UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-14201-CIV-GRAHAM/LYNCH

UNITED STATES OF AMERICA, ex rel.
LUCAS W. MATHENY AND DEBORAH LOVELAND,

Plaintiffs,

v.

MEDCO HEALTH SOLUTIONS, INC., POLYMEDICA CORP., LIBERTY HEALTHCARE GROUP, INC., LIBERTY MEDICAL SUPPLY, INC., LIBERTY COMMERCIAL HEALTH SERVICES CORP., LIBERTY DIRECT SERVICES CORP., LIBERTY MEDICAL SUPPLY PHARMACY, INC., CARL DOLAN, AND ARLENE PERAZELLA,

Defendants.
_____/

ORDER ON RELATOR/PLAINTIFFS' MOTION AND AMENDED MOTION FOR RECONSIDERATION OF ORDER (DE 249 & 251) AND THEIR MOTION PURSUANT TO FED.R.CIV.P. 37 FOR SANCTIONS (DE 239)

THIS CAUSE comes before this Court upon the above Motions filed by the Relator/Plaintiffs. (Although the parties use the term "Relators", this Court refers to them as the "Plaintiffs" for ease of reference.) Through their above Motions, the Plaintiffs seek discovery relief with respect to two different matters: reconsideration of this Court's prior discovery Order, found at DE 226, and discovery-related sanction against the Defendants for untimely disclosure. The issue common to both Motions is the impact of the discovery deadline. Thus this Court addresses both Motions together in the same ruling. This Court notes that soon after the discovery deadline, the Defendants

PolyMedica Corporation and the now consolidated "Liberty" corporations filed for Chapter 11 bankruptcy protection; thus they are now subject of an automatic stay. Therefore the Plaintiffs limit their request for relief to the remaining Defendants---Medco Health Solutions, Inc., Carl Dolan, and Arlene Perazella. (The Defendant Arlene Perazella now goes by the name of Rodriguez and that is the name that she uses in her respective pleadings. For consistency with the case style and prior pleadings, this Court however will continue to refer to her as Ms. Perazella.) Having reviewed the Motions---noting that only Defendant Perazella responds to the Motion for Reconsideration and that only Defendants Medco and Perazella respond to the Motion for Rule 37 Sanctions---and the Plaintiffs' Replies, this Court finds as follows:

1. The Plaintiffs seek reconsideration of this Court's Order of February 12, 2013 (DE 226). The final deadline for the completion of all discovery in this case was February 11, 2013. Subject of that Order were the twelve discovery disputes of which the Plaintiffs had informed this Court at 4:10 p.m. on February 11th and an additional discovery dispute of which they informed this Court the morning after. (The Plaintiffs now identify still more outstanding discovery disputes.) In that Order, this Court struck those discovery disputes as untimely. This Court explained that the February 11th discovery deadline

meant the full completion of discovery by that deadline; it did not permit raising a discovery dispute literally within the last hour of the deadline. Otherwise hearing the discovery dispute would require additional time despite the approach of other pre-trial deadlines and the June 17, 2013 trial calendar. Pre-trial deadlines, including the discovery deadline, and the trial date already had been extended, moreover. Lastly this Court notes the context in which that Order was rendered: discovery had been very contentions, sanctions had been imposed, and the attorneys were reminded of their professional obligations.

2. The Motion for Reconsideration essentially boils down to an issue of what the discovery deadline meant in this case. The Plaintiffs' position is that they did not anticipate that the discovery deadline would foreclose them from seeking judicial relief. Instead the Plaintiffs were relying on Local Rule 26.1(h) which gives them thirty days of the occurrence of the dispute to seek judicial relief.

3. This Court sees no reason to reverse its prior Order. The various deadlines that govern individual discovery requests and relief for disputes still must be applied with an eye toward the overall discovery deadline. Viewed in their entirety, the various discovery rules and deadlines are meant to bring a complete end to all discovery by a certain point. This permits the case's transition from discovery to the next pre-trial

deadline. The particular circumstances in this case, where multiple discovery disputes were raised at the very last minute, illustrate the need for such. (This Court notes that it did allow an earlier raised discovery dispute to continue.)

