

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

United States <i>ex rel.</i> Kevin McDonough,	:	
	:	Civil Action 2:08-cv-0114
Plaintiff	:	Judge Marbley
v.	:	Magistrate Judge Abel
Symphony Diagnostic Services and Symphony Diagnostic Services No. 1, d/b/a Mobilex U.S.A.,	:	
	:	
Defendants	:	
	:	

### Discovery Dispute Conference Order

On October 17, 2012, counsel for the parties participated in a telephone discovery dispute conference with the Magistrate Judge. Counsel presented two disputes for resolution. The first involved plaintiff McDonough's production of documents from his thumb drive, and the second plaintiffs' demand that Mobilex produce the database David Yarin used to arrive at his conclusions about Mobilex's pricing of its mobile x-ray services. Each will be discussed separately below.

Thumb drive documents production. My September 30, 2013 Discovery Dispute Order (doc. 96) provided:

Discussion. On the present record I cannot determine whether there has been a waiver of any claim of privilege or protection McDonough may have for the documents. The only case defendants cite supporting their waiver, *Weatherly v. State Farm Fire & Cas., Insurance. Co.*, 2009 WL 1507353 (E.D. La. May 28, 2009), sheds little light on the question before this court. In *Weatherly*, State Farm had produced documents in another litigation, then sought to prevent the plaintiff in a subsequent case from obtaining those documents from the third party possessing them. Here McDonough did not

produce the documents. His argument is that Colon stole the documents. That claim was made promptly after Colon's attorney produced the documents in the Florida litigation.

It is not possible on the present record to determine whose version of the events to believe. That could only be done by taking the testimony of the affiants and making credibility determinations.

On the other hand, it is entirely unclear whether there are any relevant documents among McDonough's thumb drive files.<sup>2</sup> Nor has McDonough supported his broad assertion of privilege and confidential business records protection with affidavit or other evidence establishing each element of the claim or protection asserted.

Decision. In an attempt to resolve this dispute without further hearing, briefing and expense, it is ORDERED that relator's counsel review the thumb drive documents and produce all relevant, non-privileged documents responsive to defendants' document requests.<sup>2</sup> The privilege log must be supported by affidavits establishing each element of the particular claim of privilege as to the specific document, documents, or categories of documents for which that particular claim of privilege is asserted.

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<sup>2</sup> Defendants point to a PowerPoint presentation that included information about pricing of mobile x-ray services, but they also assert that McDonough made the presentation to Colon and gave him a copy of it.

*Id.*, PageID 820-21.

Plaintiff has not yet produced any documents. The deadline for completing all discovery was September 16, and deadline for filing case-dispositive motions is November 12, 2013. Plaintiff's counsel asserts that few, if any of the documents are relevant to material, disputed facts in this lawsuit. Most of the documents at issue were communications between McDonough and his clients. Plaintiff asserts that these communications are protected by confidentiality agreements McDonough entered with his clients. Those agreements have not been provided to the court. Plaintiff has not provided affidavits from the clients containing facts demonstrating that the particular documents at issue were subject to a confidentiality agreement, that the client maintained adequate procedures to insure

that the documents (and the information contained in them) were not disclosed to third parties, the value of the information to them, and the harm they would suffer if the information was publicly disclosed. *See, Zenith Radio Corp. v. Matsushita Elec. Industry. Co.*, 529 F. Supp. 866, 892 (E.D. Pa. 1981)

Rule 26(c)(1)(G), Fed. R. Civ. P., provides that “a court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way . . . .” The party seeking to protect business information from disclosure bears the burden of demonstrating good cause for the order. *Zenith Radio Corp.*, 529 F. Supp. at 892 (E.D. Pa. 1981); *Reliance Insurance Co. v. Barron’s*, 428 F. Supp. 200 (S.D. N.Y. 1977). Confidential business information is not absolutely protected from disclosure. If the information is relevant to a disputed material fact at issue in the lawsuit, the information may be disclosed to the opposing party subject to an appropriate protective order. *See, Hartley Pen Co. v. United States District Court*, 287 F.2d 324, 331 (9th Cir. 1961); *Covey Oil Co.*, 340 F.2d 993, 997-99 (10th Cir. 1965).

Defendants expressed a concern about the pace of production of documents, given the fast approaching November 12 summary judgment deadline. After discussing the thumb drive documents, plaintiff’s counsel agreed and the court ordered that plaintiff provide all of the documents for which a claim is asserted that they contain confidential business information but are not otherwise privileged to 1-2 lawyers representing defendants for an attorneys’-eyes-only review. These lawyers will not communicate anything

they learn through this review to any other lawyer or person representing defendants. They will identify for plaintiff's counsel the documents containing information relevant to the disputed material factual issues in this lawsuit and identify the discovery request(s) the information in the document is responsive to or otherwise inform plaintiff's counsel why the information is relevant. Plaintiff's counsel will then produce the documents they believe are relevant. For any documents identified by the 1-2 defense counsel as relevant but not produced, plaintiff must provide an explanation why the documents do not contain relevant information and, if requested, provide affidavits demonstrating each fact necessary to demonstrate good cause for a protective order that the information not be revealed.

Other claims of privilege. If a document is withheld as privileged or entitled to work product protection, the party asserting that claim must provide a privilege log that identifies each such document and provides sufficient information to establish the factual predicates for the assertion of the privilege or protection. Rule 26(b)(5)(A) party must "expressly" state his claim of privilege and "shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

Attorney-client privilege maybe asserted only:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived. *Fausek v. White*, 965 F.2d 126, 129 (6th

Cir. 1992)(citing *United States v. Goldfarb*, 328 F.2d 280, 281 (6th Cir. 1964)).  
*Reed v. Baxter*, 134 F.3d 351, 355-56 (6th Cir. 1998). See, *Guy v. United Healthcare Corp.*, 154 F.R.D. 172, 177 (S.D. Ohio 1993)(King, Magistrate Judge). Consequently, plaintiff's privilege log should describe each withheld document (without revealing its contents), the creator of the document, the recipient(s) of the document, the date of the document, the date it was sent to the recipient(s) and the facts supporting the claim of attorney-client privilege. Each recipient should be identified as an attorney, client or other person, and plaintiff should provide sufficient information about them for defendants to determine whether the attorney-client privilege applies to the document.

Database used by David Yarin. Mobilex says it spent around \$200,000 creating the database. The raw data Mobilex manipulated/extracted to produce the database was provided to plaintiff in discovery. Plaintiff's expert testified that she did not look at that data because she needed only the parameters Yarin used to poll the database to evaluate his opinions. Plaintiff maintains he needs the database to cross-examine Yarin and test the validity of his opinions.

Plaintiff will file a motion to compel production of the database on **October 18**. Defendants will respond by the close of business **October 23**. A telephone oral argument on the motion will be held **October 28, 2013 at 11:00 a.m.**

Discovery/summary judgment deadlines. Plaintiff would like to extend the November 12 summary judgment deadline. Defendants oppose any extension. If plaintiff wants to seek an extension, plaintiff's counsel should send a proposal to defendants' counsel containing a proposed amended scheduling order and a statement of the reasons

supporting the proposed amendments. Defendants' counsel should incorporate their position in the document containing the proposed amended scheduling order. Counsel should then jointly email me ([Mark\\_Abel@ohsd.uscourts.gov](mailto:Mark_Abel@ohsd.uscourts.gov)) a word processing documents containing the proposed amended scheduling order and the parties' arguments supporting or opposing the amendment.

s/Mark R. Abel \_\_\_\_\_  
United States Magistrate Judge