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: (1) DENYING NON-PARTY RHI'S MOTION TO QUASH AND FOR SANCTIONS (Doc. 72); (2) DENYING DEFENDANTS' CROSS-MOTION FOR SANCTIONS (83); AND (3) DENYING RHI'S MOTION TO STRIKE (Doc. 88)

This civil action is before the Court on various discovery motions: (1) non-party subpoena recipient Riverview Health Institute ("RHI")'s motion to quash Defendants' second and third subpoenas and request for sanctions (Doc. 72); (2) Defendants' memorandum in opposition to the motion to quash and cross-motion for sanctions (Doc. 83) and RHI's memorandum contra (Doc. 86); and (3) RHI's motion to strike Defendants' opposition to its motion to quash, or in the alternative, motion to stay (Doc. 88) and Defendants' memorandum contra (Doc. 90).[1]

[1] By Notation Order on October 23, 2013, this Court deemed these matters fully briefed and advised counsel that no additional filings would be permitted without leave of court.

I. BACKGROUND FACTS[2]

Defendants have sought documents from RHI since May 10, 2013. (Doc. 49, Exs. A, B).[3] On July 25, 2013, this Court ordered RHI to produce documents. (Doc. 58). More than three months later, RHI has yet to produce any documents. Specifically, RHI refused to produce the Court ordered documents until the day of its 30(b)(6) deposition. Defendants then served new subpoenas seeking the documents in advance of the deposition so that defense counsel could review the documents and prepare for the deposition. RHI responded by filing another motion to quash. (Doc. 72). Not only has RHI delayed in producing documents as ordered, but it is now engaged in satellite litigation.

II. ANALYSIS

A. RHI's Motion to Quash and Motion for Sanctions

On July 25, 2013, this Court denied RHI's motion to quash and ordered it to produce documents. (Doc. 49). RHI argues that two subpoenas subsequently served on it violate both the Court's Order and relevant provisions of Rule 45. Accordingly, RHI requests that the subpoenas be quashed and sanctions be imposed against Defendants and their legal counsel.

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[2] Background facts as to this discovery dispute are discussed in detail at Docs. 58 and 93.

[3] Notably, the subpoena called for RHI to produce its documents on June 7, 2013, and the Notice of Deposition noticed the deposition a full month later, on July 8, 2013. (*Id*.)

1. Terms and conditions of the Court's Order

RHI claims that contrary to the Court's directive, Defendants issued two new subpoenas without first obtaining permission from the Court.

The Court Order provides that: "no further document demands will be served upon RHI absent permission from this Court" and "Defendants are entitled to a 30(b)(6) deposition, but absent permission from this Court shall not request additional depositions from RHI." (Doc. 58 at 10, n.3). Here, the reissued requests for production are not "further document demands," but simply request the documents that the Court previously ordered RHI to produce.[4] (Doc. 72, Exs. 2-3). In fact, the reissued Notice of Deposition is identical to the original notice and cannot be characterized as a request for an additional deposition. (*Id*.)

Next, RHI claims that Defendants seek to examine a designated RHI representative on a broad range of matters beyond the scope of the Court's Order.[5]

The Court's Order does not address the Rule 30(b)(6) deposition topics. The Order only commands RHI to produce documents. However, RHI's complaints about the scope of the Notice of Deposition are misplaced. Specifically, topics 1 and 2 which

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[4] The fact that the reissued subpoena separated the date of document production from the date of the deposition is not a "meaningful difference" as alleged by RHI. As this Court has already determined, it is typical and customary for counsel to produce documents in advance of deposition to ensure a meaningful and efficient 30(b)(6) deposition. Failure to produce such documents in advance would render the deposition impracticable. (*See* Doc. 93 at 6-7).

