

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION



**IN RE: ABBOTT LABORATORIES, ET
AL., PRETERM INFANT NUTRITION
PRODUCTS LIABILITY LITIGATION**

This Document Relates to:

ALL ACTIONS

MDL 3026

Case No. 1:22-cv-00071

CASE MANAGEMENT ORDER NO. 4

**RULE 502(d) AND PRIVILEGED
MATERIALS ORDER**

Judge Rebecca R. Pallmeyer

The Plaintiffs and Defendants to this multi-district litigation, by and through their respective counsel, have jointly stipulated to the terms of the Rule 502(d) and Privileged Materials Order, and with the Court being fully advised as to the same, it is hereby ORDERED:

A. Applicability.

1. This Order shall be applicable to any privileged or otherwise protected or exempted information contained in deposition transcripts and/or videotapes, and documents produced in response to requests for production of documents, answers to interrogatories, responses to requests for admissions, affidavits, declarations and all other information or material produced, made available for inspection, or otherwise submitted by any of the parties in this litigation pursuant to the Federal Rules of Civil Procedure, as well as testimony adduced at trial or during any hearing (collectively "Information").

B. Production of Discovery Materials Containing Potentially Privileged Information.

2. Pursuant to Federal Rule of Evidence 502(d), the production of any privileged or otherwise protected or exempted information in this case shall not be deemed a waiver or impairment of any claim of privilege or protection in this case or in any other federal or state

proceeding, including, but not limited to, the attorney-client privilege, the protection afforded to work product materials, statutory privileges and protections, or the subject matter thereof, as to the produced document and any related material.

3. Nothing contained herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI or information (including metadata) for responsiveness and/or segregation of privileged and/or protected information before production.

4. The producing party must notify the receiving party promptly, in writing, upon discovery that a document has been produced for which the producing party asserts privilege and/or other protection. This "Clawback Notice" shall include (i) the bates range of the produced materials, (ii) a new copy of the material (utilizing the same bates number as the original material) with the privileged or protected material redacted (if the producing party claims that only a portion of the document contains privilege or other protected). If the producing party claims that the entire document is privileged or protected, then the producing party shall provide a slip sheet noting that the document has been withheld. After the producing party provides the receiving party with Clawback Notice, the producing party must provide a corresponding privilege log within ten business days.

5. Upon receipt of a Clawback Notice, all such information, and all copies thereof, shall be sequestered and the receiving party shall not use such information for any purpose, except as provided in paragraphs 6 and 7, until further Order of the Court. The receiving party shall also retrieve and sequester all copies of the documents (including any excerpts used in analyses, memoranda or notes or portions thereof) in electronic format.

6. The receiving party may contest the producing party's assertion of privilege or other protection. In that instance, within seven (7) business days from receipt of the privilege log,

the receiving party shall give the producing party written “Notice of Clawback Challenge” providing the reason for said disagreement. The producing party will have seven (7) business days to respond to the Notice of Clawback Challenge, in writing, by either: (i) agreeing to withdraw the claim of privilege or other protection; or (ii) stating the reasons for such claim. If the producing party’s response to the Notice of Clawback Challenge does not resolve the issue, the parties shall meet and confer within five (5) business days of the response. If the conference does not resolve the dispute, within five (5) business days of the conference, the parties shall submit the dispute to the MDL Court for resolution. The producing party retains the burden of establishing the applicability of the privilege or other protection as to any inadvertently produced materials. If the receiving party does not serve a Notice of Clawback Challenge, then, upon expiration of the seven (7) business day period, all copies of the disputed material shall be returned or destroyed.

7. Nothing in this Stipulation prevents a receiving party from submitting the item(s) listed in the Clawback Notice to the Court for review or using the content of the item(s) in briefing submitted in connection with any challenge to such notice that is raised in accordance with paragraph 6. The challenge to the Clawback Notice must be filed under seal, and the receiving party must not assert as a ground for compelling disclosure the fact or circumstances of the disclosure. If any information is found to be privileged or protected in accordance with the procedures described herein, all copies of the information shall be returned or destroyed.

