Alexander Infusion, LLC v Professional Home Care Servs., Inc.
2013 NY Slip Op 34189(U)
December 9, 2013
Supreme Court, Nassau County
Docket Number: 006855-09
Judge: Timothy S. Driscoll

ORIGINAL

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ALEXANDER INFUSION, LLC,

Plaintiff,

-against-

PROFESSIONAL HOME CARE SERVICES, INC.,

Defendant.
----------x

TRIAL/IAS PART: 16
NASSAU COUNTY

Index No: 006855-09
Motion Seq. No. 2
Submission Date: 10/23/13

Papers Read on this Motion:

Notice of Motion.....x
Affirmation in Support and Exhibits.....x
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This matter is before the court on the motion by Plaintiff Alexander Infusion LLC ("Alexander Infusion" or "Plaintiff) filed September 21, 2012 and submitted October 23, 2013. [1] For the reasons set forth below, the Court denies the motion.

[1] Plaintiff initially filed this motion, which Defendant refers to as the "Original Motion" (Brown Aff. in Opp. at ¶ 2), on September 20, 2012. The Court subsequently permitted Plaintiff to supplement its motion papers, and Plaintiff refers to the motion and supplemental papers as the "Renewed Motion" (*id.*).

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3126, conditionally striking Defendant's Answer to Plaintiff's Complaint and dismissing Defendant's counterclaim against Plaintiff with prejudice based on Plaintiff's contention that Defendant has refused to answer Plaintiff's interrogatories, produce emails relevant to the action, and appear for its examination before trial, in violation of the Preliminary Conference Order ("PC Order") and contrary to the representations of counsel for Defendant ("Defendant's Counsel") during the PC and Compliance Conferences held by the Court.

Defendant Professional Home Care Services, Inc. ("PHCS" or "Defendant") opposes the motion.

B. The Parties' History

The parties' history is outlined in detail in prior decisions ("Prior Decisions") of the Court dated October 26, 2009 ("2009 Decision") and June 12, 2013 ("2013 Decision") and the Court incorporates the Prior Decisions by reference as if set forth in full herein. In the 2009 Decision, the Court denied Defendant's prior motion to dismiss the Second Cause of Action in the Complaint. In the 2013 Decision, the Court granted Defendant's prior motion for an Order compelling non-party Hodgson Russ LLP to comply with a subpoena and produce the settlement agreement executed in the related action of *Chipetine, Neu & Silverman, LLP v. Alexander Infusion, LLC d/b/a Avanti Health Care and New Hyde Realty Group, LLC*, Nassau County Supreme Court Index Number 10361-09, and denied Plaintiff's prior cross motion for an Order sealing the papers on Defendant's motion to compel and Plaintiff's cross motion to seal.

As noted in the Prior Decision, the Complaint alleges that on or about June 20, 2008, Alexander Infusion and PHCS entered into a written agreement ("Purchase Agreement"), pursuant to which, *inter alia*, PHCS would acquire all the membership interests in Alexander Infusion, and Alexander Infusion would assign certain of its licenses and leases to PHCS. The Complaint contains two (2) causes of action. The first cause of action is for breach of contract, for PCHS' allegedly unreasonable refusal to close under the Purchase Agreement. The second cause of action is for common law fraud based on alleged misrepresentations by PHCS on which

Alexander Infusion reasonably relied, to its detriment, in deciding to enter into the Purchase Agreement.

In support of the motion now before the Court, in his initial Affirmation in Support, counsel for Plaintiff ("Plaintiff's Counsel") affirms that Plaintiff has complied with its pre-trial disclosure obligations, which has included its production of over 80,000 pages of documents, service of answers to Defendant's interrogatories and provision to Defendant's Counsel of the curriculum vitae of Plaintiff's expert witness. Plaintiff's Counsel affirms that Defendant has never proposed dates for the examination before trial of Plaintiff.

Plaintiff's Counsel affirms that the Court held the PC on December 9, 2009, and provides a copy of the PC Order (Ex. C to Johnson Aff. in Supp.). Pursuant to the PC Order, Defendant's answers to Plaintiff's interrogatories and Defendant's responses to Plaintiff's document demands were due not later than sixty (60) days after service of Plaintiff's discovery requests on Defendant's Counsel.

