UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:16–cv-81180–KAM

UNITEDHEALTHCARE OF FLORIDA, INC.
and ALL SAVERS INSURANCE COMPANY,

Plaintiffs,

v. JURY TRIAL DEMANDED

AMERICAN RENAL ASSOCIATES LLC and
AMERICAN RENAL MANAGEMENT LLC,

Defendants.
_____/

Plaintiffs' Reply in Support of Motion for Reconsideration or Modification of Omnibus Discovery Order dated August 30, 2017 (DE 290)

FILED UNDER SEAL – REDACTED VERSION FILED PUBLICLY

I. The Court should reconsider or modify its Order granting ARA's motion to compel, in part.

The Order that United asks this Court to reconsider (a) granted ARA the right to demand that Plaintiffs collect and search the files of 16 additional custodians, no matter how tangentially their responsibilities relate to the conduct at issue in this case, and without regard to the disproportionate burden such efforts would impose relative to any benefit, and (b) granted ARA the right to force United to utilize whichever 12 additional search terms ARA desired, without regard to how overbroad, irrelevant, or burdensome the search terms would be. Ordering this relief was unfair and erroneous, as it was not based on any findings of fact and it created an asymmetrical double standard by granting to ARA discovery rights that the Court denied to United—when ARA had refused to produce *any* documents. The Court should exercise its discretion to reconsider, and revise, its Order for several reasons.

First, the Order was not based on any findings or evidence that United's production is deficient with respect to any particular category of documents. Tellingly, ARA does not dispute this in its opposition brief.[1] The Order was also not based on any findings that searching any particular new custodians with any new search terms would result in any benefit to ARA that did not outweigh the significant burden it would impose on Plaintiffs. As there is simply no factual basis for ARA getting to choose, and forcing United to search, whatever custodians and search terms ARA pleases, the Court should reconsider and revise its Order.[2]

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[1] All ARA points to is the fact that ARA has produced more documents than United and that many of United's documents are claim forms. DE 297 at 2. But ARA's conduct is at issue in this case. Far more ARA employees came into contact with the 54 individuals at issue than did United employees. Indeed, ARA employees came into contact with each of the 54 employees at least 3 times a week for as long as they received dialysis services at ARA clinics. In fact, documents show that ARA personnel [redacted] Ex. 1 [redacted] Therefore, it is not surprising that ARA would need to search more custodians and have more documents than United—after all, United only learned of ARA's fraudulent scheme a few months before filing suit. And this is a fraud case. The documents relevant to the fraud are—by their very nature—hidden from United and in the possession of ARA. Moreover, ARA specifically requested the claim forms that it now complains about receiving. DE 254 at Ex. F (RFP No. 27). It is not as though United is padding its production with irrelevant documents.

[2] Contrary to ARA's brief, United is running the original search terms on the custodians it agreed to search and it has never said that it was waiting until this motion was decided.

Second, the Order inexplicably and without any stated basis grants discovery rights to ARA that the Court has denied to Plaintiffs in this case. Earlier in this case, after the Court *compelled* ARA to respond to Plaintiffs' discovery requests (because ARA had refused to produce *any* discovery), ARA proposed using the most narrow, restrictive search terms imaginable (almost always employing limiters within five terms of another term). DE 119. Indeed, ARA's terms were specifically designed to *exclude* responsive material from their *review. Id.* United objected to this transparent attempt by Defendants to *shield their own reviewers* from even seeing their own responsive documents, and proposed terms that were still focused, but that would capture a broader universe of responsive documents. DE 131. The Court refused to order ARA to use United's selected terms and instead ordered the parties to meet and confer. DE 133. And yet, here, the Court has, without factual basis or any finding of deficiency (as clearly existed when ARA refused to produce *any* documents), departed from this approach, and has given ARA the unfettered right to force Plaintiffs to use whatever overbroad, irrelevant search terms Defendants choose. There is simply no factual or equitable basis for creating such asymmetrical discovery rights in this case. At the very least, if the Court upholds its Order on the complete lack of evidence put forth by ARA, United should be granted the same right and be given an opportunity to require ARA to run 12 new searches that it creates in its sole discretion.

Third, the Order will impose burdens on Plaintiffs that are disproportionate to any benefit that will flow to Defendants. Indeed, since Plaintiffs filed their motion, Defendants served the list of custodians they are trying to force United to collect from and the search terms they are trying to force United to use. Exs. 2 & 3. As predicted, these custodians and terms are burdensome, in many cases unrelated to the core issues in this case, and are completely unrestricted and unfocused. Indeed, they appear designed to impose as large a burden on United to pull and review irrelevant, non-responsive documents as possible.

[redacted] Ex. 4 (Yerich Decl.) at ¶ 4.d. Before United can run any search terms [redacted]. *Id.* at ¶¶ 3-6. [redacted] *Id.* at ¶ 4.d. [redacted]

[redacted] *Id.* [redacted] *Id.*[3] [redacted] for custodians that had only ancillary involvement, or in some cases absolutely no direct involvement in the issues identified in Plaintiffs' Second Amended Complaint. There is no reason to believe that these individuals would have unique responsive information that would be proportional to the incredible burdens of collecting, searching, and reviewing their documents would cause.