4. Nor can the Plaintiffs say that all avenues of relief have been foreclosed to them. As the Plaintiffs' accompanying Motion demonstrates, they continue to have the benefit of Rule 37, many provisions of which are self-executing, to address relevant discovery omissions. Indeed, between the two Motions now before this Court, both parties take inconsistent positions with respect to the meaning of the overall discovery deadline. This Court's prior ruling resolves these disputes.

5. Having denied the Plaintiffs' Motion for Reconsideration above and thereby affirming its earlier ruling that the February 11, 2013 overall discovery deadline precludes last minute relief, this Court turns to the Plaintiffs' other motion: their Motion for Rule 37 Sanctions. Whereas the Motion for Reconsideration concerns the Plaintiffs' last minute discovery disputes, their Motion for Sanctions concerns the Defendants' last minute production of "advice of counsel" discovery and by implication their last minute notice of pursuing such a defense.

6. At the heart of this dispute is an email dated September 22, 2006. The author of that email is William Eck,

Esq., PolyMedica's general counsel, to Kimberly Ramey and two other members of Liberty Medical Supply Inc.'s Compliance Department. The subject of the email was Mr. Eck's legal advice regarding Medicare Part D overpayments, the major source of overpayments that the Plaintiffs now allege were fraudulently hidden to avoid paying the federal government refunds. Mr. Eck opined that such overpayments (that are not the product of fraudulent billing) do not count as "overpayments" under the governing contracts.

7. Generally speaking, all of the discovery relevant to this issue involved all of the Defendants except for Mr. Dolan. This Court also notes that the Defendants' Initial and Amended Disclosures from May 2012 as well as their Second Privilege Log of August 2012 did identify William Eck, Esq., and Devin Anderson, Esq., (another attorney for PolyMedica) albeit in no specific context.

8. On October 19, 2012 the Plaintiffs deposed Ms. Ramey whom PolyMedica had proffered as its corporate representative. The transcript of that deposition shows how Defendants' counsel expressly had prevented Ms. Ramey from giving any substantive answer regarding Mr. Eck's advice about compliance. Indeed counsel even halted the deposition in order to instruct Ms. Ramey on the matter off-the-record. The Defendants did so on the basis of attorney-client privilege and work product protection.

The Defendants characterize this limited exchange as the Plaintiffs' first notice that Mr. Eck had rendered legal advice on the matter. The Plaintiffs reply that it had signaled the opposite: that it showed the intent to maintain privilege protection.

9. The Defendants' attorney, Ms. Wicht, provides a Declaration in which she asserts that it was not until December 2012, "shortly before the holidays", when she first learned of the Eck email. Up to that point it had been flagged as attorney-client privilege. Upon its discovery, it was made subject of further privilege review.

10. On January 9, 2013, while the Eck email remained subject of internal review, the Plaintiffs propounded upon Ms. Perazella their 17th Request for Admissions. Several of these requests asked Ms. Perazella to affirm whether she had relied on advice of counsel with respect to the overpayment/refund issue. For any answers in the affirmative, the Plaintiffs also asked for related documents through an accompanying Request for Production. Then on January 18, 2013, Defendants' counsel responded to the Plaintiffs' concerns about the Defendants' "General Objection on the basis of privilege and/or work product", answering that "no information has been withheld from any response on that basis."

11. These Requests for Admissions, along with others, were subject of a discovery Order. That ruling, found at DE 218, addressed collectively all of the 2,000 requests then pending, explaining that "[i]n the end analysis . . . the subjects of the Requests for Admission are better suited to direct discovery, such as depositions, that give the Defendants a question-and-answer format." The Defendants now argue that this Order relieved them of the obligation to answer the requests relevant to the instant Motion.

12. The ruling prompted the Plaintiffs to re-fashion their discovery request. On February 4, 2013 Plaintiffs' counsel wrote Defendants' counsel asking to depose a corporate representative who could address all topics of the Requests for Admissions including advice of counsel. The person that the Defendants proffered was Ms. Perazella. As Ms. Wicht explains in her Declaration, she used the opportunity of this deposition to produce the Eck email. This production included the (heavily redacted) minutes of an earlier meeting on the issue. Although this was the Defendants' chosen witness and despite using her deposition as the opportunity to first produce the Eck email and related meeting minutes, Ms. Perazella knew nothing of these documents. She stated that she had relied on Ms. Ramey for compliance advice instead.