Plaintiff's Counsel affirms that Plaintiff's First Set of Interrogatories to Defendant (Ex. D to Johnson Aff. in Supp.) were served on Defendant's Counsel on March 12, 2010 and, pursuant to the PC Order, Defendant's response was due no later than May 14, 2010. By email dated April 15, 2011 (*id.* at Ex. E), Defendant's Counsel assured Plaintiff's Counsel that the response would be provided the following week. Moreover, at compliance conferences held before the Court on March 15, July 6, September 28 and December 19, 2011, Defendant's Counsel assured Plaintiff's Counsel that responses to Plaintiff's interrogatories were forthcoming. Plaintiff's Counsel affirms, however, that he has not received that response.

Plaintiff's Counsel affirms, further, that Plaintiff's First Notice of Discovery and Inspection to Defendant ("Document Requests") was served on Defendant's Counsel on March 3, 2010 and, pursuant to the PC Order, responses were due no later than May 7, 2010. On or about September 8, 2010, Defendant's Counsel made an electronic document production to Plaintiff's Counsel totaling 626 pages. On or about May 11, 2011, Defendant served its Objections and Responses to Plaintiff's First Notice of Discovery and Inspection (Ex. F to Johnson Aff. in Supp.).

Plaintiff's Counsel affirms that Document Requests 26, 27, 28 and 30 seek 1) all documents concerning, relating to or evidencing the financial ability of Defendant to perform or

fulfill its obligations under the Purchase Agreement, 2) all documents sent by Defendant to MBF Healthcare Partners, LP ("MBF") concerning Plaintiff or the Purchase Agreement, 3) all documents received by Defendant from MBF concerning Plaintiff or the Purchase Agreement, and 4) all documents concerning, relating to or evidencing acquisitions by Defendant of business entities operating in the health care industry between July 1, 2008 and December 31, 2009.

Plaintiff's Counsel affirms that Defendant has not produced 1) documents reflecting Defendant's financial ability to close on the Purchase Agreement, and 2) emails that Defendant exchanged with MBF and Kohlberg Investors V, L.P. ("KKR") regarding a large deal that MBF and KKR were doing ("MBF Deal"), of which the Purchase Agreement was a small part. Plaintiff's Counsel submits that "[p]resumably, Defendant intended to fund its acquisition of Plaintiff out of the MBF Deal and intended to close on the Agreement only if the MBF Deal also closed" (Johnson Aff. in Supp. at ¶ 15), and further submits that the documents that Defendant has produced "shed no light on the fate of the MBF Deal or on what role the MBF Deal played in Defendant's decision to attempt to terminate the Agreement" (*id.*).

Plaintiff's Counsel affirms that at the Compliance Conference on July 6, 2011, counsel for the parties discussed whether Defendant would be producing additional emails and other correspondence regarding the MBF Deal and its impact on the Purchase Agreement. Defendant's Counsel agreed to follow up with Defendant regarding this documentation, and counsel for the parties subsequently communicated via email regarding this matter (Exs. G, H and I to Johnson Aff. in Supp.). In his email to Plaintiff's Counsel dated November 10, 2011 containing the subject line "RE: Correspondence regarding the MBF Healthcare deal and defendant's interrogatory answers" (Ex. I to Johnson Aff. in Supp.), Defendant's Counsel advised Plaintiff's Counsel that "I think we can probably work this out informally. My understanding, though, is that no documents meeting your description exists (i.e., the decision to terminate the purchase agreement was not related to or influenced by outside factors). I will dig into this a little bit and see if I can come up with something." Plaintiff's Counsel affirms that he heard nothing further from Defendant's Counsel regarding the Document Requests since November 10, 2011. Plaintiff's Counsel also affirms that Defendant has not produced any documents to support its counterclaim and its alleged counterclaim damages.

Plaintiff's Counsel affirms that Plaintiff served its Notice of Deposition on Defendant's counsel on November 30, 2009 (Ex. J to Johnson Aff. in Supp.). Defendant's Counsel, however, has not proposed dates for that deposition, designated the representative of Defendant who will be testifying at that deposition, or identified former employees of Defendant who will not appear voluntarily and, therefore, must be subpoenaed.