8. Any analyses, memoranda, notes or portions thereof that were internally generated and contain or were based upon the item(s) listed in the Clawback Notice shall immediately be sequestered, and shall be destroyed in the event that (a) the receiving party does not contest that the information is privileged or subject to other protection pursuant to paragraph 6 above, or (b) the Court rules that the information is privileged or otherwise protected. Such analyses,

memoranda, notes, or portions thereof may only be removed from sequestration and returned to its intended purpose in the event that (a) the producing party agrees in writing that the information is not privileged or otherwise protected, or (b) the Court rules that the information is not privileged or otherwise protected.

9. If, during a deposition, a producing party claims that a document being used in the deposition (e.g., marked as an exhibit, shown to the witness, or made the subject of examination) contains material that is subject to the attorney-client privilege, the attorney work product doctrine, or other protection, the producing party may (a) allow the document to be used during the deposition without waiver of any claim of privilege or other protection; (b) instruct the witness not to answer questions concerning the parts of the document containing privileged or protected material; or (c) object to the use of the document at the deposition to the extent the entire document is privilege or protected, in which case no testimony may be taken relating to the document during the deposition until the matter is resolved by agreement or by the court. If the producing party allows the examination concerning the document to proceed consistent with this paragraph, all parties shall sequester all copies of the inadvertently produced document. As to any testimony subject to a claim of privilege or other protection, the producing party shall serve a Clawback Notice within five (5) business days of the deposition's conclusion, after which the parties shall follow the procedures set forth in paragraphs 5 and 6. With respect to any document or testimony that is the subject of a Clawback Notice that is sent more than twenty (20) days after the conclusion of the deposition, the asserted privilege or protection will be deemed as waived, subject to paragraph 2. Pending determination of the clawback dispute, all parties with access to the deposition transcript shall treat the relevant testimony in accordance with paragraph 5.

10. If the producing party instructs the witness not to answer or provide testimony in accordance with 9(b) or (c), which is later determined not to be privileged, the producing party will remedy the lost opportunity to obtain discovery, by way of reopened deposition or such other means to which the parties may agree, following meet-and-confer efforts. At the meet and confer, the parties must discuss whether another deposition is genuinely necessary and (if so) what the proper scope, length, and subject matter of the resumed deposition is. Any resumed deposition must be proportional to the improperly invoked privilege. If the parties cannot come to an agreement, they will submit that dispute to the court.

11. If a receiving party uses produced material in a brief or at a hearing, and the producing party has not served a Clawback Notice in advance of the briefing event or hearing, the producing party shall serve a Clawback Notice within five (5) business days of the briefing event or hearing. Thereafter, the procedures set forth in paragraphs 5 and 6 shall apply. With respect to any produced material used in a brief or at a hearing that is the subject of a Clawback Notice that is sent more than twenty (20) days after the filing of the brief or conclusion of the hearing, the asserted privilege or protection will be deemed as waived, subject to paragraph 2.

12. This Stipulation does not preclude a party from voluntarily waiving any claims of privilege or protection. The provisions of Fed. R. Evid. 502(a) apply when a party uses privileged or other protected information to support a claim or defense.

13. When the producing party has asserted a Clawback Notice regarding privilege in a document, the producing party shall use best efforts to identify substantively duplicative privileged evidence in other produced documents and notify all other parties of those documents within 14 days.

C. Privilege Logging.

14. Unless otherwise provided in this Order, any document falling within the scope of any request for production or subpoena that is withheld on the basis of a claim of attorney-client privilege, work product, or any other claim of privilege or immunity from discovery is to be identified by the producing party on a privilege log, which the producing party shall produce in Excel format.

