UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

FORBA HOLDINGS, LLC, Plaintiff, v. DEBBIE HAGAN, Defendant.	)))))))))	Civil Action No. 4:08-cv-00137-JHM-ERG

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO REOPEN CASE AND DISCOVERY TO ENFORCE CONSENT JUDGMENT

Plaintiff, now known as Church Street Health Management, LLC (FORBA Holdings, LLC changed its name to Church Street Health Management, LLC effective December 31, 2010; hereinafter "Plaintiff" or "CSHM"), respectfully submits this Memorandum of Law in Support of Plaintiff's Motion to Reopen Case and Discovery to Enforce Consent Judgment.

I. FACTUAL BACKGROUND

A Consent Injunction in this matter was filed on November 17, 2008 [D.E. 11]. This action was subsequently dismissed by Order filed on April 16, 2009, with the Consent Judgment to remain in full force and effect [D.E. 37]. On July 2, 2011, Plaintiff filed its Motion for Sanctions, to Enforce Consent Injunction, to Show Cause as to Why Defendant Should Not be Held in Contempt, to Hold Defendant in Contempt, for Award of Attorney's Fees, the Imposition of Fines and Other Relief ("Motion for Sanctions") [D.E. 40]. On August 11, 2011, the Court referred Plaintiff's Motion for Sanctions for a Report and Recommendation by the Magistrate Judge [D.E. 45].

Defendant filed her response to Plaintiff's Motion for Sanctions on September 12, 2011 [D.E. 47], to which Plaintiff replied on September 29, 2011 [D.E. 50]. At a hearing on October

17, 2011, the Court advised the parties that the hearing on Plaintiff's Motion for Sanctions would be an evidentiary hearing, and Plaintiff advised the Court that it seeks discovery in connection with the proof it intends to present at such evidentiary hearing, which is to be reset at a later time. Accordingly, and since this action was administratively closed by Order entered on April 16, 2009 [D.E. 37], Plaintiff seeks to reopen this case for the limited purposes of discovery in aid of its Motion for Sanctions, consistent with the Court's Order of October 20, 2011 [D.E. 52]. Specifically, Plaintiff seeks to take the deposition of Defendant and to serve Defendant with limited discovery requests.

II. ARGUMENT

Since the Consent Injunction was entered, Defendant Debbie Hagan ("Hagan"), has consistently violated its terms, which forbid her from publishing internal and/or confidential CSHM documents and information on the internet. Through her internet websites and blogs at dentistthemenace.com, which is redirected to blog.dentistthemenace.com, and dentisthemenace.wordpress.com, Hagan has pursued a campaign of harassment against Plaintiff and its Small Smiles dental clinics. In 2008, when Hagan published documents that were plainly Plaintiff's trade secrets, this Court ordered her to remove those documents and enjoined her from publishing in the future any internal documents or information of Plaintiff. Hagan consented to this injunction.

Hagan has been undeterred, however, by the Consent Injunction to which she agreed. Despite many attempts since 2008 by CSHM's counsel and management to resolve informally the continuing issue of Hagan's repeated violations of the Consent Injunction without this Court's intervention, Hagan continues to publish details of internal and confidential contracts, communications, and policies of Plaintiff, in clear violation of the Consent Injunction. In light of Hagan's continued violation of the Consent Injunction, Plaintiff seeks to reopen this case and

discovery in this matter for the limited purpose of taking Hagan's deposition and serving Hagan with limited discovery requests to identify the unlawful disclosers of CSHM's trade secrets and confidential information that Hagan continues to post on her website/blog, all in connection with its Motion for Sanctions.

I. THIS CASE AND DISCOVERY SHOULD BE REOPENED FOR THE LIMITED PURPOSES OF DETERMINING THE IDENTITY OF HAGAN'S CSHM SOURCES WHO ARE UNLAWFULLY DISCLOSING CONFIDENTIAL BUSINESS INFORMATION AND TRADE SECRETS.

It is well-established in the Sixth Circuit that the district courts have broad discretion over discovery matters. Trepel v. Roadway Express, Inc., 194 F.3d 708 (6th Cir. 1999). Courts consider five factors when determining whether to reopen discovery: (1) whether the movant has demonstrated good cause for reopening discovery; (2) whether the need for additional discovery was precipitated by the neglect of the movant or by the party opposing the motion to reopen; (3) the specificity of the discovery that is sought; (4) the relevance of the discovery being sought; and (5) whether the party opposing the motion to reopen discovery will be prejudiced. See Victory Lane Quick Oil Change, Inc. v. Hoss, No. 07–14463, 2009 WL 777860, at *1 (E.D. Mich. Mar. 20, 2009); U.S. Diamond & Gold v. Julius Klein Diamonds LLC, No. C–3–06–371, 2008 WL 2977891, at *11 (S.D. Ohio July 29, 2008). In this case, these factors are satisfied, and this motion should be granted.

