

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

RAY KLEIN, INC. d/b/a PROFESSIONAL
CREDIT SERVICE,

Plaintiff,

vs.

BOARD OF TRUSTEES OF THE
ALASKA ELECTRICAL HEALTH &
WELFARE FUND,

Defendant.

Case No. 3:16-cv-00098-SLG

ORDER RE MOTION TO COMPEL

Before the Court is Defendant Trust's Motion to Compel Plaintiff's Responses to Defendant Trust's Second and Third Requests for Production (Docket 70). Plaintiff filed a response in opposition to the motion (Docket 74), to which Defendant replied (Docket 77). Also, at Docket 79, Plaintiff filed a surreply to the motion, to which Defendant responded in a letter to the Court dated November 16, 2017 (Docket 80). Oral argument was not requested on the motion and was not necessary to its determination.

1. The Trust's Second Requests for Production

At issue is Plaintiff's response to the following RFP:

Request for Production No. 5: Produce all documents supporting the adjustments set forth in P1122 to P1139, which resulted in an overall adjustment to Providence Alaska Medical Center's NICU facility charges for all third-party payers by approximately 69% in 2014.

In addition, RFP's 6 through 17 requested copies of agreements between Providence Alaska Medical Center and/or Providence Health and Services (collectively "Providence") and various third-party payers.

Plaintiff refused to produce any documents responsive to these requests, initially asserting that “[e]ach of those agreements contains its own requirements of confidentiality and disclosure,” and the information sought “(a) is not relevant to any claim or defense, [or] (b) is not proportional to the needs of the case.”¹

Defendant asserts that the information sought is relevant because the Trust’s obligation to pay for medical charges applies to charges that are medically necessary and “usual, customary and reasonable.”² Much of the parties’ dispute focuses on the propriety of oxygen related charges incurred for premature twins when they were in the NICU at Providence. The Trust is seeking information as to the amount of write-offs that Providence makes to other third parties for such services to assist in its determination whether the charges it was asked to pay are “usual, customary, and reasonable.” It also seeks the information to help it assess the appropriateness of the hospital’s billing and reimbursement practices. Defendant notes that the limited information it has received in the form of spreadsheet data demonstrates a large degree of variability from one payer to the next in terms of Providence’s write-offs. The Court finds that the disputed discovery sought in the second production request is relevant to these issues for the reasons asserted by Defendant.

Plaintiff also asserted that the information sought is “not proportional to the needs of the case,” and would require Plaintiff “to request 1084 confidentiality waivers (530 for

¹ Docket 70 (Motion) at 6-7 (quoting Response to Second Requests for Production).

² See Docket 70 at 2.

the individualized claims to both the third-party and PAMC . . .”).³ Plaintiff’s opposition to the motion to compel also maintained that Defendant has received sufficient information in discovery to present its assertion that the claims at issue in this case were improperly billed.

In response, Defendant correctly observes that Plaintiff did not provide any “declaration in support of its factual position or cite to any case law in support of its legal arguments.”⁴ And it observes that any assertion that Providence is an independent entity from Defendant for purposes of this litigation is at direct odds with Plaintiff’s prior litigation position.⁵ The Trust also suggests that if the Court grants the Trust’s motion, it could address any third-party confidentiality concerns by directing Plaintiff “to send a copy of the order on the Trust’s motion and a copy of the protective order to the third-party payers and give these payers five days to object and seek additional protection as they deem necessary.”⁶

The recently amended version of Federal Rule of Civil Procedure 26(b)(2)(B) provides that “[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.” Assuming that the agreements that Defendant is seeking in its second discovery request are electronically stored, then this provision may apply to have

³ Docket 74 (Opp’n) at 3.

⁴ Docket 77 (Reply) at 2.

⁵ See, e.g., Docket 78 (Declaration of Frank Morales) and letter dated May 4, 2017 at Docket 78-3 from Professional Credit Service to Frank Morales attached thereto, describing Providence as “our client.” See also Docket 77 at 3 n. 2.

⁶ Docket 77 at 4 n.3.

permitted Plaintiff from initially producing them.⁷ But even so, after the motion to compel their production was filed, that same rule provides that “the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.” Here, Plaintiff’s opposition did not attempt to make any such showing by declaration or other means. Nor did Plaintiff’s opposition address the proportionality considerations set out in Civil Rule 26(b)(1) to explain why the production of the agreements is not warranted.⁸

Defendant apprised the Court that Plaintiff recently filed a supplemental response to the second discovery request that purports to raise a new objection to the production of these documents. On November 13, 2017, Plaintiff asserted that “Plaintiff is not in possession of responsive documents, and does not possess any authority to retrieve responsive documents other than to issue third-party discovery requests.”⁹

Plaintiff’s recent unsworn, unsupported assertion that it does not have the authority to obtain the documents from Providence is at odds with the litigation position it has taken with Providence and against Defendant in this case, as demonstrated by the declarations and attachments filed by Defendant.¹⁰ As such, Providence’s documents appear to be in Plaintiff’s “possession, custody, or control” for purposes of civil discovery in this action.

