

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DOCTORS PATHOLOGY SERVICES, P.A., :

Plaintiff, :

v :

FADY J. GERGES, M.D. and GREEN :

CLINICS LABORATORY, LLC, :

Defendant. :

-----x Civil Action
FADY J. GERGES, M.C., : No. 11457-CB

Counterclaim Plaintiff, :

v :

DOCTORS PATHOLOGY SERVICES, P.A. :

and V. RAMAN SUKUMAR, M.D., :

Counterclaim Defendants. :

- - -
Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Wednesday, February 15, 2017
2:02 p.m.
- - -

BEFORE: HON. ANDRE G. BOUCHARD, Chancellor.

- - -
TELEPHONIC ORAL ARGUMENT ON PLAINTIFF'S MOTION TO
COMPEL AND FOR CONTEMPT and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
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1 APPEARANCES: (via telephone)

2 MARY I. AKHIMIEN, ESQ.
3 TIMOTHY M. HOLLY, ESQ.
4 Connolly Gallagher LLP
for Plaintiff and Counterclaim Defendants

5 STEVEN SCHWARTZ, ESQ.
6 Schwartz & Schwartz, Attorneys at Law, P.A.
for Defendants and Counterclaim Plaintiff

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1 THE COURT: Good afternoon, Counsel.
2 This is the Chancellor on the line. May I please have
3 appearances for the record, starting with who is on
4 the line for the plaintiff?

5 MS. AKHIMIEN: Sure. May it please
6 the Court, Mary Akhimen for plaintiff
7 Doctors Pathology Services. Also on the telephone for
8 plaintiff are Dr. Raman Sukumar, the founder and CEO
9 of Doctors Pathology Services, and Theresa Smith. And
10 I also have my colleague, Tim Holly, in my office with
11 me as well.

12 THE COURT: All right. Thank you.
13 And who do we have on the line for the
14 defendants?

15 MR. SCHWARTZ: Good afternoon, Your
16 Honor. It's Steven Schwartz. And I'm here for the
17 defendants, Dr. Fade J. Gerges and Green Clinics
18 Laboratory, LLC. I'd like to thank the Court for
19 doing this by telephone.

20 THE COURT: Yeah. I understand,
21 Mr. Schwartz, you're under the weather. So I hope
22 you're feeling better, but I felt we needed to at
23 least sort through these issues and get them done.

24 MR. SCHWARTZ: I appreciate that.

1 Thank you, Your Honor.

2 THE COURT: So the context here is
3 there was originally a motion to compel filed -- and
4 I've reviewed those papers over the weekend -- and,
5 frankly, they were very unfocused, which is one of the
6 reasons that I asked for a joint letter to be
7 submitted to me identifying what the specific issues
8 are that the parties are disagreeing on.

9 As I understand from the letter that
10 was submitted yesterday, I guess I'll break it down to
11 four issues. You guys can tell me if you think there
12 are more. But I think the four issues seem to be:
13 the issue of the use of an expert witness and the
14 defendants' opposition to the preliminary injunction
15 motion; perhaps, perhaps not, some remaining issues
16 concerning outstanding document requests; third, some
17 issues concerning some outstanding interrogatories;
18 and, fourth, an issue concerning sanctions.

19 For the benefit of the plaintiff, I'll
20 just say whenever a motion to compel is filed, it
21 should target very specifically what document
22 requests, what interrogatories, like by number, are at
23 issue and provide copies of the requests and the
24 interrogatory responses. I didn't have any of that

1 and, frankly, I won't be able to deal with the
2 interrogatories because I don't have it.

3 I was able, by virtue of the
4 defendants' opposition papers, to look at the response
5 to the document requests and, therefore, actually can
6 see the document requests. But I'm not going to be
7 able to do much with the third category, namely, the
8 interrogatories.

9 In any event, let's start with the
10 expert witness issue. And, Ms. Akhimien, I'll turn it
11 over to you and hear from you for a minute or two and
12 then hear what Mr. Schwartz has to say. I've read the
13 letter. So just whatever you think you want to add.

14 MS. AKHIMIEN: Thank you, Your Honor,
15 for your time today.

16 I just want to quickly address the
17 issue about the targeted outstanding discovery
18 requests. In the motion to compel we also attached
19 our deficiency letter, and in that deficiency letter
20 we outlined which discovery requests were still
21 outstanding. So apologize for any inconvenience on
22 our part, but we did attach that letter to the motion
23 to compel.