Plaintiff's Counsel affirms that the Court held a settlement conference on March 19, 2012, but the parties never discussed the staying of discovery or rescheduling of discovery deadlines. Defendant has not produced the documents to which Defendant's Counsel's November 10, 2011 email referred, and Defendant has not responded to Plaintiff's interrogatories.

In his Supplemental Affirmation dated September 6, 2013, Plaintiff's Counsel makes reference to 1) Defendant's production of financial documents ("Financial Statements") (*see* Ex. A to Johnson Supp. Aff. in Supp.) which demonstrate that, as of October 31, 2008, Defendant had $2,369,280 in available cash with which to pay the $11 million cash portion of the closing price in the Purchase Agreement, b) paragraph 10.2 of the Purchase Agreement (*id.* at Ex. B) titled "Publicity," 3) a written consent by MBF to the Purchase Agreement, and to the transaction between Plaintiff and Defendant (*id.* at Ex. C), 4) a February 5, 2008 commitment letter from Jefferies Finance LLC ("Jefferies") to provide up to $155 million of financing to MBF to be used, *inter alia*, to acquire Critical Homecare Solutions Holdings, Inc. ("CHS Holdings"), Defendant's corporate parent, from Kohlberg Investors V, L.P. ("Commitment Letter") (*id.* at Ex. D), 5) a June 19, 2008 email from Nitin Patel of PHCS to Mary Jane Graves ("Graves"), the former chief financial officer of Defendant, in which he asked "If the MBF thing is uncertain - how badly do we need Avanti?" (*id.* at Ex. E), 6) portions of the June 12, 2013 deposition testimony of Graves (*id.* at Exs. F and L), 7) portions of the March 6, 2013 deposition testimony of Robert Cucuel ("Cucuel"), the former chief executive officer of Defendant (*id.* at Exs. H and K), 8) documents produced by Defendant listing at least seven (7) different "Kohlberg" entities (*id.* at Ex. I), and 9) portions of the February 6, 2013 deposition testimony of Pietro Piacquadio ("Piacquadio"), the managing member of Plaintiff (*id.* at Ex. J).

Plaintiff submits that 1) neither the Financial Statements nor Defendant's other document productions include documents showing an amount available for borrowing from Defendant's

credit facilities; 2) neither Cucuel nor Graves identified exactly which "Kohlberg" entity made or would have made additional equity investments; 3) Defendant has never identified an individual, or individuals, who are or were employed by a "Kohlberg" entity on whose testimony it intends to rely at trial; 4) Defendant's document productions do not contain documents evidencing a commitment by any "Kohlberg" entity to invest in Defendant or Defendant's corporate parent, Critical Homecare Solutions, Inc. ("CHS") and thereby allow Defendant to close on the Purchase Agreement; 5) Plaintiff is unable to determine, from the documents provided by Defendant, which if any of the Kohlberg entities mentioned on those documents is the "Kohlberg" entity to which Cucuel and Graves referred and, therefore, Plaintiff has been unable to issue subpoenas to obtain information on which Defendant may rely in its defense of this action; 6) Defendant's document productions do not include any communications regarding whether or not the MBF transaction closed, although Cucuel and Graves testified at their depositions that it did not; and 7) Defendant's document productions do not include any communications with MBF, with Jefferies or with any "Kohlberg" entity after October 27, 2008.

In opposition, Defendant's Counsel affirms that Plaintiff's motion discusses "two somewhat contemporaneous, but otherwise unrelated transactions" (Brown Aff. in Opp. at ¶ 7). On February 6, 2008, MBF entered into an agreement to acquire CHS, the parent company of PHCS ("MBF Agreement") (Ex. 5 to Brown Aff. in Opp.). Defendant produced the MBF Agreement on January 18, 2013. At the same time that the MBF Agreement was being executed, PHCS was pursuing the execution of an agreement to acquire Plaintiff for $12.125 million. To avoid the risk that PHCS' acquisition of Plaintiff ("Avanti Acquisition") [2] would adversely affect the MBF Agreement, CHS obtained MBF's consent that the proposed Avanti Acquisition would not constitute a breach of the MBF Agreement ("MBF Consent"), and Defendant produced the MBF Consent on May 20, 2011. In addition, PHCS obtained a "carve out" to the draft Avanti Purchase Agreement (Brown Aff. in Opp. at ¶ 13) that would allow PHCS to disclose details of the Avanti Transaction to MBF, as evidenced by emails that Defendant produced on May 20, 2011.

