

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

Star Discount Pharmacy, Inc.,
an Alabama corporation;
Propst Discount Drugs, Inc.,
an Alabama corporation;
C&H Pharmacy, Inc.,
an Alabama corporation;
Darden Heritage, an individual;

Plaintiffs,

v.

**MedImpact Healthcare
Systems, Inc.,**
a California corporation;
Michael Struhs, an individual;
Nicole Adams, an individual;

Defendants.

Case No: CV-11-K-2206-NE

Opposed

**MOTION TO ENTER PROTECTIVE ORDER
AND
TO COMPEL RESPONSES TO DISCOVERY**

COME NOW the Plaintiffs, by and through undersigned counsel, and move this Honorable Court to resolve this discovery dispute by entering a confidentiality/ protective agreement and by issuing an Order providing that Defendants shall respond to basic discovery requests within 21 days thereafter.

The motion is required as the Defendants have insisted on the execution of a confidentiality agreement, prior to engaging in any document production. The Defendants also insist it be their agreement which goes well beyond basic confidentiality concerns and would fully restrict the ability of Plaintiffs' counsel to represent their client or prepare their case. Plaintiffs understand reasonable and legitimate requests for confidentiality of certain information, such as trade secrets. Prior to filing this motion, Plaintiffs' counsel spent significant hours attempting to meet Defendants' extra demands and also engaged in a lengthy telephone conference with Defendants' counsel to discuss the issues. In support of their motion, Plaintiffs state as follow:

I. INTRODUCTION

The present motion seeks discovery, including production of basic documents and information. To date, no documents have been produced. No documents have been produced by Defendants pursuant to Initial Disclosures or subsequent discovery requests.

Instead, the Defendants asserted three hurdles to discovery. The first hurdle consisted of voluminous general objections that were not specific to any item of discovery. The presentation of such voluminous general objections renders it impossible to ever ascertain whether a party has made a good faith effort to

respond to discovery. After addressing that issue in an earlier motion, the Defendants have now withdrawn their general objections.

The Defendants placed a second hurdle to discovery in the guise of seeking a confidentiality agreement to protect from public disclosure certain documents. While the undersigned understands limited confidentiality concerns, the Defendants have used the issue as a hurdle to legitimate discovery and to impose undue burdens on the Plaintiffs. This issue will be discussed in a subsequent section of this motion.

Third, the Defendants asserted multiple objections to each specific discovery request of Plaintiffs. Even basic requests that simply sought the identity of individuals drew answers couched in voluminous, specific objections. As a result, Plaintiffs must address those voluminous objections as well. Plaintiffs would ask first that the Court address the confidentiality objections to discovery. Then, perhaps basic documents can be exchanged and specific objections addressed.

II. THE NEED FOR CONFIDENTIALITY IS NO BARRIER TO DISCOVERY IN THIS CASE

A reasonable and legitimate request for confidentiality is no issue in this case. Attached hereto as Exhibit "A" is a Confidentiality order that fully protects

the Defendants' legitimate privacy interest. . The undersigned would ask that the Court enter said terms as a Protective Order in this case.

Indeed, Exhibit A was copied from a prior agreement used in a significant business tort case in this District. That case involved significant issues of customer information, the transportation and disposal of chemicals and potentially hazardous waste, the involvement of regulatory authorities in both Alabama and Georgia, private customer information from a local utility agency, a Defendant's confidential production processes, and the EPA's involvement in declaring the Plaintiffs' facility as a Superfund site. Plaintiffs believe Exhibit A is clearly sufficient to satisfy any legitimate need for confidentiality in this litigation. In the prior case, Exhibit A was entered as a "Consent Order "after agreement by multiple counsel, including respected members of both the Alabama and North Carolina bars. The undersigned has modified the order only by removing references to its consent.

If legitimate privacy concerns are no issue, then why have they become a barrier to discovery in this case? When Defendants initially answered discovery by stating that they required confidentiality, Plaintiffs' counsel promptly agreed to that basic request if limited to truly confidential information. Plaintiffs' counsel then asked the Defendants to forward a confidentiality agreement that would allow

production by both parties of certain information, including financial information and trade secrets.