24 But, in any event, we're here on DPS's

1 motion to compel and for contempt. As Your Honor
2 knows and as we outlined in our submission, this Court
3 has held that a party may be held in contempt where
4 it's bound by an order, has notice of that order, and,
5 nevertheless, violates that order. That was from the
6 Aveta Inc. versus Bengoa case. As this Court more
7 recently held in In Re Shawe & Elting LLC, the
8 TransPerfect case, "A court order is a serious matter
9 and should be treated with the utmost gravity." Thus,
10 when a party violates a court order, Court of Chancery
11 Rule 37 authorizes this Court to provide relief in the
12 form of a finding of contempt and an award of
13 reasonable expenses and attorneys' fees.

14 Here, defendants failed to comply with
15 the Court's January 28th, 2016, scheduling order
16 governing discovery which defendants not only had
17 notice of but they also agreed to in three material
18 respects: One is that they withheld documents and
19 information. No. 2 is that they failed to adequately
20 respond to discovery. And three is that they lied
21 under oath.

22 I think the first issue with respect
23 to withholding documents and information, the Court
24 has already (Inaudible) upon, which is the use of

1 expert witnesses. DPS specifically asked for any
2 information relating to experts in three document
3 requests. Contrary to defendants' assertions in their
4 joint letter, it's not just one document request; it
5 was actually three document requests, specifically
6 Request for Production No. 17, 33, and 34. No
7 documents relating to the identification of any expert
8 was produced in response to those requests. And two
9 discovery periods expired without reference to any
10 expert. And then defendants tactically, as they put
11 it, decided to include in their memorandum of points
12 and authorities in support of their motion to modify
13 the amended scheduling order that they wanted to have
14 Mr. Michael O'Brien be their expert witness.

15 The discovery rules do not require
16 that form of identification of an expert. And not
17 only that, this information was requested 15 months
18 ago and nothing was produced. For them to identify it
19 now in their motion to modify really prejudices DPS
20 because we will now have to try to obtain our own
21 expert, to question that expert. We have no expert
22 report from that expert witness, no curriculum vitae.
23 We know nothing about this expert that defendants have
24 now identified as of last Thursday.

1 And what's even more egregious is that
2 defendants had indicated back in February of last year
3 that they would provide expert witness information.
4 Now they're saying oh, you know, they weren't able to
5 identify an expert because DPS hadn't produced
6 documents. But in that February response of last year
7 they never indicated that they were waiting for DPS to
8 produce documents. And, in fact, they hadn't even
9 propounded any discovery requests on DPS in February
10 of last year when they served their responses. All
11 they said in February was that they would produce
12 expert witness information, and, again, they did not.

13 The other issue with respect to
14 withholding documents --

15 THE COURT: Why don't you hold --
16 Ms. Akhimien, why don't you hold there. I want to
17 deal with these one at a time. So let me hear from
18 Mr. Schwartz on the expert witness issue.

19 MR. SCHWARTZ: Right. Your Honor, we
20 do not have a report from Dr. O'Brien and we don't
21 have any documents (Inaudible) responsive to any of
22 the requests for production that counsel mentioned,
23 17, 33, or 34.

24 The three items, 17, 33, and 34,

1 counsel -- plaintiff's counsel was mistaken in
2 suggesting that 17 was addressed to experts.
3 Request 17 just asked for "... documents that you
4 intend to introduce into evidence at trial or any
5 hearing in this matter, or [to] use to question any
6 witness at trial or during deposition."

7 That's not a document -- that's not a
8 document request that is necessarily directed toward
9 experts. And a proper response to it would not
10 necessarily produce an expert report, if we had one.

11 So 17 is irrelevant and counsel is
12 wrong, plaintiff's counsel's wrong.

13 She points out 33 and 34, the other
14 two. And she's right, they're -- both of those were
15 directed to experts. And my response is only that 34
16 was (Inaudible). 33 and 34 would have produced expert
17 items, if we had them. We don't -- we didn't have
18 them and we don't now; but when I have them, they will
19 be produced promptly.

20 THE COURT: What is your expectation
21 for the upcoming preliminary injunction motion to be
22 resolved? Are you expecting at this point to put an
23 expert report in?