[5] Specifically, RHI claims that "Premier wants to closely examine RHI's documents to concoct all sorts of additional avenues of inquiry and perceived shortcomings in Riverview's production." (Doc. 86 at 4). The Court finds that there is simply no basis for this conclusion.

relate to RHI's general business structure are proper because RHI purports to do business in the precise manner Plaintiff alleges no one can successfully compete. Next, RHI argues that the Order limits inquiries into competitive analysis, excluding details like letters and emails, and that topics 7 and 8 violate this limitation. However, the Order only addressed whether RHI would have to produce such letters and emails, and since RHI will not be producing any such letters or emails, there is no risk that Premier would examine its 30(b)(6) representative about them. RHI also complains that topics 3-5 do not comply with the requirement that RHI produce its "discussions or correspondence with healthcare 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." However, RHI has represented that it does not and has never sought to enter into contracts with healthcare payers. Topics 4 and 5 relate only to RHI's efforts to secure contracts with healthcare payers, and if RHI has never sought such contracts, there will be little to discuss regarding these topics. Moreover, RHI's objection to topic 3 concerning RHI's contracts and negotiations with healthcare payers from 2004 to the present concern precisely the information the Court ordered RHI to produce. (Doc. 58 at 8).

Accordingly, the subpoenas do not violate the Court's Order.

2. Rule 45

Under Rule 45(b)(1), a subpoena *ad testificandum* must be accompanied by the tender of witness fees covering a one-day appearance and mileage expenses, in

accordance with the provisions of 28 U.S.C. Section 1821. RHI maintains that no fees or expenses were tendered in the instant case and therefore the subpoena should be quashed. Specifically, RHI maintains that while Defendants tendered witnesses fees and travel expenses with respect to the original subpoena in early May, Defendants never cancelled the prior subpoena and the earlier-tendered check would not be negotiable on the return date of the new subpoena.

The evidence indicates that the witness fee has already been paid. (Doc. 83, Ex. 1-F). Defendants tendered the witness fee and mileage with the original subpoena. (*Id.*) If for some reason that check is dishonored or is otherwise insufficient, Defendants maintain that they will tender a new check or bring the $50 in cash to the deposition. (Doc. 83 at 15).

Additionally, RHI maintains that the subpoena was not served upon Plaintiff as required by Rule 45(b)(1). Specifically, RHI argues that the reissued subpoenas should be quashed because Defendants did not give Plaintiff prior notice that it was going to reissue the subpoenas. According to RHI, the purpose of the notice requirement is to provide "the noticed party with an opportunity to add to the list of documents to be produced by the subpoena recipient in the event they wish to do so, thus disposing of the production burden of the subpoena recipient in one fell swoop." (Doc. 72 at 6). Here, Plaintiff has been aware of the document requests to Riverview since the original subpoena was served on May 10, 2013, and thus has had ample notice.

Accordingly, the subpoenas do not violate Rule 45.

3. Sanctions

Finally, RHI maintains that it should be awarded sanctions under Rule 45(c) based on the conduct of the attorney or party in causing the subpoena to issue and/or based on the contents of the subpoena itself. Specifically, RHI claims that it "has been unreasonably required to incur substantial fees in protection of its interest through no fault of its own as Defendants seek to unreasonably expand the scope of their inquiry." (Doc. 72 at 8). This Court could not disagree more. The fact that RHI has incurred fees and costs in bringing additional discovery related motions is entirely the fault of RHI. This Court clearly and unequivocally set forth RHI's obligations in its July 25, 1013 Order.[6] Had RHI simply agreed to produce the documents as required, this Court would not be adjudicating this satellite litigation. [7]

B. Motion to Strike

Next, RHI moves to strike Defendants' brief in opposition to its motion to quash

[6] Moreover, instead of filing multiple discovery motions, RHI should have requested an informal discovery dispute conference pursuant to S.D. Ohio Civ. R. 37.1.

[7] The Court notes that RHI's counsel is admitted *pro hac* vice from Washington, D.C. Unlike the state of affairs in our nation's capital, the spirit of cooperation and civility is not dead in the Southern District of Ohio. *See* the Introductory Statement on Civility preceding the Local Rules of this Court ("In everyday life most people accord each other common courtesies. Ordinarily these include: politeness in conversation, respect for others' time and schedules, and an attitude of cooperation and truthfulness. Involvement in the legal system does not diminish the desirability of such conduct. A litigant opposing your client, a lawyer who represents that litigant, or a judge who decides an issue, has not thereby forfeited the right to be treated with common courtesy.") With experienced counsel representing the parties in this litigation, and given the civility the Court requires from litigants and attorneys in this jurisdiction, this case should not be languishing at its current state. Counsel shall move forward productively.

the second and third subpoenas. (Doc. 78). Specifically, RHI claims that the response should be stricken because: (1) it was filed out of time; and (2) a complete, unredacted version of Defendants' brief has not been served upon RHI, which denied RHI the opportunity to properly respond.