Instead of providing a basic confidentiality agreement (as the undersigned has executed at the requests of other Defendants in multiple cases), the Defendants' counsel forwarded an approximately 20 page document that altered many provisions of basic law, gave the Defendants' unbridled ability to subjectively declare documents as confidential, expanded the definition of confidential information, and left Plaintiffs unable to even prepare their case. A copy of the Defendants' proposal is attached hereto as Exhibit "B."

Prior to filing the present motion, Plaintiffs' counsel spent hours attempting to meet Defendants' various extra demands through proposed changes to their document. Moreover, Plaintiffs' counsel had a lengthy telephone conference with Defendants' counsel to address these issues. However, Defendants' counsel would not agree to limit extra provisions of the document which altered the duties and burdens of the parties beyond simple confidentiality.

The Defendants' continued insistence of multiple provisions that allowed redactions, changed burdens, and restricted Plaintiffs from preparing necessary experts, is very distressing. This is especially so since the Defendant MedImpact has consistently made public statements that it is completely open and

transparent with information. Such broad public statements have frequently been made and are part of the company's marketing strategy. Indeed, a MedImpact executive has claimed the following:

We are encouraged to see increased interest in a fully transparent PBM model that we at MedImpact have considered imperative since our inception in 1989...

We embrace transparency -- not because of pressure from our government, our legal system or the marketplace -- but because **we believe that clients and consumers have the right to know what is happening both clinically and financially with their drug benefit.**

(MedImpact Sr. Vice-President Dale Brown in a press release attached hereto as Exhibit "C" with bold added). On another occasion, MedImpact executive Brown stated "**We've always been transparent; we've always shown full disclosure.**" (See, Exhibit "D" where Brown warned the further regulation could negatively impact MedImpact's voluntary transparency). Quite clearly, MedImpact's public promises do not match its current actions.

What are some of the additional burdens that Defendants sought to impose on Plaintiffs beyond a simple agreement to keep matters confidential?

1. **The Defendants insisted on provisions that allowed them advance knowledge, advance investigation, and even advance approval of Plaintiffs' consultants and experts.**

2. The Defendants insisted on provisions that would allow them a veto over Plaintiffs' use of any expert in the pharmaceutical industry.

Among the language restricting the Plaintiffs' ability to prepare their case with any consultants or experts, the Defendants' proposal contained the following:

- (h) To Independent Experts and Independent Consultants retained by Outside Counsel to assist in the preparation, settlement, or trial of this case, but only as follows:
 - 1) prior to disclosure of any Protected Information to an Independent Expert or Outside Consultant, the Party(ies) seeking such disclosure shall notify the Non-Disclosing Party(ies) of the same, and shall provide sufficient identifying information regarding the Independent Expert or Outside Consultant to whom such disclosure is to be made so as to allow the Non-Disclosing Party(ies) an opportunity to determine whether such Independent Expert or Outside Consultant is or could reasonably be a competitor (to include an advisor or consultant to a competitor) of the Non-Disclosing Party(ies). The information to be provided shall include, at a minimum, the Independent Expert's or Outside Consultant's name, address and employer.
 - 2) In the event that the Non-Disclosing Party(ies) believe that the proposed Independent Expert or Outside Consultant is or could reasonably be a competitor (to include an advisor or consultant to a competitor) of the Non-Disclosing Party(ies), he/she/it shall so object to the proposed disclosure, in writing, within the above-referenced 10-day period. If no such objection is made, the proposed disclosure shall be permitted, consistent with the provisions of this Order.
 - 3) In the event that an objection to the proposed disclosure

is timely served, no such disclosure shall be made until the objection is resolved by the Parties or permitted by the Court.

(Defendants' proposal, pp. 11-12). Before addressing the obvious restrictions of this language, it should be noted that the Defendants crafted it to ONLY apply to "outside" counsel activities. Separately, under the Defendants' definitions, this means that the Defendant and its in-house counsel may use any consultants they desire unimpeded by any confidentiality or notice provisions.

Likewise, the provisions apply only to "independent" experts or consultants. Separately, under the Defendants' definitions, independent experts are those retained for purposes of assisting in this litigation. Thus, the Defendants could retain any number of actual outside experts for any other common topics but later use their opinions for this case while avoiding any advance notice or approval issues.

While the Defendants are given practically unlimited authority to prepare their defenses, the Plaintiffs are required to provide "advance" notice of both experts expected to testify as well as consultants who normally are shielded from discovery burdens. This way, the Defendants can immediately begin their preparations and investigations concerning these individuals.