24 MR. SCHWARTZ: I am hoping to. I

1 heard from Dr. Gerges this morning that Dr. O'Brien
2 will need a few more days before he's prepared to
3 speak with me and to -- and prepare a report. So I'm
4 hoping to have something that I can use on the
5 answering brief. I was concerned that we lost him
6 because Dr. Gerges was after him to try to come up
7 with a report for the 13th and he stopped taking --
8 and stopped answering Dr. Gerges' calls. So we
9 thought we may have lost him, but he's evidently still
10 available. And we're hoping to be able to use him.

11 THE COURT: Now, what, in a nutshell,
12 do you anticipate the expert's going to be attesting
13 to?

14 MR. SCHWARTZ: That the -- that the
15 exhibits that were submitted with the brief, the
16 opening brief, were not trade secrets. I mean, that's
17 what I'm hoping it will show. I don't know because I
18 haven't spoken with Dr. O'Brien and I don't know what
19 his opinions are.

20 THE COURT: All right.

21 MR. SCHWARTZ: He may not -- he may
22 not agree with Dr. Gerges' view of the matter.

23 THE COURT: All right. I'm sorry. I
24 interrupted you there, Mr. Schwartz. Is there

1 something further you wanted to say on the expert
2 witness issue?

3 MR. SCHWARTZ: Well, the -- only to
4 respond to the comments in the letter that -- in the
5 joint letter. I've looked at the Beard Research case,
6 and that really tells us nothing about whether the
7 plaintiff's past due discovery responses in
8 December 2016 were responses to the defendants'
9 interrogatories. And the defendants maintain that
10 timely and proper answers responsive to the
11 defendants' interrogatories would have provided the
12 defendants with the material they need to send to an
13 expert and to elicit an opinion. And so the lateness
14 of the day is really attributable to plaintiff and not
15 to the defendants.

16 That's all I have to say.

17 MS. AKHIMIEN: Your Honor, if I
18 could --

19 THE COURT: Yeah, just a moment,
20 Ms. Akhimien. I have another question for
21 Mr. Schwartz.

22 Mr. Schwartz, when did you appear in
23 this case?

24 MR. SCHWARTZ: That's a good question.

1 Sometime in the spring. Let me see if I can very
2 quickly look at the docket.

3 MS. AKHIMIEN: I think it was in
4 April.

5 MR. SCHWARTZ: You think it was April,
6 Mary?

7 THE COURT: So April of 2016?

8 MS. AKHIMIEN: Yes --

9 MR. SCHWARTZ: Yes.

10 MS. AKHIMIEN: -- your Honor.

11 THE COURT: Okay. One thing -- I'd
12 like to know the following from both of you, which is:
13 I must say, the entry of the scheduling order, and
14 more relevantly, probably, the amendment to the
15 scheduling order, a little fuzzy in my mind how all
16 that came about. The amended scheduling order was a
17 very odd order for me to enter without inserting a
18 date. So I really just don't recall it off the top of
19 my head.

20 But what I'm interested in is, when
21 the two of you were discussing setting up this
22 preliminary injunction hearing, most people sit down
23 and they work out a schedule for taking depositions,
24 organizing on disclosure in advance of any experts

1 that may be relevant to such a proceeding. And all of
2 that is done before the first brief is filed. What
3 happened here?

4 MS. AKHIMIEN: Well, in the scheduling
5 order that was submitted in January of last year --
6 this was before, you know, Schwartz entered his
7 appearance -- but we worked with defendants' counsel.
8 She submitted that scheduling order, and it provided
9 for discovery and also dates for when we would come
10 back to the Court with a preliminary injunction
11 motion. I don't have it in front of me, but that was
12 something that the parties agreed to.

13 And, again, we asked for information
14 about experts in our discovery requests that were
15 propounded on defendants in November of 2015. And
16 they -- they just haven't produced any information
17 about -- about that expert. So this is nothing novel,
18 nothing new. Defendants' contention that, oh, they
19 were waiting for DPS to produce documents does not
20 comport with the discovery rules. There's nothing
21 that allows for that kind of quid pro quo arrangement.

