UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE MEDICAL CENTER AT ELIZABETH PLACE, LLC	:	Case No. 3:12-cv-26
Plaintiff,	:	Judge Timothy S. Black
vs.	:	
PREMIER HEALTH PARTNERS, *et al.*,	:	
Defendants.	:	

ORDER DENYING RIVERVIEW HEALTH INSTITUTE'S MOTION TO QUASH (Doc. 49)

This civil action is before the Court on non-party subpoena recipient Riverview Health Institute ("RHI")'s motion to quash (Doc. 49), and the parties' responsive memoranda (Docs. 56, 57). The Court heard oral argument on July 22, 2013.

I. BACKGROUND FACTS

On May 10, 2013, RHI was served with a subpoena to testify at a deposition in the above captioned civil action. (Doc. 49, Ex. A). In accordance with Rule 30(b)(6), the subpoena commanded the appearance of one or more RHI representatives for deposition on July 8, 2013. (*Id.*) The subpoena also commanded the deponent or deponents to bring related documents. (*Id.*, Ex. B).

RHI is a hospital that competes with Plaintiff and Defendant hospitals. RHI is located in the Dayton area, in the same business complex as Plaintiff, and opened its doors approximately the same time as Plaintiff. Allegedly, RHI has less than half the number of beds as Plaintiff, yet it has five times the number of patients. RHI has

achieved this growth even though it does not accept commercial insurance patients. Plaintiff, by contrast, alleges that it is impossible to survive without commercial patients. Defendants request discovery from RHI to understand how it is able to do what Plaintiff says cannot be done.

II. STANDARD OF REVIEW

The Federal Rules of Civil Procedure grant parties the right to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Relevance for discovery purposes is extremely broad. *Lewis v. ACB Business Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 19998). However, "district courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce." *Surles ex rel. Johnson v. Greyhound Lines, Inc*., 474 F.3d 288, 305 (6th Cir. 2007).

Under Rule 45 of the Federal Rules of Civil Procedure, parties may command a nonparty to, *inter alia*, produce documents. Fed. R. Civ. P. 45(a)(1). Rule 45 further provides that "the issuing court must quash or modify a subpoena that…requires disclosure of privileged or other protected matter, if no exception or waiver applies; or subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A)(iii), (iv). Although irrelevance or overbreadth are not specifically listed under Rule 45 as a basis for quashing a subpoena, courts "have held that the scope of discovery under a subpoena is the same as the scope of discovery under Rule 26." *Hendricks v. Total Quality Logistics*, 275 F.R.D. 251, 253 (S.D. Ohio 2011). The movant bears the burden of persuading the

court that a subpoena should be quashed. *See, e.g.*, *Baumgardner v. Lousiana Binding Serv.*, No. 1:11cv794, 2013 U.S. Dist. LEXIS 27494, at *4 (S.D. Ohio Feb. 28, 2013).

In reviewing a motion to quash, the court may consider "whether (i) the subpoena was issued primarily for the purposes of harassment, (ii) there are other viable means to obtain the same evidence, and (iii) to what extent the information sought is relevant, nonprivleged, and crucial to the moving party's case." *Bogosian v. Woloohojian Realty Corp.*, 323 F.3d 55, 66 (1st Cir. 2003). "If the documents sought by the subpoena are relevant and are sought for good cause, then the subpoena should be enforced unless the documents are privileged or the subpoenas are unreasonable, oppressive, annoying, or embarrassing." *Recycled Paper Greetings v. Davis*, No. 1:08mc12, 2008 U.S. Dist. LEXIS 10649, at *3 (N.D. Ohio Feb. 13, 2008).

III. ANALYSIS

A. Conflict of Interest

First, RHI argues that the subpoena should be quashed because it was improperly informed by Faruki Ireland & Cox P.L.L. ("FIC"). Moreover, RHI maintains that unless FIC is disqualified from the case, it would be inappropriate to permit a subpoena to go forward.