But, improper advance notice is not the only issue. The Defendants also get

the added benefit of being able to approve or disapprove of an expert or consultant by unilaterally refusing to allow that person to look at documents (According to other provisions of their agreement, the Defendants can mark any document as confidential regardless of its true nature. The Defendants have already requested to file under seal full pleadings in this case which contain little or no information that could ever be construed as confidential.).

The Defendants' ability to veto a consultant or expert Plaintiffs wish to utilize is boundless since it is within MedImpact's discretion to consider the person a competitor and then list any document as confidential, refusing to allow disclosure. How does MedImpact define its own business on the internet? Indeed, MedImpact's website lists its business categories as account management, clinical pharmacy resources, strategic benefit plan design, claims eligibility, claims management, pharmacy network management, utilization management, management reporting (including simple consulting and web-based tools), education, quality measurement, plan sponsor education, and health management consulting (which is far broader than simple pharmacy benefit plans). Please see Exhibit "E" attached hereto. Under their already utilized definitions, MedImpact could unilaterally exclude **any** and **all** of Plaintiffs' consultants or experts needed for this action. While excluding Plaintiffs' experts, the Defendants could utilize

internal employees as experts or, as previously mentioned, utilize consultants previously retained ostensibly for other purposes. In effect, the Defendants can control the use of experts on both sides.

This case involves industry-specific claims. The Defendant MedImpact's required language would allow it unbridled discretion to label any consultant or expert in the field of pharmacy benefits as a competitor, denying the Plaintiffs the ability to prepare their case. In the past, the Defendant has actually sued former employees for unfair competition claims based on the assertions that these employees started a health care consulting company (**not a PBM** like MedImpact). *See, MedImpact Healthcare Services, Inc. v. SXC Health Solutions, Inc., et al.*, (filed in the United States District Court for the Southern District of California, 3:08-cv-00590-BTM-CAB).

Finally, the Defendants' provisions allowing a party to contest an expert denial are also time consuming and would create needless delay. Such procedures create the additional likelihood that the Defendant can simply utilize the provisions to create a delay that prejudices Plaintiffs from preparing and designating experts within a timely manner.

3. The Defendants insisted on expanding the scope of confidential information beyond that allowed by The Federal Rules of Civil Procedure

In the case at bar, the Defendants have insisted on a definition of “confidential information” that would allow them, in reality, to designate any and all documents and information as confidential. When coupled with the other provisions of their proposed agreement, the Plaintiffs would be denied the ability to judiciously and timely prepare their case.

How do the Defendants seek to define confidential information? They define it as documents or information, including anything derived from such, that:

a Party or Person reasonably believes reveals business, financial, competitive, proprietary, trade secret or other information otherwise unavailable to the public, the disclosure of which would cause the producing Party competitive harm or is of a sensitive nature about the Party (or of another Person) and which is not generally made publicly available...

(Defendants’ Proposed Agreement, Sec. 6(a), p. 3).

The undersigned does not dispute that the Court should provide reasonable protections that allow discovery but also prevent legitimate trade secrets or confidential business research from additional disclosure outside this litigation. The Federal Rules of Civil Procedure contemplate the protection of trade secrets and confidential research by allowing for protective orders for such information. See, Rule 26(c)(1)(G), *FRCP*. However, the scope of such protection is limited by the rules. It clearly would not include “other information otherwise unavailable to

the public” or information the Defendants feel to be “sensitive” and, therefore, simply deems now to be confidential within its discretion.

In the recent decision of *Bandsuch v. Werner Enterprises, Inc.*, 2010 WL 2791706 (Not reported in F.Supp.)(M.D. Fla. 2010), a District Court addressing discovery and a defendant’s request for a protective order stated:

A protective order should be entered only when the movant makes a particularized showing of “good cause” and specific demonstration of fact by affidavit or testimony of a witness with personal knowledge, of the specific harm that would result from disclosure or loss of confidentiality; generalities, conclusory statements and unsupported contentions do not suffice. *Gulf Oil Company v. Bernard*, 452 U.S. 89, 102 n. 16, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981)

Id. at *1. Yet, the Defendants wish to expand the agreed-upon definition of confidentiality to include generalities of vague “sensitivity.”