22 And in addition to that, DPS has been
23 clear about what information constitutes trade
24 secrets, what tortious interference issues are at

1 stake here. From Day 1 it was in DPS's complaint.
2 It's been in the various motion papers. Even in its
3 discovery responses that were propounded on defendants
4 in December, which was, indeed, timely, contrary to
5 Mr. Schwartz's assertion, we outlined what the
6 discovery -- excuse me -- what the trade secrets were.

7 And Beard Research, the case that
8 Schwartz was referring to, actually says
9 that identifying categories of trade secret
10 information can be sufficient. In fact, the Court
11 held in that case that the categories of trade secret
12 information that was identified constituted trade
13 secrets.

14 But beyond all of that, DPS, again,
15 went above and beyond. And last month, almost three
16 weeks ago, we specifically identified as a trade
17 secret and the Bates numbers that were associated with
18 that trade secret information, over three weeks ago.
19 And defendants sat on that information and did
20 nothing. And now they're identifying an expert and a
21 motion to modify an amended scheduling order? I
22 just -- it's definitely going to unduly prejudice DPS.

23 We've already submitted our opening
24 brief. We've had to go through third parties to get

1 information that the defendants have had, and it puts
2 DPS in a very awkward position.

3 THE COURT: All right. Mr. Schwartz,
4 I'll give you the final word on this, and then I'm
5 going to tell you what we're going to do with the
6 expert witness issues.

7 MR. SCHWARTZ: Right. I don't know
8 how plaintiff can maintain that their discovery
9 responses were timely, when the discovery was filed in
10 May of 2016 and they -- they obtained a -- the listing
11 of the bankruptcy stay in September, and then it was
12 late December before they responded to the discovery
13 upon being prompted by me. Discovery responses were
14 not timely.

15 THE COURT: All right.

16 MR. SCHWARTZ: That's all I have to
17 say.

18 THE COURT: All right. Thank you.

19 So we're in a very odd place in this
20 case, and this case has had some oddities from the
21 beginning and a lot of twists and turns for a whole
22 variety of reasons between the arbitration, the
23 changing of counsel, the filing of the bankruptcy, the
24 lifting of the stay, so on and so forth. But I want

1 to be practical given where we are.

2 No. 1, I did look through Document
3 Requests 17, 33, and 34. Frankly, they are sort of
4 boilerplate requests that people typically would
5 object to as being premature until there's such time
6 as when expert issues arise in a case. I'm not sure
7 that objection was stated in so many terms, but other
8 objections were made. And the reality is that
9 Mr. Schwartz at the moment still doesn't have anything
10 to actually produce in response to these requests.

11 The bigger flaw here is in how this
12 schedule for a preliminary injunction hearing was set
13 up in the first place. I've done this a few times,
14 and it typically is worked out to have intermediate
15 deadlines for documents to be produced on a certain
16 schedule, witnesses to be deposed, expert testimony to
17 be taken and done before the first brief is filed.
18 For whatever reason, that didn't happen here.

19 The reality right now, as I see it, in
20 this case -- and I reviewed the opening preliminary
21 injunction brief before this call -- is that there's
22 finally been some identification of specific
23 documents, six or seven exhibits or so, that are
24 purported to be trade secrets. I don't think it's a

1 secret to the plaintiffs here that I expressed some
2 skepticism that the kinds of things that were being
3 referred to as trade secrets in a very generic way
4 early in this case I had some questions about. Now
5 there are some specific things on the table.

6 If Mr. Schwartz's client comes forward
7 with an expert report as part of their answering
8 brief, then, Ms. Akhimien, you will have the
9 opportunity at that time to tell me how much time you
10 think you need to depose that person and to put in
11 your own expert report. And Mr. Schwartz will have
12 the same opportunity to depose that person and to put
13 in a reply report with his reply brief, and then we're
14 going to have a preliminary injunction hearing.

15 That is the best I can do to do
16 justice in this circumstance, because what I'm really
17 interested in is if the trade secret claim is going to
18 be pressed, that it's being done substantively on the
19 merits. And I think expert reports may be helpful for
20 that. So that's how we're going to handle the expert
21 witness issue.

22 Does everybody understand what I just
23 said?

24 MS. AKHIMIEN: Sure. Is there --

1 MR. SCHWARTZ: Yes, Your Honor.

2 MS. AKHIMIEN: Yes, Your Honor. Is
3 there going to be a deadline for defendants to meet
4 that expert report or identify, you know -- give us
5 the information we've requested?