⁷ If the documents are not electronically stored, then it would appear that Rule 26 would require Plaintiff to have sought a protective order under Rule 26(c).

⁸ The considerations listed in Rule 26(b)(1) are “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”

⁹ Docket 80-1 (Pl.’s Suppl. Resps. to Def.’s 2nd Req. for Prod.) at 3.

¹⁰ See *supra* note 5 and accompanying text.

Certainly, Plaintiff has provided no sworn declarations or legal authority to support a contrary conclusion. The Court also finds that the provisions of the Stipulated Qualified Protective Order previously entered in this case at Docket 29 (at a time when Plaintiff considered Providence its “client”) accord adequate protection to Providence in this action.

Accordingly, the Court will require Plaintiff to produce all of the discovery sought in the Second Requests for Production, except that third-party payers (as distinct from Providence) shall first be given an opportunity to be heard as to their confidentiality interests. To that end, the Court will direct that Defendant send a copy of this order together with a copy of the Second Requests for Production and the Stipulated Protective Order on each of the third-party payers, who will then be each accorded an opportunity to object to the release of the agreements to Defendant and seek additional protections and/or redactions as they may each deem necessary.¹¹ If Plaintiff is thereafter unwilling or unable to fully comply with this order, then Defendant may seek appropriate sanctions pursuant to Civil Rule 37(b)(2).

2. The Trust’s Third Requests for Production

The Trust also seeks an order compelling the production of the following:

Request for Production No. 3: For claims incurred in 2014, a nominal sample (10) of Medicare claims (UB-04s) and detailed itemizations (including CDM descriptions, revenue codes and charge amounts) where the hospital charged for oxygen in an NICU/PICU/CICU or other Intensive Care Area. (Redacted PHI)

¹¹ The Court finds that Defendant, as opposed to Plaintiff, should take on the task of notifying the third-party payers.

Request for Production No. 4: For claims incurred in 2014, a nominal sample (10) of non-Medicare claims (UB-04s) and detailed itemizations (including CDM descriptions, revenue codes and charge amounts) where the hospital charged for oxygen in an NICU/PICU/CICU or other Intensive Care Area and were billed to Medicaid. (Redacted PHI)

Request for Production No. 5: For claims incurred in 2014, a nominal sample (10) of non-Medicare claims (UB-04s) and detailed itemizations (including CDM descriptions, revenue codes and charge amounts) where the hospital charged for oxygen in a NICU/PICU/CICU or other Intensive Care Area and were billed to other commercial insurers (Premera, Cigna, Aetna, Moda, United Health Care). (Redacted PHI)

In its response in opposition to the motion, Plaintiff indicated that it would produce the responsive documents no later than November 15, 2017. In its reply, Defendant indicated this to be satisfactory. Neither party's filings after that date reference the Third Requests for Production. Accordingly, it appears that this portion of the motion has been satisfactorily resolved.

In light of the foregoing, IT IS ORDERED that the motion to compel at Docket 70 is GRANTED as follows:

1. Defendant shall immediately serve a copy of this order, a copy of the Second Requests for Production, and a copy of the Protective Order previously entered in this case, upon each of the third-party payers named in RFP Nos. 5 through 19. Each third-party payer shall be entitled to file an objection or seek other relief from this Court with regard to the production required by this order, but must do so within **14 days of the date of service of upon that third-party payer**. Any such objection shall include an explanation as to why the terms of the Stipulated Qualified Protective Order are

insufficient to protect the interests of that third-party payer. Defendant shall file proof of such service.

2. Plaintiff shall provide all documents responsive to Defendant's Second Requests for Production Nos. 5 through 19 **within 21 days after Defendant complies with Paragraph 1 of this order, but only as to all documents responsive to the RFP's to which no objection has been timely filed by a third-party payer.**

3. The Court will issue such further orders as necessary with respect to any further production required as to those documents to which a third-party payer has filed a timely objection.

4. Plaintiff shall immediately produce all documents responsive to RFP Nos. 3 through 5 of the Third Requests for Production, to the extent it has not yet done so.

DATED this 21st day of December, 2017 at Anchorage, Alaska.

/s/ Sharon L. Gleason
UNITED STATES DISTRICT JUDGE