In late December 2006, Dr. Fallang, owner of RHI, asked Mr. Ireland, partner at FIC, to assist in the analysis of possible legal claims that Dr. Fallang and RHI might have

against various insurance carriers for certain accounts receivable.[1] (Doc. 56, Ex. 2 at ¶ 9). Mr. Ireland and an associate (who is no longer with FIC) performed the requested research and legal analysis, but FIC was never engaged to pursue any claims on behalf of Dr. Fallang or RHI. (*Id.*) Mr. Ireland's representation of Dr. Fallang and RHI terminated in or around February 2007. (*Id.*) None of the attorneys at FIC working on the instant case worked on the matter for Dr. Fallang and RHI. (*Id.* at ¶ 10). In fact, Mr. Faruki was unaware of any prior representation until it was brought to his attention on May 30, 2013. (*Id.* at ¶ 7). While Mr. Faruki does not believe FIC has a conflict of interest that would prevent it from representing Defendants in the enforcement of the subpoena, out of an abundance of caution and to avoid wasting this Court's time in addressing the issue, FIC withdrew from handling the enforcement of the subpoena and implemented an ethical screen that formally prohibits Mr. Ireland from working on the case and all attorneys, paralegals, and staff working on the case from accessing, reviewing, or using the closed file from Mr. Ireland's former representation. (*Id.* at ¶ 11).

RHI maintains that based on the Restatement of the Law (Third) Governing Lawyers at Section 132, FIC is conflicted from this matter. The Restatement provides that "a lawyer who has represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the interests of the former client are materially adverse." *Id.* However, the Restatement (Third) of the Law Governing Lawyers has recognized the use of screens to remove the imputation of shared

[1] Dr. Fallang claims these discussions included alleged illegal and anticompetitive behavior on the part of two major Dayton-area hospitals. (Doc. 57, Ex. 2 at ¶ 3).

confidences or secrets. Section 124 of the Restatement provides that a former client conflict will not be imputed to affiliated lawyers when:

> (a) Any confidential client information communicated to the personally prohibited lawyer is unlikely to be significant in the subsequent matter;
>
> (b) The personally prohibited lawyer is subject to screening measures adequate to eliminate participation by that lawyer in the representation; and
>
> (c) Timely and adequate notice of the screening has been provided to all affected clients.

Restatement § 124. The touchstones of the imputation inquiry are the significance of the prohibited lawyer's involvement in the knowledge of the former client's confidences or secrets. *See, e.g., Cheng v. GAF Corp.*, 631 F.2d 1052, 1054 (2nd Cir. 1980).

As a threshold matter, a court must examine the degree to which the tainted attorney represented the former client. For example, when an associate has played an "appreciable role" in representing an adversary in the same matter, a screen will, as a matter of law, fail to rebut the presumption of shared confidences or secrets. *Kassis v. Teacher's Ins. & Annuity Ass'n*, 717 N.E.2d 674, 678 (New York App. 1999). In *Kassis*, the court held that because a tainted attorney "appeared as sole counsel" for the adversary and was "sufficiently knowledgeable and steeped in the files of [the] case," the existence of a screen was inconsequential. *Id.* However, this holding does not extend to a matter where a tainted attorney performs only minimal work for an adversary. For example, in *Del-Val*, the law firm Proskauer Rose Goetz & Mendelson ("Proskauer") was the subject of a disqualification motion. The court disqualified a Proskauer partner based on his

previous representation, but declined to disqualify the entire firm. *See In re Del-Val Fin. Corp. Sec. Litig.*, 158 F.R.D. 270, 274-75 (S.D.N.Y. 1994). The court determined that the presumption of shared confidences was rebuttable in part because the tainted attorney's involvement in the representation had been peripheral. *Id*. at 274. In this matter, Mr. Ireland was the principal attorney retained by RHI. This fact weighs in favor of disqualification. However, the Court finds it important to note that Mr. Ireland did not represent RHI in a lawsuit, the representation lasted less than three months, RHI is not a party to the litigation, and FIC claims the subject matter of the prior representation is distinguishable.

Although no bright line rule exists, another pertinent consideration as to whether the presumption has been rebutted is the relative recency of the incident. In *Bank Brussels Lambert v. The Chase Manhattan Bank*, No. 93-5298, 1996 U.S. Dist. LEXIS 13114 (S.D.N.Y. Sept. 9, 1996), the fact that the conflicted associate had been separated from his prior firm for more than a year weighed against disqualification. *See also Papyrus Tech. Corp. v. N.Y. Stock Exch., Inc.*, 325 F.Supp.2d 270, 279 (S.D.N.Y. 2004) (the fact that almost thirty months had passed since representation weighed against disqualification). Mr. Ireland's representation of RHI terminated in February 2008, more than five years ago. The fact that extensive time has passed since Mr. Ireland's representation weighs against FIC's disqualification.

