

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KELLY A. SHURE

*

*

Plaintiff

*

V.

*

CIVIL ACTION FILE NO.:

*

1:16-CV-00650-RWS

*

GS ROCKLEDGE, LLC, GREP
SOUTHEAST, LLC.

*

*

*

Defendants.

*

NONPARTY SPINE CENTER ATLANTA’S BRIEF IN SUPPORT OF ITS
MOTION FOR RECONSIDERATION OF THE COURT’S APRIL 23, 2018
ORDER TO COMPEL

COMES NOW Nonparty Orthopaedic and Spine Surgery Center of Atlanta d/b/a Spine Center Atlanta (hereafter “SCA”), by and through its undersigned counsel, and files this Brief in Support for its Motion for Reconsideration of the Court’s April 23, 2018 Order to Compel (“Order”). SCA respectfully requests that this Court reconsider and amend its Order as follows: (1) to include with it, an order protecting from public disclosure, the confidential and proprietary pricing terms within the agreement between SCA and Pro-Med Capital, LLC; (2) to greater clarify the scope of its Order in regard to the number of additional custodians whose emails could potentially be searched for ESI of their communications with plaintiff or her counsel (or to shift the financial burden and deadlines for a broader search); and (3) to provide direction to SCA in regard to the

specific SCA employee custodians whose personal cellular phones must be searched for text messages they may have exchanged with plaintiff or her counsel. SCA also states herewith that it has demonstrated compliance with the Court's Order, and demonstrates same with its Exhibit "A," attached to the Motion.

ARGUMENT

Under the Local Rules, "[m]otions for reconsideration shall not be filed as a matter of routine practice[,]" but rather, only when "absolutely necessary." [LR 7.2\(E\), N.D. Ga.](#) Such absolute necessity arises where there is "(1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact." [Bryan v. Murphy, 246 F. Supp. 2d 1256, 1258-59 \(N.D. Ga. 2003\)](#). A motion for reconsideration "may not be used to present the court with arguments already heard and dismissed or to repackage familiar arguments to test whether the court will change its mind." [Id. at 1259](#). Nor may it be used "to offer new legal theories or evidence that could have been presented in conjunction with the previously filed motion or response, unless a reason is given for failing to raise the issue at an earlier stage in the litigation." [Adler v. Wallace Comput. Servs., Inc., 202 F.R.D. 666, 675 \(N.D. Ga. 2001\)](#). Finally, "[a] motion for reconsideration is not an opportunity for the moving party . . . to instruct the court on how the court 'could have done it better' the first time." [Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs, 916](#)

F. Supp. 1557, 1560 (N.D. Ga. 1995). Ultimately, though, a district court “has broad discretion in determining whether to grant a motion [for reconsideration].” Baker v. Dorfman, 239 F.3d 415, 427 (2d Cir. 2000). Here, SCA moves not based on any intervening new law or other need to correct clear error—but rather to seek direction and discretion from the Court to alter the Order somewhat, now that the practical burdens pertaining to compliance have come to light subsequent to the issuance of the Order.

1. Dissemination Of The Pro-Med Contract Should Be Limited

In accordance with the Order, SCA must produce “[i]ts complete agreement with lawsuit funding company Pro-Med Capital, LLC, pertaining to the instant lawsuit.” SCA has produced said document; however, as part of its contract with Pro-Med Capital, LLC (hereafter “Pro-Med”), SCA has an express obligation to prevent the distribution of the contents of the contract beyond the bounds of this Court, as the contract contains potential Trade Secrets—and thus same was partially redacted.

To protect the contents of the agreement, which are proprietary to nonparty Pro-Med, “[t]he Court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including...requiring that a trade secret...or commercial information not be revealed or be revealed only in a specified way.” Fed. R. Civ. P. 26. In deciding

whether to grant protection, the Court should consider wither the potential harm to Pro-Med is outweighed by Defendants' need for disclosure. Direct Purchaser Class v. Apotex Corp., No. 16-62492-MC, 2017 U.S. Dist. LEXIS 159585, at *12 (S.D. Fla. May 15, 2017).

Here, Pro-Med's privacy rights prevail, as the contract will be disclosed to the parties to this case with an arguable need to review same—but those same parties have no legitimate cause to thereafter spread those proprietary contents further afield. The Pro-Med contract contains confidential and proprietary information (for example, the different rates it gives to different clients) that could cause Pro-Med business harm if such information became available to the public.

In addition, SCA's contract with Pro-Med is collateral to the issues in this case. Defendants seek the Pro-Med contract in the hope of discovering evidence indicating the treating physician is an investor in the plaintiff's lawsuit. Pro-Med's interest in maintaining the confidentiality of its proprietary pricing information outweighs any interest the parties could have in the public filing of a document, whose sole collateral purpose is the impeachment of a witness.¹ Consequently, SCA requests that the Court issue an appropriate protective order governing the

¹ Should this same issue arise in other cases, then discovery of the SCA contract with Pro-Med in those courts would obviate any argument here, that the contract could have value in cases other than the one at bar.

further use and dissemination of the Pro-Med contract, so it can then produce an unredacted copy of same.

2. The Court Should Give Direction As To Which Additional Custodians May Be Affected By the Order To Produce Communications (Emails And Text Messages) Between SCA And Plaintiff.