1. Out of time

First, RHI argues that Defendants' brief in opposition was filed out-of-time, and therefore should be stricken, because Local Rule 7.2(a)(2) is a "date-certain" deadline to which Rule 6(d) does not apply. (Doc. 88 at 2).

Under the plain language of the rules and this Court's clear precedent, the memorandum was timely filed. In *Norman v. Whiteside*, No. 2:08-cv-875, 2013 U.S. Dist. LEXIS 59377, at *5-6 (S.D. Ohio Apr. 25, 2013), this Court rejected RHI's very argument and held that under Rule 6(d), the defendant had three extra days beyond the twenty-one days under S.D. Ohio Civ. R. 7.2(a)(2) to file its brief in opposition to the plaintiff's motion. In fact, this Court has repeatedly held that Rule 6(d) applies to the S.D. Ohio Civ. R. 7.2(a)(2) deadlines to file response and reply briefs. *See*, *e.g.*, *Davis v. Astrue*, No. 2:10cv713, 2011 U.S. Dist. LEXIS 109904, at *4-5 (S.D. Ohio Sept. 26, 2011); *DWS Int'l, Inc. v. Meixa Arts & Handcrafts Co., Ltd.*, No. 3:09cv458, 2010 U.S. Dist. LEXIS 130125, at *2-3 (S.D. Ohio Nov. 27, 2010).

Accordingly, the Court finds that Defendants' memorandum in opposition was timely filed.

2. Unredacted version

Next, RHI argues that Defendants' brief in opposition should be stricken because Defendants have not served RHI an unredacted copy of the brief.

In its opposition, Defendants referenced and attached a few short excerpts from the Rule 30(b)(6) depositions of Kettering Health Network's representative, Bryan Weber, and United HealthCare's representative, Lori Cleary, to rebut RHI's claims that Premier targeted small hospitals and that RHI does not really compete with Plaintiff. Both Kettering and UHC have designated their Rule 30(b)(6) testimony as "Highly Confidential – Outside Counsel's Eyes Only" under the Protective Order that governs in this case. Pursuant to the Protective Order, the only attorneys to which such testimony may be disclosed are "Outside counsel of record representing a named party to this litigation, who are on the signature block of this Protective Order and employees of such attorneys and law firms to whom it is necessary that the material be shown for purposes of this Action." (Doc. 43 at ¶¶ 1, 6). RHI and its counsel do not fall within this category.

RHI also complains that Defendants conditioned service of the unredacted brief upon RHI: (1) signing a Protective Order that RHI never consented to; and (2) convincing two other non-parties to agree to disseminate their confidential information and trade secrets. (Doc. 88 at 3). However, it would have been a clear violation of Defendants' duty to protect Kettering and UHC's "confidential information and trade secrets" to disclose it to RHI when, by its own admission, RHI never consented to the Protective Order designed to protect that information.

Accordingly, RHI's motion to strike is denied.

C. Defendants' Cross-Motion for Sanctions

Finally, Defendants filed a cross-motion for sanctions alleging that RHI's motion to quash had no colorable basis. A "district court may award sanctions pursuant to its inherent powers when bad faith occurs." *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 115 F. Supp. 2d 898, 904 (S.D. Ohio 2000) (citing *Runfola & Assoc. v. Spectrum Reporting II, Inc.*, 88 F.3d 368, 375 (6th Cir. 1996). Among other ways, "a party 'shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order.'" *Ferron v. Echostar Satellite, LLC*, 658 F. Supp. 2d 859, 863 (S.D. Ohio 2009) (quoting *Chambers v. NASCO*, 501 U.S. 32, 45-46 (1991)).

While the Court declines to award sanctions at this time, should RHI continue its attempts to relitigate matters already decided by this Court or delay the production of documents or the 30(b)(6) deposition, the Court will revisit the issue.

III. CONCLUSION

Accordingly, for the reasons stated here:

(1) Riverview Health Institute's motion to quash and request for sanctions (Doc. 72) is **DENIED**;

(2) Defendants' cross-motion for sanctions (Doc. 83) is **DENIED**; and

(3) Riverview Health Institute's motion to strike (Doc. 88) is **DENIED**.

IT IS SO ORDERED.

Date: 11/4/13

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