A party can also attempt to rebut the presumption of shared knowledge through affidavits, setting forth the tainted attorney's recollection of any confidential information

and whether the attorney shared such information with co-workers. *Del-Val.*, 158 F.R.D. at 274. Mr. Faruki submitted an affidavit to rebut the presumption of shared knowledge. (Doc. 56, Ex. 2 at ¶ 10). Specifically, Mr. Faruki represents that Mr. Ireland had no inovlement in the instant case. (*Id.*) This affidavit weighs against FIC's disqualification.

Moreover, the presumption is further rebutted by FIC's screen. *See, e.g., Del-Val,* 158 F.R.D. at 273 (discussing a similar screen that rebutted the presumption of shared confidences). FIC sealed RHI's file preventing all persons working on this case from accessing it. (Doc. 56, Ex. 2 at ¶ 11). Additionally, the screen formally prohibits Mr. Ireland from working on the case. (*Id.*) This screen evidences Mr. Ireland and Mr. Faruki's understanding of their ethical obligations in this matter. More importantly, it adequately isolates Mr. Ireland from the case.[2]

Finally, the evidence supports a finding that the screen was timely erected. Specifically, Mr. Ireland did not work on this case and Mr. Faruki had no knowledge of his prior representation. (Doc. 56, Ex. 2 at ¶ 11). The screen was erected immediately upon learning about the potential conflict. (*Id.*)

Given these facts, the Court concludes that there is no real danger that FIC may have gained or will gain an unfair advantage over non-party RHI and that it would be highly unjust to disqualify each member of the FIC firm. For the foregoing reasons, FIC has rebutted the presumption of shared confidences or secrets.

---

[2] Courts have been less reluctant to approve small-firm screens. *See Cheng*, 631 F.2d at 1058 (disapproving of screen erected by satellite office that consisted of approximately twenty attorneys). However, there is no per se rule that a small-firm cannot erect an effective screen.

B. Subpoena Requests In Dispute

RHI contends that the subpoena seeks irrelevant information, imposes an undue burden, and would harm RHI by requiring it to produce confidential trade secrets and commercial information. Additionally, RHI claims that the requested information requires the production of a large volume of sensitive patient, physician, and proprietary information, the gathering, analysis, and production of which would impose an undue burden and expense.

As narrowed, the Court finds that the subpoena seeks information that is relevant to the claims and defenses in this litigation. Specifically relevant is information regarding a competitor in the Dayton area that does business in a manner that Plaintiff claims is impossible. The Court has already found that the marketplace information regarding hospital competitors in the Dayton area is relevant. Contrary to RHI's contention otherwise, "per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive effect." *Nat'l Collegiate Athletic Assn. v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104, n. 26 (1984). In denying Defendants' motion to dismiss the Amended Complaint, the Court found that "discovery may later support a finding that the rule of reason is in fact the appropriate standard of analysis." (Doc. 39 at 9, n. 8). Consistent with this ruling, Premier is entitled to discovery to establish that the rule of reason and not the per se rule is in fact the appropriate standard of analysis in this case, and the subpoena as narrowed seeks information that is directly relevant to that inquiry.

RHI contends that information regarding its "operation is not analogous to the [*sic*] either party's operations" in that RHI "does not accept any in-network insurance patients or Medicare/Medicaid patients; it provides services only in exchange for out-of-network insurance payments or cash." (Doc. 49 at 7). However, this distinction renders information about RHI particularly relevant because it goes to the crux of Plaintiff's allegations. Plaintiff claims that it was injured, and that competition in the market was injured because Premier's conduct allegedly foreclosed Plaintiff from the managed care contracts (*i.e.*, in-network arrangements) necessary for Plaintiff to compete. (Doc. 7 at ¶ 90). Thus, by its own statements, RHI competes in the hospital services business in the Dayton area in the very manner that Plaintiff claims is impossible – out-of-network, without government payer patients, and from the same building where Plaintiff is located.