In another recent case, the Federal Circuit actually addressed an allegation of a Defendant’s “extensive use of improper confidentiality markings in the briefs filed. . .” *In re Violation of of Rule 28(D)*, 635 F.3d 1352 (2011). In determining whether their own circuit rules were violated, that Court discussed the issues surrounding discovery, confidentiality, and protective orders.

Specifically, the Court discussed, at length, Rule 26(c)(1)(G) which deals with confidential trade secrets and commercial information. In discussing the

Rule, the Court noted that the decisions afforded “only limited protection.” *Id.* at 1357. The party seeking to limit full disclosure must show not some generic sensitivity or perceived harm, but instead, “must show that ‘specific prejudice or harm will result if no protective order is granted.’” *Id.* at 1357-1358.

Moreover, even if the Defendants actually have a concrete, specific harm that is legitimate, the Court must still “balance the public and private interests.” *Id.* The case at bar involves significant public interests, including the benefits provided by a public fund and the provision of essential pharmacy services throughout Alabama. Indeed, the Defendants have even affirmatively pled that they are entitled to defenses afforded public entities. As such, when it comes to PEEHIP or Alabama specific requests, one must question whether the Defendants have any privacy interests at all. If the Defendants did have such interests, does their attempt to stand in the stead of the State end their ability to assert privacy interests as a normal non-public business?

As for other information, if the Defendants are allowed a broad discovery agreement or Order whereby they may designate any information, if deemed by them to be sensitive, then they will have circumvented the goal of our discovery rules. They will have prevented full disclosure while at the same time cloaking themselves in the other benefits of a public entity.

The problem in this case is also that the current Defendants have already exhibited their desire to use this process not only to protect legitimately confidential documents, but also, to delay the litigation and keep serious issues involving PEEHIP and pharmacies across Alabama from being resolved. This desire has been exhibited in Defendants' prior actions of filing generic legal responses completely under seal despite the lack of truly confidential information therein. If the Defendants are allowed to go beyond the Rules of Civil Procedure in defining protected information regardless of (1) the producer of said information (as noted in their proposed definitions which give them authority over 3rd party production); (2) the bounds or definitions of said information; and, (3) the procedures to address disputes over said information, then the Defendants may use this authority to delay the resolution of this case, to deny a complete hearing of all issues based on full information; and, to create grossly unnecessary expense on the litigants.

- 4. The Defendants insisted on placing the obligation to seek judicial redress for any dispute on the receiving party (likely the Plaintiffs) while the designating party (likely the Defendants) can freely mark any document confidential**

This limitation imposed by the Defendants requires little additional discussion. In the preceding paragraphs, the undersigned discussed how the

Defendants have broadly written various definitions to allow their complete discretion in asserting confidentiality. By creating an almost unlimited right to mark documents as confidential and then to place additional burdens on the receiving party that limit its ability to question such classification, the Defendants create additional delay and costs to the Plaintiffs. The law is clear that the party asserting confidentiality has the burden of moving for protection. Plaintiffs do not believe that burden should be shifted to them.

- 5. The Defendants insisted not just on “confidentiality” protections, but also, that they be allowed to categorize documents by a higher level of “restricted confidential” that actually allows a redaction or withholding of information.**

In their proposed agreement, the Defendants do not simply want the discretion to label any document or deposition as confidential. They also want a new and completely discretionary two-tiered approach. Here, again, is the subjective and broad definition that Defendants wish to assert for general “confidential” information:

a Party or Person reasonably believes reveals business, financial, competitive, proprietary, trade secret or other information otherwise unavailable to the public, the disclosure of which would cause the producing Party competitive harm or is of a sensitive nature about the Party (or of another Person) and which is not generally

made publicly available...

(Defendants' Proposed Agreement, Sec. 6(a), p. 3). Now, what is the difference between the Defendants' term of simply "confidential" as opposed to the new term and tier of "restricted confidential" information? Here is how the Defendants seek to define this new category:

7. "Restricted Confidential Information" means information in written, oral, electronic or other form, whether it be a document, information contained in or derived from a document, information revealed during a deposition, or information revealed in responding to a discovery request, that:

(a) a Party or Person reasonably believes reveals business, financial, competitive, proprietary, trade secret or other information of a highly sensitive nature about the Party (or of another Person which information the party is under a duty to maintain in confidence); and

(Defendants' Proposed Agreement, Sec. 7, p. 4). What's the difference? It appears the only difference is that "confidential" information is just "sensitive" while "restricted confidential" information is "highly sensitive." Of course, that subjective designation is solely within the Defendants' discretion. Moreover, even if challenged in Court, it is incapable of any meaningful distinction or argument.