Defendant addresses Plaintiff's claim that PHCS has failed to produce sufficient documents evidencing 1) PHCS' ability to close the Avanti Acquisition, 2) CHS' intent to rely

[2] Defendant refers to Plaintiff as "Avanti."

on the MBF transaction to fund the Avanti transaction, and 3) post-Avanti-transaction termination correspondence. Counsel for Defendant affirms that PHCS has "expended considerable effort to collect all relevant documents in this matter" (Brown Aff. in Opp. at ¶ 21) and provides details regarding those efforts (*see* ¶¶ 22-31 to Brown Aff. in Opp.). Defendant's Counsel affirms that, during the process of collecting and producing documents, Kohlberg & Co. sold CHS, the parent company of PHCS, to Bioscrip, Inc. ("Bioscrip"), resulting in a large turnover in personnel and none of the individuals affiliated with Bioscrip when initial document collections were conducted are still with the company. Defendant's Counsel affirms that on May 20, 2011, PHCS produced additional documents which included documents reflecting how PHCS intended to fund the Avanti Acquisition (*see* Exs. 15 and 16 to Brown Aff. in Opp.).

Defendant's Counsel affirms that, to address the concerns raised by Plaintiff at the July and December 2011 conferences before the Court, PHCS "revisited" its document collection efforts (Brown Aff. in Opp. at ¶ 35) and determined that certain documents evidencing a) PHCS' financial ability to close the Avanti Acquisition in 2008, and b) PHCS' counterclaim damages, may have been inadvertently missed in the original document collection and production efforts. PHCS undertook a search to locate these documents. During this search, Avanti and BioScrip entered into settlement discussions that would potentially resolve this litigation and, while settlement discussions were ongoing, "the parties effectively suspended discovery" (Brown Aff. in Opp. at ¶ 37). After settlement discussions proved unfruitful, Avanti never contacted PHCS or the Court about setting new discovery deadlines.

Defendant's Counsel submits that, as outlined in the supporting affirmation of Plaintiff's Counsel, the theories that underlie Plaintiff's instant motion are that 1) PHCS terminated the Avanti Acquisition because it lacked the financial resources to close ("Liquidity Theory"); and 2) PHCS intended to fund its acquisition of Avanti out of the MBF Deal, and intended to close on the Purchase Agreement only if the MBF Deal also closed ("MBF Theory"). Counsel for Defendant affirms that Bioscrip was subsequently able to locate documents related to PHCS' 2008 liquidity, which Defendant produced on November 20, 2012, along with a letter advising Avanti that PHCS had been unable to locate additional MBF-related documents at that time. Defendant also outlines the CHS Financial Statements that Defendant produced on November 20, 2012 (Brown Aff. in Opp. at ¶¶ 44-46).

Following a December 3, 2012 status conference with the Court, PCHS sought to avoid any future discovery disputes by producing the MBF transactional documents. Counsel for Defendant provides details regarding this process (Brown Aff. in Opp. at ¶¶ 55 to 59), which included difficulties arising from Bioscrip's IT staff's inability to locate the "legacy-CHS documents relating to the MBF transaction" (*id.* at ¶ 55).

On January 18, 2013, PHCS made a production ("January 18, 2013 Production") consisting of 1) non-privileged but non-responsive documents from the original collection of electronically stored information ("ESI") mentioning MBF, 2) responsive, non-privileged documents found in data that BioScrip's IT department could not confirm had been previously collected; 3) responsive, non-privileged documents relating to PHCS' counterclaim damages, and 4) responsive, non-privileged documents drawn from paper files discovered during subsequent searches. Defendant's Counsel affirms that the January 18, 2013 Production included documents that mention MBF, but make no mention of Avanti and, therefore, Plaintiff deemed the January 18, 2013 Production unresponsive. The MBF Agreement and Commitment Letter were included in the January 18, 2013 Production.