13. On February 8, 2013 the "Polymedica Defendants" sent an updated Privilege Log disclosing the Eck email and the meeting minutes (although the Eck email was omitted from the Updated Privilege Log that they submitted later on February 11, 2013). The time for discovery in this case ended on February 11, 2013. Several communications relevant to this advice of counsel issue occurred on this date. In addition to the above-mentioned Updated Privilege Log, the Defendants sent their Second Amended Initial Disclosures. There the Defendants listed, for the first time, Mr. Eck, Esq., and Mr. Anderson, Esq., as individuals likely to have discoverable information. The subject area of Mr. Anderson's knowledge was described as "[d]atafixes, Defendants' compliance processes, procedures and reporting", and the subject area of Mr. Eck's knowledge was described as "LMSP payers & CIA reporting obligations with respect to LMSP". The Defendants did not draw any specific attention to these particular additions. Rather, in the accompanying email, the Defendants' counsel, Ms. Wicht, simply noted that the Initial Disclosures were being amended "only to the extent required to conform to information revealed during discovery."

14. Lastly, on February 11, 2013, Ms. Wicht, counsel for the Defendants, wrote counsel for the Plaintiffs. There, in anticipation that the Plaintiffs would object to the Eck email and meeting minutes as untimely disclosed, she stressed that in

the Requests for Admissions and Requests for Production, the Plaintiffs already had "inquired about the subject of communications with counsel on subjects related to this dispute". "Nevertheless" she offered "the possibility of allowing certain additional discovery into this subject matter to be conducted out of time, by agreement of the parties", including the "possibility" of taking the depositions of Mr. Eck and the "possibility of allowing limited additional deposition time with M[s]. Ramey and/or Ms. Gregory, if you feel it necessary, limited to the subject matter of the disclosed advice."

15. The Plaintiffs wrote back four days later on February 15, 2013. There they asserted their position that the advice of counsel-related materials were untimely disclosed and to decline post-deadline discovery. On that same day, February 15, 2013, PolyMedica and the Liberty corporate entities filed a 481 page petition for Chapter 11 bankruptcy.

16. This Court does not find persuasive the Defendants' contention that their production of advice of counsel-related materials was timely. The Defendants' invocation of attorney-client privilege at the October 2012 deposition of Ms. Ramey to foreclose any substantive questions related to legal advice did not convey notice of their intent to raise an advice of counsel defense. It signaled to the contrary: that the Defendants

intended to persist in maintaining the privilege. Indeed, according to Ms. Wicht in her Declaration, Defendants' counsel, themselves, still did not know of the Eck email at that time. Defendants' counsel did not know of this email even though several witnesses were party to it and despite the fact that it contained an agreed-upon term used in an email data search. Nor does this Court find the Plaintiffs' independent inquiry on January 9, 2013 into whether an advice of counsel defense was at issue to suggest notice on their part.

17. The Eck email and the minute meetings were eventually disclosed, albeit on the eve of the discovery deadline. Although these documents were given to the Plaintiffs, it was done during a deposition of a deponent, chosen by the Defendants to answer questions related to advice of counsel, but who denied personal knowledge of the documents. Then it was not until the very last day of discovery when the Initial Disclosures were updated to include the attorneys behind those materials.

18. The parties dispute whether this late disclosure was done in good faith and was otherwise sufficient and proper (as the Defendants argue) or was deliberate and strategic (as the Plaintiffs argue). Which actually was the case this Court need not decide. Whether or not the materials were deliberately withheld (or whether or not the Plaintiffs somehow should have anticipated it on their own), the fact remains that the

Defendants produced the materials too late. The Defendants produced them too late to be of any use to the Plaintiffs, and the late production fell short of the Defendants' general obligation to produce relevant discovery in a timely fashion.

19. Nor does this Court find the Defendants' offer of post-deadline (limited, possible) discovery on the subject to render the late production harmless. Notwithstanding the fact that the PolyMedica and Liberty Defendants became subject of an automatic bankruptcy stay four days after the discovery deadline, the Defendants do not explain why this particular subject matter should be subject of further discovery while the 19 discovery issues that the Plaintiffs raise in their Motion for Reconsideration should not. Nor do the Defendants reconcile the purpose of a final, overall discovery deadline---as they stress in their defense of this Court's prior Order---with their present limited offer.