In accordance with the Order, SCA is searching for and producing (or has already produced) the email and text message communications between Kelly Shure or her counsel, and SCA employees who were at all likely to have engaged in those communications. SCA does not believe that the Court intended that SCA search all its state-wide employees who would never have communicated with the Plaintiff or her counsel; but to be certain of its obligations, SCA moves for reconsideration to make clear its burden.

SCA, along with its affiliates, has offices and employees across the state of Georgia, each offering a wide range of different medical services. The vast majority of these offices have never treated or (to the best of our knowledge) communicated with the Plaintiff. Having searched for responsive material in line with the Court's prior order, SCA identified several of its employees who had non-treatment related communications with plaintiff or her counsel. Those employees included Rich Merritt, Tu Tran, Tammy Blizzard, Michael Glantz, Michelle Watson, and Kimberly Franklin. Of the six individuals listed, Rich Merritt and

Michelle Watson are no longer SCA employees. The remaining individuals remain employed by SCA in various capacities.

SCA requests that the Court provide clarification as to the extent of its custodian records search obligation. SCA contends that it is well within compliance with the Order so long as those six employees' files are thoroughly searched for materials responsive thereto.² If the Court instead would like SCA to search its entire server, or the email accounts for all current and former SCA employees who may have had the ability to communicate with plaintiff or her counsel, then SCA respectfully requests that the order be modified to not only postpone final compliance by two additional months, but also that the additional cost associated with this additional ESI search (scope) be borne by Defendants—the requesting party.³

² To ensure a thorough search for any responsive emails, and out of an abundance of caution, SCA enlisted the services of a third party IT vendor. SCA plans to supplement its production of material responsive to this Court's order with the vendor's findings (and declaration of its search protocol and parameters) as soon as they are received.

³ In relation to costs, Defendants submitted to SCA an extensive list of documents they felt would be responsive to the Court's order to produce any electronic Centricity data demonstrating alterations of Kelly Shure's bills. SCA, in the spirit of cooperation, produced all suggested documents save any SQL Server Backups. After consultation with Centricity staff, it was determined that the production of the SQL Server Backups would take six to eight weeks and cost SCA one hundred and ninety (\$190) dollars per hour. Should the Defendants demand these server backups, SCA requests the Court place the costs of that additional expansive investigation on the requesting party – the Defendants.

In addition, SCA does not provide its employees with cellular phones for their business use. Hence, the Order, as currently written, would require SCA to seek and receive permission from its employees for a search of each of their personal cell phones. As mentioned, SCA has only been able to identify six employees who had (non-treatment) contact with plaintiff or her counsel. Of those, four remain SCA employees. SCA requests that the Order be modified to reflect its complete compliance by asking that those four employees perform searches targeted to find any text messages between them and plaintiff or her counsel – and to explain those searches in declaration form.

For the foregoing reasons, SCA respectfully requests this Court reconsider and amend its Order to provide a protective order to prevent the public distribution of SCA's unredacted (pricing) contract with Pro-Med. SCA also requests that the Court further delineate the scope of its Order so as to expressly permit SCA's compliance by performing ESI searches of only the six employees' files who have been shown thus far to have had (non-treatment related) contact with plaintiff or her counsel; and further that SCA only be required to ask that its four (of those six) current employees search their personal cellular devices for responsive text messages.

Respectfully submitted this 7th day of May, 2018.

MOORE INGRAM JOHNSON & STEELE, LLP

/s/ Jeffrey A. Daxe

Jeffrey A. Daxe

Ga. Bar No. 213701

G. Bowie Link

Ga. Bar No. 432128

Attorneys for Nonparty SCA

326 Roswell Street, Ste. 100

Marietta, GA 30060

Telephone: (770) 429-1499

jad@mijs.com

gblink@mijs.com

LOCAL RULE 7.1 COMPLIANCE CERTIFICATE

Pursuant to L.R. 7.1D, this is to certify that the foregoing NONPARTY SPINE CENTER ATLANTA'S BRIEF IN SUPPORT FOR ITS MOTION FOR RECONSIDERATION OF THE COURT'S APRIL 23, 2018 ORDER TO COMPEL complies with the font and point selections approved by the Court in L.R. 5.1B. The foregoing document was prepared on a computer using the Times New Roman font (14 point).

This 7th day of May, 2018.

MOORE INGRAM JOHNSON & STEELE, LLP

/s/ Jeffrey A. Daxe _____

Jeffrey A. Daxe

Ga. Bar No. 213701

G. Bowie Link

Ga. Bar No. 432128

Attorneys for Nonparty SCA

Emerson Overlook
326 Roswell Street, Ste. 100
Marietta, GA 30060
Telephone: (770) 429-1499
Facsimile: (770) 429-8631
jad@mijs.com
gblink@mijs.com

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2018, I electronically filed a true and correct copy of NONPARTY SPINE CENTER ATLANTA'S BRIEF IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF THE COURT'S APRIL 23, 2018 ORDER TO COMPEL with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

Zach Matthews

Charles Blaska

This 7th day of May, 2018.

MOORE INGRAM JOHNSON & STEELE, LLP

/s/ Jeffrey A. Daxe _____

Jeffrey A. Daxe

Ga. Bar No. 213701

G. Bowie Link

Ga. Bar No. 432128

Attorneys for Nonparty SCA

Emerson Overlook
326 Roswell Street, Ste. 100
Marietta, GA 30060
Telephone: (770) 429-1499
Facsimile: (770) 429-8631
jad@mijs.com
gblink@mijs.com