United cannot even begin to run the proposed new 12 search terms to get a sense of the magnitude of the documents the terms will capture until the collection is complete. But those terms are troubling on their face for various reasons. For example, this Court already denied ARA's motion to seek more information regarding Document Request Nos. 38-41, seeking strategies about increasing revenues, improving competitive position, and other financial metrics, finding that "[g]ood cause to renew these requests has not been shown" and that they were "overbroad." DE 290 at 3. But now, ARA uses the Court's Order to circumvent that denial by using overbroad search terms that will undoubtedly capture documents that fall within those denied requests. For instance, if a document contains "affordability initiative w/40" "non-par,"—which could relate to any number of scenarios far outside ARA's claims (or even the entire dialysis world)—United has to spend the resources to search and review it, even though it need not be produced because ARA's motion was denied. *See* Ex. 3 at No. 7. The burden on this front is compounded, since ARA has included United's President of Network Operations among its list of new custodians. This further illustrates why the Order's failure to tie the custodians and search terms to any purported deficiency is so problematic.

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[3] ARA complains that requiring further meet-and-confer efforts "would allow United to run down the clock on discovery…." DE 297 at 3. To be clear, ARA has all the documents that it needs to defend this case from United. United has substantially completed its production weeks ago and the fact that ARA has insisted on seeking further documents outside the margins of relevance does not change that. If ARA wishes to stand down on taking depositions until this burdensome, timely, costly, and wasteful exercise is finished, that is its choice. Had ARA not continued to demand an unreasonable number of additional custodians in past meet and confers, it would not be in the position it is now. If the Court were to provide the parties guidance on where, if anywhere, there are deficiencies in the parties' productions, it would force the parties to be reasonable in their negotiations and they could likely find common ground. *See* Ex. 4 at ¶ 12.

Similarly, documents that contain "tak" within 40 words of "TP" will also be captured under ARA's search No. 1. *See id.* at No. 1. As will documents containing "polic" AND "TP." *See id.* at No. 2. By any objective measure, these searches are so broad that they are nonsensical and unreasonable. And without any deficiency identified, such an onerous and burdensome collection cannot be reconciled with Rule 26(b)(1)'s proportionality requirement.

Moreover, because the Order did not identify any deficiencies, ARA seems to be targeting individuals who are more likely to serve ARA's non-litigation strategies. For instance, several individuals are focused on United's network agreements.[4] ARA, however, is an out-of-network provider. It has little need for information from these individuals unless it were trying to ascertain competitively-sensitive information that it could use in trying to negotiate an in-network agreement with United. The network employees primarily involved with past negotiations with ARA that might be relevant to this case have already been searched. There is no proportional need to search more tangential custodians—especially when the collection will likely pull back highly-competitive information about ARA's competitors (and nothing about ARA that hasn't already been produced). For instance, using the broad search term IEX within 15 words of AKF (Ex. 3 at No. 8) will bring back information relating to ARA's competitors which will have no bearing on this case because this Court has already denied United's requests to have ARA produce information about other dialysis providers. DE 106 at 7 (sustaining Int. No. 7). The Court should not allow such disproportionate and unfair discovery to be forced upon Plaintiffs without any finding of deficiency.

Finally, there is precedent for this Court reconsidering and modifying a previous motion to compel order. DE 133. Indeed, ARA itself asked this Court to reconsider the deadline it set when compelling ARA to produce documents. DE 117. The Court made no finding of good cause there, but nevertheless, exercised its discretion and revisited its earlier Order and decided to modify it to allow ARA more time to comply with the Court's Order. DE 133. Similarly, this Court is free to exercise its discretion and—now that the effects of the Court's Order combined with ARA's decision on how to exploit that Order are clear—modify the Order to ensure that unintended consequences do not arise.

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4 [redacted]

II. ARA should be required to provide a privilege log to ensure that it is not withholding further non-privileged documents.

ARA now argues that the reason it failed to produce a responsive, non-privilege document regarding John McDonough's exit from the company was because United *agreed* to parameters that did not capture the document. This is simply not true. As ARA's own submission makes clear, the agreement regarding parameters was *"With respect to interrogatories Nos. 13 and 14...."* DE 268 at Ex. B (emphasis added). United *never* agreed to narrow *document requests*. Document Request Nos. 2-3 seek documents "relating to (a) the reasons why [McDonough/Cordeiro] left [ARA] at the end of 2016, and (b) [McDonough's/ Cordeiro's] exit from the company." DE 252 at Ex. 2. In response, ARA only objected on the basis of privilege and agreed to produce "responsive, non-privileged documents from the decision-makers involved in or with knowledge of [Ms. Cordeiro's/Mr. McDonough's] exit from the company." DE 252 at Ex. 10. The document ARA withheld clearly falls within that description. Thus, United had every expectation that it would be receiving the documents that ARA withheld. It did not and United has no way of knowing what else ARA might be withholding. And the fact that ARA continues to maintain that the document did not fall within the scope of discovery casts doubt on its representation to this Court that all responsive documents have been produced. A privilege log is the only way to ensure that ARA is not withholding other documents that are not privileged.

ARA makes the troubling point that the document it withheld would not have appeared on a privilege log because it was not privileged. But this only highlights the fact that were it not for McDonough's counsel disclosing the document's existence, United never would have known of it. Just because ARA could just as easily withhold documents without putting them on a privilege log does not mean that this Court should not fashion a remedy that will minimize ARA's ability to withhold responsive documents.

CONCLUSION

For the reasons stated above, United respectfully asks this Court to reconsider or modify its August 30, 2017 Omnibus Discovery Order (DE 290) as set forth in its proposed order.

Dated: September 21, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed under seal (with service via email to counsel listed below) and electronically on September 21, 2017 with the Clerk of Court using the CM/ECF system, thereby sending a notice of electronic filing to all counsel of record on the service list below.

s/Michael R. Whitt
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