Defendant's Counsel affirms that on January 30, 2013, PHCS made a final production consisting of responsive, non-privileged documents drawn from additional paper files while BioScrip was vacating CHS' former corporate headquarters in Pennsylvania. PHCS' total document production now exceeds 30,000 pages. BioScrip continued to search for the MBF transactional documents, but was unable to locate them. All MBF transactional documents that made reference to Avanti, however, were produced at a time when the documents could still be located. Defendant's Counsel affirms that BioScrip's IT department "expended considerable resources in an effort to locate such documents" (Brown Aff. in Opp. at ¶ 63). Defendant's Counsel submits, further, that during their depositions, PHCS' witnesses "uniformly offered testimony contradicting both the Liquidity Theory and the related MBF Theory" (*id.* at ¶ 64).

Defendant submits that Plaintiff ignored Defendant's offer to resolve the discovery disputes. Defendant's Counsel affirms that, at the conclusion of the April 18, 2013 compliance conference, despite contrary deposition testimony of PHCS witnesses, Plaintiff again raised its concerns regarding PHCS' document collection with regard to the Liquidity Theory and the MBF Theory. The Court suggested that Plaintiff take the deposition of someone involved in

PHCS' document collection efforts. By letter dated May 16, 2013 (Ex. 20 to Brown Aff. in Opp.), Defendant's Counsel responded to Plaintiff's request to schedule such a deposition. In that letter, Counsel for Defendant contended, and explained its contention, that a document collection deposition was unwarranted and futile but, in an effort to avoid motion practice, suggested the following:

> Avanti remains free to subpoena documents from non-parties that may have participated in the MBF Transaction such as [Jeffries], CIT and/or MBF itself. Provided Avanti opts not to seek to resolve this dispute through further motion practice, in the unlikely event that Avanti's efforts: 1) turn up responsive, relevant documents evidencing a deeper connection between the MBF Transaction and Avanti Transaction (2) that reasonably should have been maintained and produced by PHCS, then PHCS would agree to pay Avanti's reasonable costs related to Avanti's non-party discovery. On the other hand, PHCS has already borne more costs than it should have borne chasing down documents related to Avanti's flawed MBF Theory. As such, if no such documents are located, Avanti would pay for PHCS' reasonable costs related to Avanti's non-party discovery.
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> Ex. 20 to Brown Aff. in Opp. at p. 5.

Defendant's Counsel affirms that Plaintiff did not respond to PHCS' offer as outlined in the May 16, 2013 letter, did not serve subpoenas on non-parties and did not schedule a deposition regarding PHCS' document collection efforts. PHCS sent a follow-up letter dated July 22, 2013 (Ex. 21 to Brown Aff. in Opp.), and Plaintiff responded by email dated July 22, 2013 (*id.* at Ex. 22). In its July 22, 2013 email, Plaintiff reaffirmed its position "regarding the discoverability of all documents connecting the PHCS transaction with Avanti to the transaction between CHS and MBF," but did not address PHCS' offer regarding non-party discovery as outlined in its May 16, 2013 letter..

Defendant's Counsel affirms that the parties appeared before the Court for a Compliance Conference on July 23, 2013 and provides a transcript of those proceedings (Ex. 23 to Brown Aff. in Opp.). At that conference, Defendant advised the Court of its position that Plaintiff remained free to subpoena Kohlberg regarding its "equity commitment" (Tr. at p. 8), and that Defendant had offered to pay the costs of that subpoena, but Plaintiff had not done so. The Court directed Plaintiff to file updated motion papers regarding its outstanding discovery issues. Defendant submits that the identity of both Kohlberg & Co., and specific individuals affiliated with Kohlberg who would be expected to have relevant information, is apparent from documents

produced by the parties in this action, and Defendant provides copies of such documents (Exs. 19, 24, 25 to Brown Aff. in Opp.), as well as a copy of Kohlberg's publicly viewable website (*id.* at Ex. 26).

In further opposition to the motion, Gordon H. Woodward ("Woodward"), a Partner in and the Chief Investment Officer ("CIO") of Kohlberg & Company, L.L.C. ("Kohlberg & Co."), affirms that he is responsible for originating and executing new investments and monitoring the current portfolio, and manages the approval process for new investments. Woodward joined Kohlberg & Co. in 1996, and has been CIO of Kohlberg & Co. since 2010, and a Partner and member of the Investment Committee since 2001.

