Defendants.	:	NO. 04-5504

August 4, 2005

PRATTER, DISTRICT JUDGE

MEMORANDUM AND ORDER

The need for the Court to become involved in the discovery dispute addressed below manifested itself on July 5, 2005 with the filing of a Motion for Protective Order filed by Defendant McNeil (Docket No. 36), attended by a memorandum, certificate of service, four declarations, and proposed form of order. Within a week's time, plaintiff Merisant retorted with a Motion to Strike¹ (Docket No. 45) the McNeil Motion, two Motions for Leave to File Excess Pages (Docket Nos. 44 and 47) (one on July 11, 2005 and another the next day, both apparently relating to memoranda on discovery disputes generally and to address the dispute extant), a supporting response to the McNeil Motion for Protective Order, supporting declarations, proposed forms of orders, a Motion For Leave To Supplement The Record In Opposition To Motion For Protective Order (Docket No. 53), a Motion to Compel with a supporting memorandum (Docket No. 55) and yet another declaration. Of course, McNeil has responded to oppose (Docket No. 49) the Motion to Strike and to oppose (Docket No. 54) the Motion to Supplement. Without counting the Court's Orders between the first filing mentioned above and

¹In the future, perhaps a simple opposition memorandum will suffice.

the most recent (at least as of the date this Memorandum and Order is being drafted) to address the more ministerial of the parties' filings, these two litigants have made 19 entries on the docket in this case - - - all apparently related to their discovery disagreement.

The most recent filing, Merisant's Motion To Compel (Docket No. 55), in its footnote 2, chides - - "respectfully", but unmistakably - - the Court for not having already acted on the discovery dispute motions. Accepting at face value the respectful nature of the prodding, the Court has reviewed all of the parties' various submissions, and issues the accompanying Order with respect to the instant discovery dispute. However, in view of the work required both of the parties and of the Court as a result of the accompanying Order, and because the parties' various submissions in the last month offer little hope that they will move through the remainder of the discovery process unaided by the Court, a few guideposts are included here for the parties' and counsel's serious contemplation.

The underlying dispute, like all disputes brought to court, is undeniably important to the litigants, their counsel and the Court. The present case involves financially blessed and obviously motivated litigants, skilled teams of legal talent, and commercially significant stakes. However, none of that should prompt over-expenditures of resources of any type on discovery disputes that, in the final analysis, can be addressed and resolved in a more efficient and economical way. Stated differently, the simple good fortune of having more than sufficient funds and professional horse-power is no reason to expend either. This case presents more than enough challenge on the merits to usefully absorb the resources being devoted to these discovery disputes.

In large measure, these observations are prompted by the many unproductive distractions

contained in many of the submissions the Court reviewed on the present issue. These distractions primarily took the form of meaningless adverbs that seasoned the submissions (e.g., “tellingly”, “rigorously”, “unilaterally”², “shockingly”, etc., or other “filler” phrases and words such as “even more shocking”, “cavalier”, “disturbing”, “borders on frivolous”, and “stunning”).³ In general, one might observe that the strongest legal and factual positions are those that glisten in the clarity of simple declarative sentences supported by on-point, controlling case law.

With respect to case law, it is the Court’s observation that generalized judicial language may be located and laid out in briefs to support almost any colorable argument in the abstract - - especially in discovery disputes generally and, most particularly, when those disputes raise the sword or shield of the attorney-client privilege, “relevance”⁴ issues, proprietary and confidential nature, and similar principles. The practical fact of the matter is, beyond laying out the

²The Court is constrained to point out that it can be presumed that the conduct of one party in a two-party case that prompts the other party to cry foul was undertaken “unilaterally”, instead of “mutually” or “cooperatively”. Therefore, repeated charges that a litigant “unilaterally” withheld documents would seem to be unnecessary. Recalling the familiar litigator’s lament that “If I had had more time, I would have made it shorter”, the Court anticipates that in the future perhaps there will be more time spent on editing out inflammatory surplusage before filings are made. That effort may even have the additional benefit of reducing the number of motions seeking leave to file longer submissions, e.g., Docket Nos. 44 and 47.

³The Court notes the remarkable professional experience of counsel in this case and doubts that any of the discovery-related conduct thus far engaged in has been so “off-the-chart”, novel or unusual for such litigation as to stun, disturb, shock or surprise any of the litigators in this case. Indeed, the Court hazards to guess that, more likely than not, similar conduct has been engaged in - - in good faith - - by all concerned here in the past.

⁴Because all counsel in this case surely realize that “relevance” is not the touchstone for discoverability in a case such as this, the Court was puzzled by the frequency with which the written submissions made reference to the “clearly relevant” or “patently not relevant” materials or information being disputed here. Suffice it to say, while the Court does not adhere to the notion that anything and everything requested must always be produced, the scope set out by the Federal Rules of Civil Procedure will be used.

rudimentary principles and latest controlling precedent, citations to and quotations from a host of cases from around the country cannot substitute for the hands-on work of evaluating the specific item(s) in controversy.⁵

Therefore, to resolve the present log jam (which the Court believes has arisen in good faith on the part of all counsel), the Court will undertake an in camera inspection of the documents presently in dispute. Before doing so, however, the Court expects counsel for McNeil to (1) review the materials thus far withheld to be certain that, with respect to material withheld on attorney-client privilege or work product grounds, the withheld material can be represented by counsel as being related directly to a request on behalf of McNeil and/or its agents for legal advice pertinent to McNeil, the rendering of (or communicating to those who need to know the rendering of) legal advice, or represents a direct part of the process of preparing for litigation, and is not merely reflective of business conduct undertaken once legal advice has been rendered or litigation strategy has been decided;⁶ (2) prepare a log for the Court's use⁷ listing all documents to be submitted for in camera review, broken down into the categories of the grounds being asserted for justifying non-production; (3) group copies of the documents according to category and deliver them to the Court's Chambers along with pre-paid Federal Express shipping

⁵The exception to this, of course, is the rare circumstance where a discovery decision is so precisely on point to the specific issue that it actually is helpful to the specific problem under consideration.

⁶Material that cannot withstand such scrutiny should be produced promptly on the timetable included herein, unless it falls within some other category of non-discoverability.

⁷The log presented to the Court can and should include whatever fulsome explanation McNeil wishes to present to support non-production. A copy of the log with or without such detailed explanations, depending upon the confidential nature of the explanation, shall be served contemporaneously on opposing counsel.

labels so that the Court's Deputy can forward them to the Court for prompt review and resolution⁸; (4) with respect to the 32-page document commencing at Bates stamped 00042971 (a full copy of which shall be supplied for in camera review) (i) McNeil shall provide a one-page explanation as to why pages 4 through 32 of that document have not been produced under the terms of the existing Protective Order and (ii) Merisant shall provide the Court with a one-page explanation as to why pages 1 through 3 of the referenced document are not compliant with Request No. 17's demand for documents "sufficient to describe" the referenced process; and (5) McNeil shall propose such additional terms for a protective order that would be responsive to its other concerns about producing materials as outlined in its submissions, or shall present no more than 3 pages explanation as to why no protective order can be appropriate.

The Court will commence the in camera inspection as soon as the materials are made available. In the absence of good cause shown, the submission of the log and the delivery of the documents will be expected by the Court on or before August 19, 2005, but McNeil should make every reasonable effort to commence the process of providing materials to the Court as outlined above in advance of August 19, 2005.

An appropriate Order follows.

BY THE COURT:

/S/
Gene E.K. Pratter
United States District Judge

⁸Pre-paid shipment labels with McNeil's counsel's address are to be supplied as well so that the materials reviewed can then be promptly returned to counsel following inspection.

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	:	
Defendants.	:	NO. 04-5504

ORDER

AND NOW, this 4th day of August, 2005, upon consideration of the Motion for Protective Order filed by McNeil Nutritionals LLC, et al. and its accompanying documents (Docket Nos. 36-43) and the response thereto (Docket No. 48), the Motion to Strike the Motion for Protective Order filed by Merisant Company and its accompanying documents (Docket Nos. 45, 46), the response thereto (Docket Nos. 49, 50), the Motion for Leave to Supplement the Record in Opposition to Defendants' Motion for Protective Order and Memorandum of Law in Support thereof (Docket No. 53) and the response thereto (Docket No. 54), and the Motion to Compel filed by Merisant Company and its accompanying documents (Docket Nos. 55-56), it is hereby ORDERED that each of these Motions is DENIED pending the in camera inspection of the documents to be submitted to the Court as set forth in the accompanying Memorandum.

BY THE COURT:

/S/ _____
GENE E.K. PRATTER
United States District Judge