In other words, it is solely subjective to the Defendants. And, it goes well beyond the recognized protections actually afforded the Defendants.

Why does it make a difference how the Defendants unilaterally choose to designate documents? That's an interesting question. As a whole, the Defendants' proposed agreement is very vague and confusing. However, it does contain several provisions further expanding Defendants' discretionary ability to withhold information.

First, information subjectively deemed "restricted confidential" by Defendants can simply be designated for "Attorney's Eyes Only." (See, Defendants' proposal, Par. 7(b), p. 4). Thus, Defendants' can simply restrict Plaintiffs from even discussing pertinent information with their own client or consultants. How can the undersigned prepare his case if restricted from addressing issues with his own client? How can the undersigned fulfill his obligations to his client if restricted from using experts?

In subsequent provisions of their proposed agreement, the Defendants make it clear that their unilateral designation of "restricted" confidential as opposed to simply confidential means that this information may not be disclosed to the other party or that parties' consultants or experts at all. In other words, the Defendants' designation renders the otherwise discoverable information unusable in this case.

Such interference between counsel and client would be contrary to all accepted concepts of justice. Moreover, such interference between counsel and their experts is wholly improper and would deny a fair hearing in this case. And, because of the way the Defendants' have defined the levels of protection, there is little that Plaintiffs could do if such an agreement is made.

Second, the Defendants' proposed agreement allows them the option of permitting Plaintiffs to initially inspect documents for production and then withhold documents from production as "restricted confidential." According to the Defendants, "[i]n this event, the receiving Party will treat all information learned in its initial inspection which is NOT contained in the copied documents as "Restricted Confidential." (Defendants' proposed agreement, Par 10, pp. 5-6, emphasis added). So, the Defendants are giving themselves room to unilaterally decide to withhold documents. And, in an effort to justify that conduct, are imposing an impossible burden on Plaintiffs to remember everything they saw in every document inspected so they will know if something is missing. That is unacceptable in any fair judicial system. Plaintiffs simply cannot accept such a system that allows Defendants unfettered discretion to categorize documents, redact information, and restrict their use in this litigation.

6. The Defendants insisted on provisions that extended their power to unilaterally assert confidentiality for 3rd parties, including the State of Alabama.

On one hand, the Defendants seek to impose definitions of confidential information that seem to protect anything they deem private or having not been disclosed to the public. But, their agreement also states that it governs information “given or exchanged by any party to the Litigation or by any third party subject to discovery in this Litigation.” (See, Defendants’ proposed agreement, p.2). So, in reality, the Defendants desire not just to protect their legitimate, private trade secrets and private financial information but to also impose barriers to information not held by them.

Such a restriction is particularly unjust in this case. This case involves a public fund, pharmacies throughout the State of Alabama, and the provision of a necessary service to the citizens of our State. The Defendants chose to defend themselves by arguing they acted on behalf of the public sovereign. Information related to such issues is due far less protection than simple, private commercial dealings. This fact has long been borne out in cases seeking governmental information as well as cases involving the rights of the press to report on such topics. Indeed, when a local State Senator (who sat on a committee relevant to

these issues) requested data from MedImpact, the company responded by stating that such information belonged to PEEHIP and would have to be received from it. See, Exhibit "F" attached hereto. The undersigned does not believe the Defendant can legitimately assert such information is its private proprietary information in this case but tell a sitting Senator it is public information.

Moreover, the Service Agreement (Attached hereto as Exhibit "G") between the Defendant MedImpact and PEEHIP (effective October 1, 2010) provides for the disclosure of much of the information requested without any limitation whatsoever. This includes without charge (p.46 of Agreement).