15. Within thirty (30) days of each production of documents or ESI, the producing party shall provide a privilege log or logs concerning any information that has been redacted or withheld in whole or in part from that production. The following documents presumptively need not be included on a privilege log:

- a. Attorney-client privileged communications between a party and its counsel on or after December 20, 2019; or
- b. Attorney work product created on or after December 20, 2019.

16. The privilege log shall set forth the privilege or protection relied upon and specify separately for each document the following to the extent such information is available from the metadata of the document:

- a. Bates-number range, or if no Bates-number range, a unique identifier;
- b. Family relationship, if applicable (i.e. identification of parent emails and all attachments)
- c. A description of the document, including the factual basis sufficient to support the claim that the document is privileged and/or protected;
- d. The names of the author(s);
- e. The names of all addressees and recipients, including copies (“ccs”) and blind copies (“bccs”);

- f. The document date;
- g. An indication of whether the document has been produced in redacted form or withheld in its entirety; and
- h. The privilege designation (attorney-client; attorney work product; joint defense and/or common interest, etc.).

17. Attachments to emails shall be logged as separate documents on the log, with family relationships identified. A party shall only be required to include one entry on the privilege log to identify each family of non-email files that are withheld in their entirety for privileged (parent document that has embedded objects or attachments).

18. Attorneys or their staff must be identified on the log with an asterisk (or similar notation).

19. Where multiple email messages are part of a single chain or “thread,” a party is only required to include on a privilege log the most inclusive message (“Last In Time Email”) and need not log earlier, less inclusive email messages or “thread members” that are fully contained within the thread, provided that the log entry includes the names of the authors, addressees, and recipients (including copies and blind copies) for all thread members (i.e., not limited to the last message in the thread), that the description of the thread include the factual bases sufficient to support the claim of privilege for each thread member over which privilege is asserted, and that the log entry include the privilege designations applicable to any thread members. This inclusive email and any unique attachments found in the thread which a party claims is entirely privileged may be logged in a single entry. For the avoidance of doubt, an email chain will only be treated as a single thread if it consists of the same participants throughout the message; if participants are

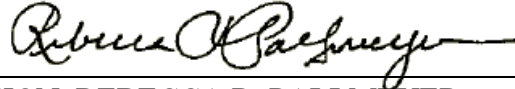
added or removed in the course of a chain, the emails resulting from that addition or removal will be treated as separate threads and would be the subject of a separate log entry.

20. Subject to the parties' good faith meet and confer discussions regarding the specifics as to the proposed categories to be logged as such, documents withheld on the basis of privilege and/or work product protection may be grouped in categories based on content, and a categorical privilege log prepared, including a description of the nature or general subject matter of the communications for each category sufficient to support the claim that the documents within the category are privileged and/or protected. The categorical log shall also include the metadata listed in paragraphs 14(a), (b), and (d)-(g) for each document within the category. Notwithstanding the forgoing, the decision to log documents on a categorical basis does not waive party's right to adjudicate any challenge(s) to privilege on a document-by-document basis.

21. After the receipt of a privilege log, any Party may dispute a claim of privilege. Prior to seeking Court intervention, the Party disputing, questioning, or otherwise objecting to a claim of privilege shall provide in writing the identification of the documents or category of documents for which it questions the claim of privilege and the reasons for disputing, questioning, or otherwise objecting to the privilege designation. Within fourteen (14) days, the Party that designated the documents as privileged will provide a written response explaining the basis for its claim or privilege, or if applicable, de-designating documents as privilege and producing such documents in accordance with this Order. Thereafter, if the Parties continue to disagree, they will then then meet and confer in good faith as to the claims of privilege. If agreement has not been reached after fourteen (14) days, the parties shall submit the dispute to the MDL Court for resolution.

IT IS SO ORDERED.

Dated: August 18, 2022

A handwritten signature in black ink, appearing to read "Rebecca R. Pallmeyer", written in a cursive style. The signature is positioned above a horizontal line.

HON. REBECCA R. PALLMEYER
UNITED STATES DISTRICT JUDGE