Woodward affirms that, at the time of the events underlying this action, he was a member of the Board of Directors ("BOD") of PHCS, and also served on the BOD of CHS, the parent company of PHCS, and on the BOD of CHS Holdings, the "ultimate parent" of PHCS and CHS (Woodward Aff. in Opp. at ¶ 4). Woodward affirms that he also serves on the BOD of Kohlberg & Co. Fund V investment fund ("Fund") which, at the time of the events underlying this action, owned a controlling interest in CHS Holdings. In 2010, the Fund sold that controlling interest to BioScrip while retaining a minority stake in the company. Woodward is currently a member of the BOD of BioScrip.

Woodward affirms that Kohlberg & Co. had a relationship with Cucuel, the President and Chief Executive Officer ("CEO") of CHS, by virtue of Cucuel's service as President and CEO of a Kohlberg Fund III portfolio company called American Homecare Supply ("AHS") from 1998 until its sale in 2002. In November of 2005, Cucuel "launched" CHS Holdings as a Fund portfolio company (Woodward Aff. in Opp. at ¶ 7), through investments from that Fund. CHS Holdings was formed "to take advantage of a consolidation opportunity in the highly-fragmented home infusion therapy services sector" (Woodward Aff. in Opp. at ¶ 7). CHS Holdings, through its subsidiary CHS, acquired two regional companies in 2006, specifically Specialty Pharma, Inc. ("SPI") (PHCS' parent company) and New England Home Therapies, Inc. ("NEHT"). Woodward oversaw the Fund's investments, including the investment in CHS Holdings. As a BOD member of CHS Holdings and its subsidiaries, and as a member of the executive committee, Woodward reviewed and participated in the approval of acquisitions made by CHS Holdings and its subsidiaries.

Woodward affirms that CHS' acquisitions were generally funded using CHS' credit facility, through additional equity infusions in CHS by the Fund, or by a combination of the two. Typically, in a "consolidation or roll-up investment" like AHS or CHS (Woodward Aff. in Opp. at ¶ 10), the portfolio company "buys smaller regional companies in a fragmented sector and consolidates those companies into a larger entity" (*id.*). As a Fund portfolio company, CHS Holdings and its subsidiaries "maintained a large pipeline of potential acquisition opportunities" (*id.* at ¶ 11).

Woodward provides details regarding the companies acquired by CHS Holdings and its subsidiaries between 2006 and 2010. At the time that PCHS terminated the Avanti Acquisition in October 2008, the Fund maintained approximately $161 million in equity capital that was available to invest in acquisitions for its portfolio companies, including CHS. Thus, the Fund had more than adequate funds to provide to PCHS to close the Avanti Acquisition. Moreover, after the termination of the Avanti Acquisition in 2008, but before its sale to BioScrip in 2010, CHS Holdings and its subsidiaries closed two additional transactions for a total purchase price of $13.9 million.

In his Supplemental Reply Affirmation dated October 18, 2013, Plaintiff's Counsel submits that, contrary to Defendant's contention in its Memorandum of Law in Opposition, Plaintiff's Counsel did inquire of Defendant's witnesses, during their depositions, regarding correspondence after October 27, 2008. Specifically, Plaintiff's counsel asked the witnesses whether anyone on behalf of Defendant had responded to an October 27, 2008 mail sent by Jerrold Silverman ("Silverman"), Plaintiff's former accountant who prepared financial statements required by the Purchase Agreement, and whether anyone acting on behalf of Defendant had communicated with Plaintiff after that date. That questioning produced no responses reflecting the existence of documents that Defendant was obligated to produce.

Plaintiff's Counsel submits, further, that Defendant never listed anyone from a Kohlberg entity, or its lenders or its corporate parent's lenders, as a trial witness in this action, "even though it clearly intends to rely on [Woodward's] testimony at trial in its case in chief on its counterclaims and in its defenses" (Johnson Supp. Reply. Aff. at ¶ 4). Plaintiff's Counsel contends that, based on the documents and testimony produced, Plaintiff could not determine whether Woodward was the appropriate person to depose and suggests that, at the conference on

July 23, 2013, Defendant's Counsel could have advised the Court that Woodward was a trial witness and agreed to produce him for his deposition. Plaintiff argues that it is not required to subpoena every entity and individual involved in the relevant transactions "to ferret out which of them and which documents in their books and records might conceivably be used by Defendant in its case in chief on its counterclaims or in its defenses" (*id.* at ¶ 6).