This Service Agreement requires MedImpact to comply with open records laws. (Sec. 12.2, p.19). Under the Services Agreement, MedImpact agreed that it does NOT even own the claims data, files, and much of the other information sought by Plaintiffs in their discovery requests. (Sec. 11.1, 2nd paragraph, p. 14 and Sec. 5.3(a), p.9). Finally, and most important, MedImpact explicitly agreed in its Service Agreement to abide and comply with its definition of transparency as contained in the Service Agreement. (Sec. 11.2, p.14). That definition provides for "full disclosure". (Sec. 1.18, p.4).

It would be patently unjust for the Defendants to seek to impose normal commercial discovery protections to issues of public entities or public services.

The undersigned believes that a 3rd party who has received a subpoena (or other discovery request) is adequately protected and can easily address their concerns in that particular situation, to the Court. The Defendants' agreement has certainly not provided any allowance for such public concerns which would need to be addressed and it would be improper to reach an agreement that did not allow a 3rd party the opportunity to voice its unique issues.

7. The Defendants insisted on expanding permission to file matters "under seal" beyond actual confidential information which would allow them to make the entire case "under seal."

According to their proposal, the Defendants can consider materials confidential, or the completely discretionary "restricted" confidential, even if they simply contain some confidential information. In other words, the entire document or deposition can be marked off and protected from viewing. Indeed, the Defendants simply have to place their stamp on "the initial page of a protected document." (See, Defendants' proposed agreement, Par. 9, p. 5). For depositions, portions OR simply the whole transcript can be protected. (See, Defendants' proposed agreement, Par. 13, pp. 6-7).

First, the Defendants can mark any documents as confidential within a discretionary and subjective definition. Then, the Defendants can mark the entire

transcript or entire document confidential instead of just the actual “confidential” information. Then, under paragraph 25 of their proposed agreement, they may file any documents they designate as confidential, under seal. Thus, the Defendants have written an agreement that allows them to file everything under seal. Already in this case, the Defendants have filed entire briefs under seal despite the fact that they contained almost nothing but legal arguments.

While truly legitimate private information should be protected, our Courts have long held that the public interests of justice largely outweigh secrecy. In *Romero v. Drummond Co., Inc.*, 480 F.3d 1234, 1246 (11th Cir. 2007), the Court stated:

In balancing the public interest in accessing court documents against a party’s interest in keeping the information confidential, courts consider, among other factors, whether allowing access would impair court functions or harm legitimate privacy interests, the degree of and likelihood of injury if made public, the reliability of the information, whether there will be an opportunity to respond to the information, whether the information concerns public officials or public concerns, and the availability of a less onerous alternative to sealing the documents.

The case at bar clearly involves issues of great public concern, involving the distribution of necessary pharmacy benefits in Alabama. In fact, the Defendants

have admitted through their pleadings, by attempting to cloak themselves in governmental immunity, that this case involves issues of public concern.

8. **The Defendants insisted that they will not provide any advance notice of an intention to assert confidentiality or even the higher "restricted" confidential status at a deposition, even if Defendants reasonably, or in good faith, expected in advance to do so.**
9. **The Defendants insisted that they be allowed to unilaterally designate an entire deposition as confidential or restricted confidential, regardless of whether actual confidential information was reviewed or discussed.**
10. **The Defendants insisted on a restriction that no deposition transcript could be used for 21 days after its receipt.**

Each of the preceding 3 limitations placed by Defendants relates to depositions. To understand all the limitations the Defendants can unilaterally and subjectively impose on depositions, a full reading to their 20 page proposal of fine print is required.

However, the Defendants did include a specific paragraph on depositions which relates the above-mentioned 3 requirements. The Defendants' paragraph reads as follows:

13. *Designation of Depositions.* Depositions or portions thereof upon oral or written questions may be classified as Protected Information either by an examining party's attorney or by an attorney defending or attending the deposition. A Party claiming that a deposition or any portion thereof is

Protected Information shall give notice of such claim to the other affected Parties and Persons either prior to or during the deposition, or within twenty-one (21) days after receipt of the deposition transcript, and the testimony taken and the transcript of such deposition or portion thereof shall be designated as Confidential or Restricted Confidential. The entire deposition transcript shall be treated as Restricted Confidential until twenty-one (21) days after receipt of the transcript. Where a designation of deposition testimony pursuant to this Order is made prior to, or during, the taking of a deposition, only those Persons permitted access to the Protected Information to be addressed during such deposition shall be present during the witness' testimony regarding the same.