6 THE COURT: The deadline is their
7 brief. If they don't have it with their brief, you
8 have nothing to worry about, there will be no expert
9 issue to have to deal with. When their brief comes
10 in, if it's accompanied by an expert report or
11 affidavit of an expert, you have the right to take a
12 deposition of that person and to get whatever
13 appropriate materials you need to take that
14 deposition, and then you can submit your response in
15 your reply papers. And the other side will have the
16 right to take a deposition of your expert if you put
17 an expert report in with your reply.

18 It's not perfect. This is not the way
19 I'd like to do it, and it's not the way I should have
20 to do it, but we're just faced with the reality of
21 this not being set up the right way in the first
22 place.

23 All right. Let's go to issue No. 2,
24 which is the outstanding document requests. I

1 gathered from the letter some of this may be moot but
2 maybe not all. So tell me what remains outstanding.

3 MS. AKHIMIEN: Sure, Your Honor. With
4 respect to the document requests, defendants submitted
5 and produced e-mails without attachments. They also
6 produced documents that were password protected and
7 encrypted. So we really haven't had an opportunity to
8 assess what those documents were. Yesterday -- excuse
9 me. Yeah, yesterday morning they submitted additional
10 documents that they had withheld. And, again, at this
11 point our opening brief has already been filed. We've
12 requested all this information, you know, months ago.
13 And for us to just get this information now, again,
14 puts us in a precarious position.

15 So we also outlined in our deficiency
16 letter and in, I believe, yesterday's joint letter
17 some of those document requests that are outstanding
18 in addition to the e-mail issue and the encrypted
19 documents, which is Documents No. 1, 3, 7, and 21.
20 And those also remain outstanding at this point.

21 THE COURT: All right. Mr. Schwartz.

22 MR. SCHWARTZ: Your Honor, this is not
23 a case where -- well, first let me address the item of
24 the e-mail attachments that were provided yesterday,

1 yesterday morning.

2 We had -- the defendants had produced
3 documents in December, responses to the requests for
4 production in the hope that it was going to complete
5 the discovery requests that were outstanding. And as
6 far as I knew, plaintiff had everything that it had
7 requested.

8 In my conversation -- teleconference
9 Monday with opposing counsel, she made known that the
10 e-mails that we supplied had attachments that were not
11 included. So just having learned of that Monday,
12 yesterday morning, I obtained them and supplied them
13 to her. It's not a matter of items being withheld.
14 If she had contacted me in December, the day after I
15 had produced the documents and told me that the
16 attachments were missing, I would have obtained them
17 for her then. As soon as I became aware of it, I got
18 them to her.

19 So I don't think there's a
20 justification for her to claim that we were
21 withholding the items.

22 Now, insofar as the items 1, 3, 7, and
23 21 in the request for production, this isn't a case
24 where the plaintiff has requested a production of

1 documents and where the defendants have failed to
2 respond. The defendants responded in February 2016
3 with objections to poorly worded requests, and
4 plaintiff chose not to reword its discovery requests
5 but to double down and push ahead. Then there were
6 delays. Defendants' counsel withdrew and I came in,
7 and in a matter of weeks after I came in, defendants
8 went into bankruptcy.

9 In November 2016, I believe it was
10 about two months after plaintiff obtained a lifting of
11 the stay, automatic stay, I was notified for the first
12 time that the bankruptcy stay had been lifted. I
13 don't know why my client didn't notify me, but
14 plaintiff didn't notify me, either. So I was told in
15 November, I believe it was, 2016. And then by
16 December, I -- it was determined I was still on board,
17 and we produced, the defendants produced, the
18 documents requested.

19 Now, the plaintiff has gotten the
20 documents they requested. Their motion is based
21 simply on their opinion that there should be more
22 documents. We've given the plaintiff what we have.
23 And all we can do is insist that we've produced
24 everything we've got. They've gotten a voluminous

1 production. And if they claim that there's more,
2 well, they're just dissatisfied with what was
3 produced. And I don't know what more we can do to
4 convince the Court or to convince the plaintiff that
5 we've produced everything we've got.

6 THE COURT: All right. So let me go
7 back to the top of this. I think there are subissues
8 on document requests. The first issue was the e-mail
9 that didn't have the attachments. And are you
10 representing to me, Mr. Schwartz, you've now produced
11 those attachments?