In pertinent part, the Consent Injunction (1) recognized that "Plaintiff's trade secrets and copyrighted information should be protected from misappropriation and infringement"; (2) permanently enjoined Hagan from "publishing or posting . . . or making available for access to others in any way . . . any internal and/or copyrighted documents or other information of [CSHM]"; and (3) permanently enjoined Hagan from "using or disclosing any documents or information constituting trade secrets of [CSHM], including [CSHM]'s marketing materials,

marketing strategy information, budgeting materials, recruitment strategy information, spreadsheets and facility information lists." Consent Injunction (DE 11; DE 37).

Since at least as early as May 2008, Plaintiff has had in place a Confidential Information policy to which its employees are subject, pursuant to which Plaintiff's employees agree that they will not, during and after their employment by Plaintiff, directly or indirectly, use, disseminate, or disclose any confidential information concerning the business or patients of Plaintiff. Declaration of Todd Cruse ("Cruse Decl.") (DE 40-1, ¶ 2). Under this Confidential Information policy,

> Plaintiff's Confidential Information means information disclosed to Employee, not generally known in the profession about Employer's services or processes, including information relative to patient lists, patient names and addresses, patient records, pricing policies, financial information and Employer's procedures, systems, and processes relating to its Medicaid practice. Employee agrees that Employer's Confidential Information is in the nature of trade secrets and should not be made available to any other dentist or dental professional, or any present or potential competitor, including Employee, without regard to whether or not said Confidential Information may or may not be defined as a trade secret pursuant to the Uniform Trade Secrets Act. In the event Employee misappropriates any of Employer's Confidential information, employer shall have all rights and remedies available to Employer pursuant to State law, including Uniform Trade Secrets Act.

(DE 40-1, ¶ 2). In addition, since March 2009, Plaintiff has had an Internet Posting policy that prohibits its employees, applicants for employment, agents and contractors from engaging in communications that disclose any information that is confidential or proprietary to Plaintiff or its associated dental centers. (DE 40-1, ¶ 2).

Since the Consent Injunction was entered in this action on November 17, 2008, Plaintiff has continued to monitor the Hagan Blog. (DE 40-1, ¶ 3). Hagan has made several recent postings at her blog that violate the Consent Injunction's prohibition on posting internal and/or confidential documents or information of Plaintiff. (DE 40-1, ¶ 3.) The confidential CSHM documents that Hagan accessed and published are valuable to the company were not known to

or readily ascertainable by competitors or the public at large. In fact, the CSHM information that Hagan posted could only be obtained from either current or former CSHM employees, and in some instances the posted information could only have been obtained from current CSHM employees.

For example, on May 5, 2011, Hagan listed three elements of a "reportable event" for CSHM compliance purposes, and the three elements were directly from an internal CSHM document. Similarly, on May 29, 2011, Hagan quoted directly from an internal CSHM document describing dental center performance bonuses and also disclosed that CSHM is beginning a "pilot program" regarding pay in a particular center, which constitutes internal information of CSHM regarding its business operations. Similarly, on June 21, 2011, Hagan posted a blog entry in which she referred to hearing internal "chatter" about specific internal steps being taken by CSHM, and identifies those steps.

It is not disputed that Hagan is being provided internal documents and communications of CSHM. Indeed, Hagan repeatedly describes her "sources" at CSHM and continues to solicit internal information from CSHM and its competitors. Moreover, it cannot be disputed that the disclosure of the information Hagan has posted from one or more employees or affiliates of CSHM is in violation of such persons' obligations to CSHM under its Confidential Information and Internet Posting Policies. (See DE 40-1, ¶ 2).

Because Hagan refuses to comply with the terms of the Consent Injunction, Hagan has filed the instant motion in an attempt to determine the manner by which Hagan is obtaining the internal CSHM documents she is posting on her website/blog. To that end, CSHM seeks to take Hagan's deposition and to serve Hagan with limited discovery requests aimed at identifying all current or former employees and/or agents of Plaintiff and/or any dental practice(s) managed by Plaintiff (including, without limitation, Small Smiles) with whom Hagan has been in contact

and/or from whom Hagan has obtained internal and/or confidential CSHM information that she has posted on her website/blog.

On these facts, CSHM has demonstrated good cause for reopening discovery in order to cease the publication of its confidential information. In addition, CSHM's need for this additional discovery was precipitated solely by the acts of Hagan, who has continued to publish CSHM's confidential information in spite of the Court's orders not do to so. The information sought through this discovery is specific and narrowly tailored to identify the individuals from whom Hagan has obtained and is obtaining CSHM's confidential information. Finally, it cannot be disputed that the identification of Hagan's sources of information is relevant to the continued violations of the Consent Injunction. Plaintiff has satisfied the factors applicable to a determination of whether discovery should be reopened, and Plaintiff's motion should be granted.