To prove its claim, Plaintiff must prove the existence of an antitrust injury. Specifically, Plaintiff must show that "there has been an adverse effect on prices, output, or quality of goods in the relevant market as a result of the challenged actions." *Guinn v. Mount Carmel Health*, No. 2:09cv226, 2012 U.S. Dist. LEXIS 24353, at *4 (S.D. Ohio Feb. 27, 2012). Accordingly, this Court must consider the marketwide impact of the challenged conduct on competition, not merely its impact on Plaintiff. As RHI competes from the same building as Plaintiff, the competitive impact of RHI before and during the period when Plaintiff alleges that the group boycott occurred is relevant to the Court's determination of whether Plaintiff can show not just that its business has been harmed, but antitrust injury, *i.e.*, "injury of the type the antitrust laws were intended to prevent and

that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-a-Mat, Inc.*, 429 U.S. 477, 489 (1977).

The parties worked to resolve and/or narrow portions of the subpoena, but the follows requests are still at issue:[3]

1. Requests 1-3

Identify, by name and title, the managers at Riverview.

RHI agrees to provide a sworn statement with respect to its ownership, number of physicians practicing at RHI, number of beds, and its out-of-network status, but will not provide the names of its managers and employees or its chain of command because it feels its employees will be harassed by Defendants.

The purpose of requesting the names of "a handful" of managers at RHI is to identify relevant custodians who may have responsive documents. Accordingly, to the extent RHI can provide a sufficient description of these managers in order to identify relevant custodians, the identities of these managers need not be disclosed. If in fact identities are required in order to identify relevant custodians, such information shall be

[3] RHI indicates that as a condition precedent to its provision of such information, it would require written assurance that: (a) no further document demands will be served upon it; (b) no RHI personnel will be deposed; and (c) no information provided will be made available to members of Faruki Ireland & Cox, LLC. As articulated at oral argument: (a) no further document demands will be served on RHI absent permission from this Court; (b) Defendants are entitled to a 30(b)(6) deposition, but absent permission from this Court shall not request additional depositions from RHI; and (c) as explained in Section III.A, FIC does not have a conflict in this matter and is therefore entitled to review all relevant information in accordance with its ethical screen and the Protective Order.

designated as "Highly Confidential – Outside Counsel Eyes Only" to prevent any alleged harassment.

2. Request 4

Identify the names of the physicians who regularly practice medicine at Riverview as well as their medical specialties, the level of their privileges, and the dates that Riverview granted those privileges.

RHI maintains that it will not provide such information because it feels its physicians will be harassed by Defendants.

Defendants require this information in order to link physicians with information provided by the Ohio Hospital Association. *See* Section III.B.4. The Court finds that this information is relevant in interpreting the Ohio Hospital Association data and therefore should be produced. Moreover, this information shall be designated as "Highly Confidential – Outside Counsel Eyes Only", thereby obviating RHI's concern about its production.

3. Request 5

Riverview's regularly prepared financial statements.

RHI maintains it will not provide the financial statements because they are not relevant and they do not want to produce such information to a competitor.

Defendants do not seek all financial information, only the financial reports in order to determine RHI's success.

The Court finds that the financial reports are relevant (*see* Section III.B) and that the documents shall be designated as "Highly Confidential – Outside Counsel Eyes Only" to protect RHI from such information being released to a competitor.

4. Request No. 6

Riverview's unpublished patient discharge information. Specifically, information provided to the Ohio Hospital Association, such as information on inpatient visits, services provided (i.e., diagnostic and procedural codes), admission and discharge dates, payer category and total hospital charges.[4]

RHI claims that it will provide public information that has been provided to the Ohio Hospital Association ("OHA"), but not the confidential information provided to OHA.

The OHA information depicts all inpatient visits and the general category of services at RHI. However, the public information does not disclose any details about the kinds of surgeries performed at RHI. Defendants request the confidential data submitted to OHA which includes specific diagnostic and procedural codes for all surgeries performed at RHI. Such information is useful in matching types of services to the actual services performed and is relevant to determine the extent to which RHI is a mirror or pattern for MCEP.

The Court finds that this information (which is comparable to the information Plaintiff and Premier are providing to each other) is necessary to determine the specific

[4] Premier does not seek the identity of the patients, which can be masked before production. Specifically, Premier asks Riverview to produce the electronic patient data that it provides to the Ohio Hospital Association on an annual basis.

hospital services provided by RHI on a patient level basis. Such data shall remain confidential pursuant to the Protective Order.