12 MR. SCHWARTZ: Yes, Your Honor.

13 THE COURT: All right. The second
14 issue that Ms. Akhimien brought up -- I don't think
15 you've addressed directly yet -- are the documents
16 that were encrypted or had password protection. Has
17 that been addressed?

18 MR. SCHWARTZ: Oh, oh, okay. No, I
19 haven't addressed them. And I looked at exhibits --
20 Exhibit B, which is where I believe those are listed,
21 and I can't identify the documents from Exhibit B.
22 Exhibit B to me doesn't contain file names or file
23 specs. It's a list of data. And if counsel will
24 provide me with the names of the files, I'll go back

1 to my client and find out what's going on with them.

2 THE COURT: And I'm sorry. You're
3 referring to Exhibit B to what exactly?

4 MR. SCHWARTZ: Exhibit B to the joint
5 letter.

6 THE COURT: All right. Give me a
7 moment to find that, please.

8 All right. I'm looking at it now.
9 What information is it you say you need?

10 MR. SCHWARTZ: The name of the file.

11 THE COURT: Ms. Akhimien, is that
12 information you have?

13 MS. AKHIMIEN: I mean, the name of the
14 file is right there. That's where it's coming from.
15 These are the documents that his client produced. So
16 I don't -- it's -- in the example it says C:, you
17 know, //localtemp, and then it has the name of where
18 -- the file password. So I don't know whatever
19 information he needs.

20 MR. SCHWARTZ: Well -- I'm sorry.

21 MS. AKHIMIEN: That's what's been
22 produced to us.

23 THE COURT: Mr. Schwartz.

24 MR. SCHWARTZ: There's a list of --

1 I'm sorry.

2 THE COURT: No. Go ahead.

3 MR. SCHWARTZ: There's a list of items
4 on Exhibit B. It looks -- it looks like a list of
5 maybe 20, 25 items. And in the left-hand column
6 there's -- under "Modified" there's a date and -- but
7 I don't see -- and it looks like we're talking about
8 25 or so different items. But the name of the file
9 isn't stated anywhere.

10 THE COURT: Whose system did this
11 document come from?

12 MS. AKHIMIEN: This is from
13 Dr. Gerges. These are part of the 4 gigabytes of
14 documents that he downloaded onto his computer,
15 which -- actually, his wife actually had access to
16 that computer based on the user name that was produced
17 to us. But that's where they came from.

18 Part of the issue is that defendants
19 only continue to produce documents after they learn
20 what we have. And even then, they don't even produce
21 everything that they have. For example, we have text
22 messages and contracts and e-mails that we received
23 from third parties that defendants never produced to
24 us. One of those text messages even was incriminating

1 to Dr. Gerges. It indicated that he was tortiously
2 interfering with our contract with Dr. Swier and that
3 he wanted to play a chess game with DPS and his
4 contract with Dr. Swier. It's just strange to me that
5 he can produce text messages with people like Abboud
6 and others, but when it comes to incriminating
7 evidence with Dr. Swier, he doesn't produce those
8 documents.

9 THE COURT: All right. Ms. Akhimien,
10 let me stay on point of what I want to deal with right
11 now.

12 This document that we're looking at
13 that's attached to Exhibit B, did you receive this in
14 native format or just paper?

15 MS. AKHIMIEN: In -- in native. So
16 they sent us a -- an external hard drive with this
17 information.

18 THE COURT: All right. So what I need
19 you to do, Mr. Schwartz, is I need you to give to
20 Ms. Akhimien -- and I want you to do it within 48
21 hours -- whatever password she needs to access what
22 you produced to her in native format so that she can
23 analyze each of these documents. Alternatively, you
24 can produce them all in paper copies, but she needs to

1 get the information.

2 Do you understand that, Mr. Schwartz?

3 MR. SCHWARTZ: Yes. Yes, Your Honor.

4 THE COURT: Now let me deal with the
5 third issue.

6 MR. SCHWARTZ: May I add?

7 THE COURT: Go ahead. Go ahead,
8 Mr. Schwartz.

9 MR. SCHWARTZ: Oh, my question:
10 Exhibit B, is plaintiff's counsel saying that this
11 Exhibit B was produced by Dr. Gerges?