Plaintiff's Counsel affirms that Plaintiff has taken five (5) non-party witness depositions in this action. He advised Defendant's Counsel that he would be deposing Silverman, but Defendant's Counsel insisted on subpoenaing Silverman himself. Plaintiff's Counsel also affirms that he has spent months trying to locate Cynthia A. O'Sullivan, a former consultant to Defendant, to take her deposition, and has been pursuing other potential non-party witnesses, "with no success thus far" (Johnson Supp. Reply Aff. at ¶ 7).

C. The Parties' Positions

Plaintiff submits that the central issue in this action is whether Defendant properly terminated the Purchase Agreement or, rather, attempted to terminate it on grounds not set forth in the Purchase Agreement, possibly because it lacked the financial resources to close on the transaction. Plaintiff contends that the financial documents produced by Defendant, as well as deposition testimony of Defendant's witnesses, demonstrate that Defendant lacked the resources to pay the cash portion of the closing price in the Purchase Agreement. Defendant's witnesses also testified that Defendant was relying on Kohlberg to make an additional capital investment in CHS, which would allow Defendant to close on the Purchase Agreement. Plaintiff contends, however, that Defendant has not produced documents demonstrating that any Kohlberg entity committed to making that investment, although Plaintiff's document demands clearly requested the production of such documents. Plaintiff also argues that it has been unable to determine which Kohlberg entity Cucuel and Graves were referring to during their depositions. Plaintiff submits that Defendant was obligated to identify non-party witnesses on whose testimony it intends to rely at trial to support its defense that it would have received funding through Kohlberg's investment in CHS, and to produce any documents in its possession bearing on that defense. Plaintiff argues that "[b]y blatantly refusing to do either, Defendant deprived Plaintiff of the opportunities, *inter alia*, to examine [Cucuel] and [Graves] about such documents during their now concluded examinations before trial" (P's Supp. Memo. of Law in Supp. at p. 4).

Plaintiff contends that the only source of funding that appears in Defendant's document productions concerns the transaction between MBF and CHS. Plaintiff submits, however, that Defendant's document productions include no communications with MBF, Jefferies or Kohlberg after October 27, 2008, and that those communications are important because they may shed light on 1) whether the MBF transaction was terminated, and how that termination affected the Purchase Agreement, 2) the relationship among the Purchase Agreement, the MBF transaction and the Jefferies funding, 3) Defendant's financial condition, 4) Defendant's dependence on the Jefferies funding to close on the Purchase Agreement, 5) Defendant's "actual reasons" (P's Supp. Memo. of Law in Supp. at p. 5) for attempting to terminate the Purchase Agreement, and 6) Defendant's claims that it would have closed on the Purchase Agreement by using additional capital contributed to CHS by a Kohlberg entity. Plaintiff contends that Defendant's failure to produce these documents was willful and contumacious, and has prejudiced Plaintiff and, accordingly, the Court should grant the relief sought in its motion.

Defendant opposes Plaintiff's motion, contending that Defendant has produced all responsive, non-privileged documents that are material and necessary to the prosecution of Plaintiff's claims and defenses. Defendant contends *inter alia* that 1) Plaintiff's motion is not a genuine effort to obtain additional evidence, but rather an effort to distract the Court from the weakness of Plaintiff's case, as evidenced by Plaintiff's resistance to seeking discovery from non-parties, including MBF, MBF's lenders, and counsel on the MBF transaction; 2) if Plaintiff's Liquidity Theory were correct, which it is not, Plaintiff would have obtained evidence from non-parties to bolster that claim, particularly in consideration of Defendant's offer to compensate Plaintiff for the cost of non-party discovery that revealed relevant evidence not maintained by Defendant; 3) Plaintiff had the opportunity to pose questions of Cucuel and Graves regarding Kohlberg's involvement in the underlying transactions, but did not do so; 4) Plaintiff could have reviewed Kohlberg's publicly available website which disclosed its investment in CHS, or propounded interrogatories regarding Defendant's knowledge of the relationship among Defendant, CHS and Kohlberg; 5) Plaintiff's Liquidity Theory is contradicted by the documents produced by Defendant; and 6) Defendant has produced all responsive documents relating to the MBF transaction, and the remaining MBF documents are beyond the scope of discovery because the record demonstrates that Defendant had access to the

liquidity necessary to close the Avanti Acquisition, and that the MBF transaction and Avanti Acquisition were unrelated.