5. Requests Nos. 7-9

All documents constituting or relating to any surveys, analyses, or studies undertaken by Riverview or on Riverview's behalf regarding competition with MCEP, Premier or any of the Premier facilities (limited to the files of a few key custodians, i.e., the "managers" whose identifies Defendants requested in Request Nos. 1-3).

RHI refuses to produce its competitive analyses, strategic, and investment plans because: (1) Defendants are competitors; and (2) production of such information is burdensome because it would require extensive email and letter searches in order to respond to the broad request.

Defendants do not seek all letters and emails, but more specifically the basic planning documents, strategic plans, analyses, and studies that were undertaken by RHI. The Court finds this request, as narrowed, to be relevant. Accordingly, RHI shall produce such documents designated as "Highly Confidential – Outside Counsel Eyes Only."

6. Request No. 11(c)

Documents relating to payment or reimbursement rates or other terms with any healthcare payor (limited to the files of a few key custodians, i.e., the "managers" whose identifies Defendants requested in Request Nos. 1-3).

RHI maintains that it will not provide copies of its correspondence with insurers regarding its out-of-network payments or payment disputes because such a request would be burdensome due to the substantial volume of correspondence with insurers.

Defendants do not request correspondence regarding payment or whether the insurers will pay a particular claim on a patient-by-patient basis. Rather, Defendants request the discussions or correspondence with health care payers regarding the payment or reimbursement rates or other terms on which those payers are willing to do business with RHI as an out-of-network provider. Defendants expect that these documents would have come to the attention of the individuals identified in Requests 1-3. As narrowed, the Court finds this request to be relevant and not unduly burdensome. Accordingly, RHI shall produce the same.

C. **Protective Order**

RHI claims that some of the requested information consists of trade secrets or confidential information. While the Court acknowledges the implicit concern in producing such information, RHI may designate its highly confidential information as "Highly Confidential – Outside Counsel Eyes Only," and only outside counsel for Premier may view or discuss that information. (Doc. 43). The fact that RHI competes with Premier and Plaintiff is insufficient to thwart the free flow of information at the heart of the discovery rules. *Dean Foods Co. v. Pleasant View Dairy Corp.*, No. 2:10mc189, 2011 U.S. Dist. LEXIS 1343, at *5 (N.D. Ind. Jan. 5, 2011). Notably, Premier and Plaintiff who are direct competitors have agreed that the protective order adequately protects their interests. Moreover, this Court has ordered Kettering, another

competitor, to produce documents subject to the protective order over similar concerns raised by Kettering.[5]

D. Attorney Fees

Under Rule 45, attorneys fees may be awarded where a party serving a subpoena fails to comply with its obligation to "take reasonable steps to avoid imposing an undue burden or expense on a party subject to the subpoena." Accordingly to the 1991 Advisory Committee Notes, Rule 45's sanctions provision was intended primarily to protect "a non-party witness as a result of a misuse of the subpoena." Fed. R. Civ. P. 45(c)(1) advisory committee's note (1991). Given the fact that: (1) the Court declines to quash the subpoena as narrowed; and (2) Premier engaged in a good faith effort to negotiate reasonable parameters in an effort to avoid imposing an undue burden, the Court declines to award attorneys' fees.

[5] RHI's reliance on *In re Vitamins Antitrust Litig.*, 267 F. Supp. 2d 738 (S.D. Ohio 2003) is misplaced. In granting the subpoenaed party's motion to quash, the court in *Vitamins Antitrust Litigation* relied on two crucial factors that are not present here: (1) the underlying litigation was in a distant forum such that it "had no enforcement power over the extant protective order, and thus would be unable to protect [the subpoenaed party's] interest were its terms to be breached," and (2) more importantly, there was a pending motion to dismiss in the underlying litigation, that if granted would render the disputed records "irrelevant." *Id.* at 742. The court granted the motion to quash not because the protective order was insufficient, but because the subpoena "was issued prematurely" and because the issuing party had not "notified this Court that a failure to enforce its subpoena at this time would prejudice its defenses" in the underlying litigation. *Id.* at 743. Accordingly, the case is inapposite.

IV. CONCLUSION

Accordingly, for the reasons stated here, non-party Riverview Health Institute's motion to quash (Doc. 49) is **DENIED** and RHI is **ORDERED** to comply with the subpoena as explained and directed in this Order.

IT IS SO ORDERED.

Date: 7/25/13

s/ Timothy S. Black
Timothy S. Black
United States District Judge