12 MS. AKHIMIEN: Yes.

13 MR. SCHWARTZ: Yes? Okay. All right.
14 Thank you.

15 THE COURT: And as I understand it, it
16 was produced in native format, meaning they have it in
17 electronic format. They just can't access it.

18 MS. AKHIMIEN: That's correct.

19 THE COURT: So you need to either give
20 them the information that allows them to access it
21 electronically or get them the hard copy of the
22 documents that are referenced in this exhibit within
23 48 hours.

24 MR. SCHWARTZ: Okay.

1 THE COURT: All right. The next issue
2 concerns Document Requests 1, 3, 7, and 21. Now, the
3 first issue here is, Mr. Schwartz, I'll be candid. I
4 do have a concern that there's not a forthcoming
5 production of documents by your client here because
6 Ms. Akhimien, you know, put her finger on something
7 that I'm sensing here and I hope I'm wrong, which is
8 he doesn't seem to be very forthcoming with documents
9 until some third party has produced information
10 already. And that can't be the way this works, or
11 he's going to be in a very bad spot when this
12 litigation is concluded.

13 I looked at Requests 1, 3, 7, and 21.
14 They are very broadly worded, but they, at their
15 heart, deal with relevant subjects.

16 Now, my first question to both of you
17 is: In the last 48 hours when I were asking you to
18 meet and confer to try to resolve these disputes, did
19 you guys actually try to work through those specific
20 requests to see if you can get to the bottom of
21 things? Ms. Akhimien?

22 MR. SCHWARTZ: Your Honor ...

23 MS. AKHIMIEN: We did. We worked
24 through various requests.

1 THE COURT: I'm just talking about 1,
2 3, 7, and 21 right now.

3 MR. SCHWARTZ: I don't think we
4 discussed them.

5 THE COURT: Right. Well --

6 MS. AKHIMIEN: Well, it was in the
7 motion -- it was in the motion to compel --

8 THE COURT: Yeah. No, Ms. Akhimien.
9 I want to go back for a second, because this is very
10 annoying to me. It is not -- and I'm going to
11 underscore "not" -- a proper motion to compel to
12 attach a meet-and-confer letter and say somebody
13 didn't produce documents, "Judge, go read all my
14 attachments and figure out what the problems are."
15 The motion should identify specifically what the
16 subjects are and explain the grounds for seeking
17 information. It was not a well-done motion. It was
18 very unhelpful to me to have to try to piece this
19 together.

20 So I'm going to order both of you over
21 the next 48 hours to walk through and discuss No. 1,
22 3, 7, and 21 and report back to me with a joint letter
23 in 48 hours telling me if you're able to resolve them.

24 Bottom line here is this:

1 Mr. Schwartz, your client will have to produce
2 everything he has on these topics as reasonably
3 construed.

4 And, Ms. Akhimien, you're going to
5 have to work with him not to have these things read so
6 broadly that it means producing everything in the
7 world. They have to relate to subjects that are
8 legitimately in dispute here. Yes, your client is
9 clearly entitled to all the communications between
10 Dr. Gerges and Dr. Swier or Mr. Swier, whatever it may
11 be, no question about it. But there's a lot of add-on
12 language in those requests, and you're going to have
13 to work with him and discuss it. All of this should
14 have happened long before either of you ever got on
15 the line with the Court.

16 Now --

17 MR. SCHWARTZ: I'm going to -- Your
18 Honor, I can represent to the Court that in December
19 when we did the production of documents, it was done
20 with the instruction to my client that he was to go
21 through all of his records and find everything that
22 was responsive and give it to me. We weren't -- we
23 weren't -- we weren't trying to read closely the
24 document requests in order to provide as little as

1 possible. My instructions to my client -- and I don't
2 have any -- I don't have any reason to know that he
3 disregarded my instructions. My instructions were to
4 produce everything that -- that's in the ballpark.

5 THE COURT: All right. Well, I still
6 want you to do what I just indicated. Hopefully that
7 is true.

8 MR. SCHWARTZ: Yes, Your Honor.

9 THE COURT: But I want you to do it
10 with 1, 3, 7 -- excuse me a moment --

11 MR. SCHWARTZ: 7 and 21.

12 THE COURT: Yes, with 1, 3, 7, and 21
13 specifically in mind.

14 MR. SCHWARTZ: Yes, Your Honor.

15 THE COURT: And, frankly, I want you
16 to do it with respect to the next category, the
17 interrogatories. I can't do anything for you today
18 because I don't even have a copy of the
19 interrogatories, which is just ridiculous. They
20 weren't provided with the motion papers.