In reply, Plaintiff contends *inter alia* that 1) Plaintiff has mischaracterized the significance of documents and deposition testimony, and the documentary and testimonial evidence establishes that, as of on or about October 27, 2008, Defendant had no more than $2,369,280 in available cash with which to close the Purchase Agreement; and 2) while Defendant contends that it has produced all discoverable documents regarding the MBF transaction, Defendant has not provided an affidavit of someone with personal knowledge of relevant communications, or documents reflecting, *e.g.*, how and when Defendant learned that the MBF transaction was going to be terminated, and/or what actions Defendant took when it learned that the Avanti Acquisition would not be part of MBF's acquisition of the corporate parent of Defendant.

RULING OF THE COURT

CPLR § 3126 provides as follows:

> If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:
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> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
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> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
>
> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

The nature and degree of the penalty to be imposed pursuant to CPLR § 3126 lies within the sound discretion of the trial court. *Workman v. Town of Southampton*, 69 A.D.3d 619, 620 (2d Dept. 2010), quoting *McArthur v. New York City Hous. Auth.*, 48 A.D.3d 431 (2d Dept. 2008). The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands is willful or contumacious, or in bad faith. *Workman v. Town of Southampton*, 69 A.D.3d at 620 citing, *inter alia*, *Northfield v. New York City Hous. Auth.*, 63 A.D.3d 808 (2d Dept. 2009). The willful and contumacious conduct can be inferred by a party's repeated failure to respond to demands or to comply with discovery orders, absent a reasonable excuse. *Workman v. Town of Southampton*, 69 A.D.3d at 620 citing, *inter alia*, *McArthur v. New York City Hous. Auth.* and *Northfield.v. New York City Hous. Auth.*, *supra*. The determination of whether to strike an answer pursuant to CPLR § 3126 is addressed to the sound discretion of the trial court. *Pinto v. Tenenbaum*, 105 A.D.3d 930, 931 (2d Dept. 2013).

CPLR § 3101(a) provides that there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof. *See Allen v. Cromwell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968); *Spectrum Systems International Corporation v. Chemical Bank*, 78 N.Y.2d 371 (1991); *Quevedo v. Eichner*, 29 A.D.3d 554 (2d Dept. 2006). Unlimited disclosure is not required, however, and supervision of disclosure is generally left to the trial court's broad discretion. *Scorzari v. Pezza*, 2013 N.Y. App. Div. LEXIS 7884, *1-2 (2d Dept. 2013), citing *H.R. Prince, Inc. v. Elite Envtl. Sys., Inc.*, 107 A.D.3d 850 (2d Dept. 2013), quoting *Palermo Mason Constr. v. Aark Holding Corp.*, 300 A.D.2d 460, 461 (2d Dept. 2002).

The Court denies Plaintiff's motion based on the Court's conclusion that Plaintiff has not demonstrated that Defendant has failed to respond to Plaintiff's discovery demands, and has clearly not met the high burden that would warrant the relief that Plaintiff seeks. The record supports the conclusion that Defendant has produced voluminous documents regarding this action, and Plaintiff has deposed Defendant's witnesses with knowledge of relevant information. Moreover, Plaintiff has not sought third-party discovery, as suggested by Defendant in its May 16, 2013 letter to Plaintiff in which Defendant offered to pay Plaintiff's reasonable costs related to Plaintiff's non-party discovery in the event that the third-party discovery revealed "responsive, relevant documents evidencing a deeper connection between the MBF Transaction

and Avanti Transaction... that reasonably should have been maintained and produced by PHCS." It appears that Plaintiff is taking the position that because the documents produced, and deposition testimony of Defendant's witnesses, do not support its theory of the case, then there must necessarily be documents and witnesses that Defendant is required to produce, but has not. The Court declines to adopt such an approach, and Plaintiff may pursue discovery from any third-party that it believes may have relevant and helpful information that would support its causes of action and defenses.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Certification Conference on December 12, 2013 at 9:30 a.m.

ENTER

DATED: Mineola, NY
December 9, 2013

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
DEC 12 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE