

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: INVOKANA
(CANAGLIFLOZIN)
PRODUCTS LIABILITY LITIGATION

:
: MDL NO. 2750
: Master Docket No. 3:16-md-2750
:
: JUDGE BRIAN R. MARTINOTTI
: JUDGE LOIS H. GOODMAN
:

CASE MANAGEMENT ORDER NO. 12
(Protocol for Treatment of Privileged and Work Product Materials)

This Order shall govern the treatment of all privileged or work-product materials in this action. This Order applies equally to all parties, who for the purposes of below shall be designated as either the "Producing Party" or the "Receiving Party."

1. **General Principles.** Privilege logs shall comply with Federal Rule of Civil Procedure 26(b)(5), which requires a party to:
 - a. Expressly identify the privilege asserted; and
 - b. "[D]escribe the nature of the documents, communications, or tangible things not produced or disclosed . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess this claim." *See* FED. R. Civ. P. 26(b)(5).
 - c. In order to avoid unnecessary cost, the parties will meet and confer to identify categories of privileged information that may be logged categorically rather than document-by-document and not require individualized or subjective descriptions of the claimed privilege or protection. *See* Advisory Committee Note to Fed. R. Civ. P. 26(b)(5)(1993).

2. **Specific Principles.**
 - a. To the extent that documents are withheld from production on the basis of privilege or the work-product doctrine, the Producing Party shall produce rolling privilege logs. The first privilege log to be produced in this Multi-District Litigation shall be produced within sixty (60) days after the date upon which the documents were required to be produced or were partially produced in a rolling production. The Producing Party shall use good faith efforts to produce subsequent logs within thirty (30) days after the date upon which the documents were required to be produced or were partially produced in a rolling production but may take up to forty-five (45) days to make said production.


- b. The rolling privilege logs from the Producing Party shall be produced in a cumulative manner, incorporating in each subsequently produced privilege log the previously produced privilege logs. Each privilege log shall be sorted first by volume number and then by Bates number. The correspondence accompanying each privilege log shall indicate the document production volume(s) and Bates range(s) to which the privilege log applies.
- c. For documents withheld on the basis of privilege or work product, the Producing Party shall provide a separate entry for each document as to which the Producing Party asserts a privilege. The entry should list:
 - i. a unique identifying number for each logged document;
 - ii. the Bates number(s) of documents that are produced with redactions based on a claim of privilege (using the same Bates numbering format agreed to by the parties for regular document productions);
 - iii. a field or column indicating the privilege log volume;
 - iv. the nature of the privilege asserted (e.g. "Attorney-Client" or "Work-Product");
 - v. whether the document was "Withheld" or "Redacted";
 - vi. the custodian(s) of the document;
 - vii. the name(s) of the author(s) of the document (if known) (to the extent a document is comprised of an email chain, the name of the author on the most recent email in the chain will be identified);
 - viii. the name(s) of the recipient(s) of the document, including anyone who was sent the document as a "CC" or "BCC" (if known) (to the extent a document is comprised of an email chain, the name(s) of the recipient(s) on the most recent email in the chain will be identified);
 - ix. the document type, including, for example, whether the document is an email, email thread, paper file, a PowerPoint presentation, an Excel spreadsheet, or other descriptive identifier of the document type;
 - x. the date of the document or communication;
 - xi. the general nature of the legal advice requested or provided or an explanation of the work-product claim that, without revealing information itself privileged or protected, will enable other parties to assess the claim;
 - xii. a field or column indicating the production volume to which the individual log entry relates;

- xiii. indication of which individual(s) on the log are attorneys or legal staff (either by placing an asterisk or some other reasonable identifying marking immediately adjacent to said individuals' names whenever they appear on the log); and
 - xiv. indication of which individual(s) on the log are third parties either by placing an asterisk or some other reasonable identifying marking (distinct from the marking used to identify attorneys and legal staff as outlined in paragraph 2.c.xiii above) immediately adjacent to said individuals' names whenever they appear on the log).
3. **Privilege Log Format.** Privilege logs shall be produced in Excel format.
4. **Privilege Log Descriptions of Email Threads.** An e-mail thread contained within a single document need only be recorded once on the Producing Party's privilege log, even if a privilege is asserted over multiple portions of the thread. The Producing Party may use electronic email threading to identify emails that are part of the same thread. As set forth in the ESI Order entered in this matter, where a most inclusive email thread is either redacted or withheld for privilege, the Producing Party need only include the most inclusive email thread on a privilege log and need not produce or log the prior or lesser-included emails within the same thread.
5. **Categories of Documents Presumptively not to be Logged on Privilege Log.**
- a. The withholding/redacting party need not provide an individualized or subjective description of the privilege or protection claimed for documents corresponding to the following categories because the parties agree that the individual review of such categories is not worth the time and/or expense necessary to do so:
 - i. Emails to/from Tucker Ellis, LLP and/or Barnes & Thornburg, LLP and after September 21, 2015.
 - ii. Emails dated after September 21, 2015 to/from five (5) in-house legal department employees whose roles focus primarily on litigation, who are managing or supporting product liability litigation involving Invokana and/or Invokamet , and whose identities have been provided separately by counsel for Defendants.
 - iii. Emails dated after September 21, 2015 to/from electronic discovery vendors working at the direction of the employees referenced in paragraph 5.ii. above on product liability litigation involving Invokana and/or Invokamet.
 - iv. Work product prepared by or at the direction of Tucker Ellis, LLP, Barnes & Thornburg, LLP, or in-house legal department employees managing or supporting product liability litigation involving Invokana and/or Invokamet after September 21, 2015 for purposes of such litigation.

- v. Emails with limited redactions (e.g. a few sentences) for which the Producing Party believes the privilege basis to be apparent on the face of the document. Along with each privilege log, the Producing Party shall provide the Bates number(s) of produced documents in this category. If this approach proves to be difficult or problematic, the parties will meet and confer regarding a different approach.

6. Challenges to Privilege and/or Work Product Claims.

- a. If the Receiving Party seeks to challenge a claim of privilege, the parties shall meet and confer in an attempt to resolve the issue(s) prior to submitting a challenge to the court. The parties shall consider whether providing the subject or "re" line of the disputed document or communication (to the extent that same does not reveal information which itself is privileged or protected) would assist in resolving the issue(s) in dispute.
- b. If a meet-and-confer does not resolve all issues, the Receiving Party seeking to challenge a claim of privilege shall submit a motion identifying the specific entries on the Producing Party's privilege log or specific documents containing a claim of privilege that: i) it believes to be inadequate or otherwise improper and providing the basis for the challenge, and/or ii) it believes as a substantive matter are not entitled to privileged treatment and providing the basis for the substantive challenge.
- c. With respect to challenges made pursuant to ¶6(b)(i) above, if the court finds that the content of the Producing Party's privilege log is inadequate or otherwise improper, the party asserting the privilege shall have a reasonable amount of time (as determined by the Court) to supplement the information in the privilege log in light of the number of inadequate or otherwise improper entries at issue. With respect to challenges made pursuant to ¶6(b)(ii), if a party challenges the assertion of privilege with regard to certain documents as a substantive matter, the court shall conduct an *in camera* review, subject to its discretion, of either:
 - i. the contested documents; or
 - ii. a reasonable number of representative documents selected by the responding party, as well as a reasonable number of additional documents selected by the requesting party.
- d. The Producing Party shall have the opportunity, at the Court's discretion, to provide affidavits, argument, and/or *in camera* explanations of the privileged nature of the documents at issue to ensure that the court has complete information upon which to base its privilege determinations. The Receiving Party shall have the opportunity to respond and/or reply to any such affidavits, argument, and/or *in camera* explanations.

So Ordered this 30th day
of MAY, 2017


HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