20. The Plaintiffs raise another defect. Expanding the issue beyond discovery, they argue that the Defendants failed to plead the affirmative defense of advice of counsel at all, much less with the required specificity. As such, the Defendants have failed to comply with Rule 8(c), Fed.R.Civ.P. The parties dispute whether the defense of advice of counsel is an affirmative defense or not. The Defendants contend that it is not. Compare SEC v. Wall Street Capital Funding, LLC, 2011 WL

2295561 (S.D.Fla. 2011) (regarding advice of counsel to be an affirmative defense). Whether it is an affirmative defense or whether it is merely a defense to the intent element of the Plaintiffs' fraud cause of action, this Court does not answer. For one, it is not a discovery-related issue and hence not within the scope of this Court's Order of Reference. However this Court does address it to the extent it relates to the present discovery dispute. Whether the reasons for the late disclosure were legitimate or not, the Defendants remained obliged to produce relevant discovery. Were it an affirmative defense, the Defendants would have been subject of this Court's Order specifically compelling the production of affirmative defense-related discovery; were it a defense to the Plaintiffs' prima facie case, the Defendants would have been subject to a general obligation to produce relevant discovery. However they raised this defense too late and thereby prejudiced the Plaintiffs. Indeed the whole issue may be moot. The fact that the Defendants, themselves, did not know of Mr. Eck's legal advice until two months before the final close of discovery implies that the Defendants had no intention of raising an advice of counsel defense---whether as an affirmative defense or not---in the first place.

21. Consequently, this Court finds the Plaintiffs to be entitled to Rule 37(c) relief and that the Defendants are

foreclosed from using the late-produced Eck email and meeting minutes. Support for this ruling can be found in the case of Immuno Vital, Inc. v. Telemundo Group, Inc., 203 F.R.D. 561, 564-65 (S.D.Fla. 2001). There Judge Moore held that "when the advice of counsel defense is raised, the party raising the defense must permit discovery of any and all legal advice rendered on the disputed issue." Although the defendant to the Immuno case raised the defense on the eve of trial rather than shortly before the close of discovery, this Court's past discovery rulings and even the Defendants' own arguments regarding the final discovery deadline show that the particular circumstances here present the functional equivalent of Immuno's timing issue.

22. This Court limits its ruling to the discovery context since that is the scope of its Order of Reference. Therefore this Court does not decide whether the Defendants are precluded from raising an advice of counsel defense outside the discovery context and in the context of any matter that the District Court shall decide. However this Court does observe that except for the Eck email and the meeting minutes, the Defendants produced no other documentary, testimonial, or other evidence of legal advice upon which they relied.

23. There is another issue regarding the scope of the instant ruling: which of the Defendants are subject to it. The

Defendants argue generally that only those Defendants now in bankruptcy and subject of the automatic stay are the proper parties to this dispute. This Court disagrees. First Medco Health Solutions, Inc. and Ms. Perazella are sufficiently intertwined with the bankruptcy Defendants to be subject of both the instant advice of counsel dispute and this Court's instant discovery ruling thereon. Not only do the circumstances show them to be sufficiently interrelated as a matter of fact, but they also collectively pursued the discovery at issue here. This ruling does not apply to the bankruptcy Defendants, of course, because they are subject of the automatic stay. Nor does this ruling apply to the remaining individual Defendant, Mr. Dolan, who apparently did not participate in the relevant discovery.

It is therefore,

ORDERED AND ADJUDGED that the Plaintiffs' Motions for Reconsideration are **DENIED.** The Plaintiffs' Motion for Rule 37 Sanctions is **GRANTED, in part**. The Motion is **GRANTED** to the extent that the Defendants are foreclosed from using the late-produced discovery in subsequent proceedings as a matter of Rule 37 discovery sanction, as set forth in ¶21 above. It is **DENIED**, without prejudice, to the extent the Plaintiffs seek to preclude the use of the advice of counsel defense outside the scope of Rule 37 and the discovery context, as set forth in ¶22 above.

DONE AND ORDERED in Chambers at Fort Pierce, Florida, this 14th day of March 2013.

FRANK J. LYNCH, JR.
UNITED STATES MAGISTRATE JUDGE

cc: Daniel S. Fridman, Esq.
Jennifer G. Wicht, Esq.
Michael S. Tarre, Esq.
Nathan M. Berman, Esq.
Mark A. Cullen, Esq.