II. HAGAN CANNOT ESTABLISH THAT HER SOURCES OF INFORMATION ARE PRIVILEGED FROM DISCLOSURE.

The Supreme Court has explicitly held that "the First Amendment does not guarantee the press[1] a constitutional right of special access to information not available to the public generally." Branzburg v. Hayes, 408 U.S. 665 (1972). Although Branzburg was decided in the in the context of a grand jury seeking the disclosure of a reporter's sources related to a criminal investigation, the holding and analysis are equally applicable to the instant case, where Hagan's sources have unlawfully disclosed trade secrets in violation of a confidentiality agreement. The Branzburg court based its decision, in part, on the "longstanding principle that the public has a right to every man's evidence, except for those persons protected by constitutional, common law,

[1]CSHM specifically denies that Hagan's blog constitutes "the press" or that she is a journalist.

or statutory privilege." 408 U.S. at 688 (citations and internal punctuation omitted). The Court then noted that "the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination." Id. at 689-90. The Court expressly declined "to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy." Id. at 690.

In language that is as relevant to the alleged unlawful disclosure of confidential trade secrets as it was to the alleged criminal acts at issue in Branzburg, the Court stated that it could not "seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about a crime than to do something about it." Id. at 692. In this case, Hagan not only posts information that was unlawfully obtained, she openly solicits the unlawful disclosure of confidential information.[2] Under Branzburg, Hagan cannot refuse to disclose her sources who have unlawfully disclosed trade secret and otherwise confidential and proprietary information in violation of confidentiality agreements.

In addition, Hagan cannot assert that she is protected from disclosing her sources pursuant to the Kentucky shield statute, Ky. Rev. Stat. Ann. § 421.100, which provides, "[n]o person shall be compelled to disclose in any legal proceeding or trial before any court . . . the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected." Id. By its plain language, Section 421.100 applies only to information that is (1)

[2]In a June 16, 2011 post, Hagan openly requested the unlawful disclosure of confidential internal documents regarding a CSHM competitor: "If you are a former employee please contact me, send me what evidence you have, your identity is strictly confidential. I couldn't know all I know if I didn't keep my informants [sic] identity a secret. Heck, just send me some documents anonymously, that's fine too."

published in a newspaper or by a radio or television station; and (2) the published information was obtained by an individual who is engaged, employed by or connected with that newspaper, radio station, or television station. Hagan cannot satisfy the requirements of Section 421.100, and thus, cannot use that statute as a basis for protecting her sources of information.

Moreover, companies are entitled to discover the identity of employees breaching confidentiality agreements by posting confidential and proprietary information on the Internet. See Immunomedics, Inc. v. Doe, 775 A.2d 773 (N.J. Super. Ct. App. Div. 2001). The Immunomedics case concerned an employee anonymously posting proprietary company information on a Yahoo! message board. The company sued the employee and issued a subpoena to Yahoo! for any identifiable information of the employee. The court held that Immunomedics was entitled to learn the poster's identity: "With evidence demonstrating [poster] is an employee of Immunomedics, that employees execute confidentiality agreements, and the content of [poster's] posted messages providing evidence of the breach thereof, the disclosure of [poster's] identity, which can be reasonably calculated to be achieved by information obtained from the subpoena, was fully warranted." Id. at 777. The court further explained, "there must be an avenue for redress for those who are wronged. Individuals choosing to harm another or violate an agreement through speech on the Internet cannot hope to shield their identity and avoid punishment through invocation of the First Amendment." Id. at 777-78.

As noted above, CSHM has a Confidential Information policy and an Internet Posting policy applicable to all employees prohibiting the disclosure of confidential company information. (See DE 40-1 at ¶ 2). Hagan is openly soliciting and posting internal information from CSHM personnel, and CSHM has requested the identity(ies) of such employee(s) through discovery. Hagan should be ordered to disclose the identities of such person(s).

III. CONCLUSION

For the reasons sent forth above, Plaintiff respectfully requests that the Court grant its Motion to Reopen Case and Discovery to Enforce Consent Injunction and grant Plaintiff such other and further relief as the Court deems just, proper and equitable.

Respectfully submitted,

/s/ Thor Y. Urness

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Plaintiff's Memorandum in Support of Motion To Reopen Case and Discovery To Enforce Consent Judgment" is being served, via U.S. Mail, first class postage prepaid, on this the 27th day of October, 2011, on:

Debbie Hagan
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Owensboro, KY 42301-6519

/s/ Thor Y. Urness
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