(See, Defendants' proposal, Par. 13, pp. 6-7).

What does this mean in practical terms? The case at bar will likely require a significant number of depositions. Many of these depositions will probably be taken in Alabama. However, the Defendants MedImpact and Struhs are California residents. Likewise, all of the Defendant MedImpact's employees except Defendant Adams are out-of-state residents likely residing in California. Clearly, the parties expect to take depositions not just in Alabama, but also California. According to the Defendants' counsel in the parties' initial conferences, it is expected that numerous depositions will be taken in California.

The limitations required by Defendants would severely hamper discovery and result in needless costs in many ways. The examples are numerous. They

include the following non-exhaustive list:

1. The Defendants could (without any justification) allow Plaintiffs' group (which could include multiple counsel, the Plaintiffs' representative, and possibly expensive consultants/experts) to travel to California for depositions and, upon arrival, simply declare that the deposition testimony will be RESTRICTED CONFIDENTIAL. Thus, everyone but counsel would be required to leave the deposition. In which case, Plaintiffs have incurred significant costs due to Defendants' unilateral and subjective determination after arrival.
2. The Defendants could designate an entire transcript as confidential even if only a small portion included actual confidential information; thus, effectively barring the use of non-confidential information with other needed witnesses.
3. The Defendants could designate an entire transcript as restricted confidential (without justification or if only a small portion actually contained confidential information); thus, preventing the actual Plaintiffs' representative or Plaintiffs' experts from assisting Plaintiffs in preparing said case.
4. The Defendants could use their discretionary ability to restrict depositions in bad faith at the time of the deposition even where they clearly knew in advance of an intention to assert privileges. This damage would be compounded by the expense of travel and the advance scheduling time necessary to set any deposition with multiple parties, multiple lawyers, and busy schedules.
5. The Defendants could utilize their additional 21 days in which to designate a transcript AFTER its receipt (during which time the entire transcript was designated "restricted confidential" by this agreement) as a means of preventing the Plaintiffs' from preparing their case and meeting other Court deadlines. During this period, the Plaintiffs would be unable to use the transcript and unable to show it to their consultants/experts. It is important to note that the Defendants already largely control the scheduling of their clients' employees. Thus, with this additional time issue, the Defendants can place Plaintiffs' in an extremely prejudiced position.

The Defendants' position is unjust. The parties will have produced documents prior to depositions. If the parties utilize a single category of confidential documents that protects their public dissemination but not their use in this case, then the attorneys can simply mark sections of the deposition which discuss those previously identified documents, as confidential. That is the customary method the undersigned has used in other significant business torts, including those that involved truly confidential proprietary information and those in which the government may have been involved.

11. The Defendants insisted that they be allowed to alter the designation of documents, at any time, up to the conclusion of the litigation.

In discussing this issue with Defendants' counsel, they compared this demand to situations involving the inadvertent disclosure of privileged attorney-client communications and the ability to claw back such documents. However, the present situation is different in at least two respects. First, the attorney-client privilege is a clear rule bounded by well-settled precedent. In most situations, everyone knows what an attorney-client communication looks like when they see it. Rarely, would there be any disagreement.


Also, the rules of attorney-client communications are not governed by the

subjective whims that would allow a person to designate something as privileged simply because they felt it to be “sensitive” as allowed here. We certainly don’t need 20 pages of verbiage to define what constitutes an attorney-client privilege.

Second, because the Defendants’ proposal is full of subjective and expansive definitions, the Defendant could decide at a later date that a document is “sensitive” and protected when, in truth, the Defendants simply realized it was a document important to the other side.

CONCLUSION

For all the foregoing reasons, Plaintiffs request that this Court enter Exhibit “A” as a Protective Order in this case governing further discovery. Thereafter, the parties can begin exchanging documents and discussing specific objections.


Jeffrey G. Blackwell (BLA070)

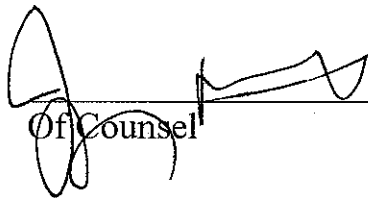
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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing pleading upon all parties or counsel of record by email and/or by placing copy of same in the United States Mail, postage prepaid and properly addressed on this the 8th day of JULY 2012:

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