21 So you'll both have to -- whatever
22 interrogatories that remain outstanding -- and from my
23 notes they would be Interrogatories 2, 4, 14, and 22.
24 You'll have to discuss. And I want the same thing, a

1 letter back telling me what remains in dispute, if
2 anything.

3 MR. SCHWARTZ: Yes, Your Honor.

4 MS. AKHIMIEN: Yes, Your Honor.

5 THE COURT: And then the last subject
6 is sanctions. I'm not awarding sanctions based on
7 this motion. This motion wasn't, frankly, filed
8 correctly in the first place. But I will reserve
9 judgment as to whether or not there's been litigation
10 misconduct, and that will be dealt with down the road
11 if there's a basis for somebody to make such an
12 application. But that's premature at this time.

13 I believe that covers the four topics
14 that were in the letter. Does anybody else have any
15 other questions for me?

16 MR. SCHWARTZ: No, Your Honor.

17 MS. AKHIMIEN: I don't have a
18 question, but I just wanted to also highlight, when I
19 was reviewing the joint letter again this morning, I
20 noticed that counsel had made a representation that
21 defendants had supplied Mr. O'Brien with not only
22 defendants' opening brief but exhibits that were
23 attached to that opening brief that DPS has marked as
24 highly confidential, which, pursuant to the order

1 governing the production and exchange of highly
2 confidential information, was supposed to be for
3 Attorneys' Eyes Only. Specifically, it was
4 Exhibits 26, 27, and 28. Those documents were
5 Bates-stamped, and in the left they indicated that
6 they were highly confidential. The documents were
7 also filed under seal.

8 So I -- that kind of conduct, I just
9 want to highlight to the Court that defendants should
10 be careful in terms of abiding by that order as well,
11 especially when we've taken care to mark things as
12 highly confidential, filed things under seal --

13 MR. SCHWARTZ: Yeah.

14 MS. AKHIMIEN: -- and notified them
15 accordingly.

16 MR. SCHWARTZ: And I instructed -- I
17 instructed my client to tell Dr. O'Brien that these
18 materials are confidential materials and they can't be
19 used for any other purpose other than for this
20 judicial proceeding and that, you know, they can't be
21 used for personal gain or anything; that they're
22 sealed.

23 So he's -- you know, the witness -- I
24 haven't spoken with the witness yet, so I can't -- the

1 expert witness. So I can't tell you specifically what
2 he was told. But I was -- I had instructed my client
3 to -- on what to tell the expert witness and to
4 caution him in the use to which the documents could be
5 put.

6 THE COURT: Well --

7 MS. AKHIMIEN: Your letter -- the
8 letter says that Dr. Gerges actually supplied
9 Mr. O'Brien with those exhibits that were marked
10 highly confidential, meaning --

11 MR. SCHWARTZ: That's right.

12 MS. AKHIMIEN: -- yeah, he was not
13 supposed to actually even see them, "he" being
14 Dr. Gerges.

15 THE COURT: Right. So a couple things
16 here. Hold on, Mr. Schwartz.

17 So I don't have your
18 confidentiality -- Ms. Akhimien, is there a pretty
19 standard confidentiality order entered in this case?

20 MS. AKHIMIEN: Yes, Your Honor. It
21 was entered in September of 2015.

22 THE COURT: All right.

23 MS. AKHIMIEN: I don't have the docket
24 number.

1 THE COURT: And I gather you're
2 telling me it's a two-tiered order and that Mr. Gerges
3 is not allowed to see certain documents; is that
4 right?

5 MS. AKHIMIEN: That's correct, Your
6 Honor.

7 THE COURT: Is there a provision in
8 there for an undertaking to be signed by any experts?

9 MS. AKHIMIEN: I believe so. I
10 believe it might be an exhibit.

11 THE COURT: Yeah.

12 MS. AKHIMIEN: I have it in front of
13 me, but I'd have to (Inaudible) --

14 THE COURT: Right.

15 MS. AKHIMIEN: -- look at it.

16 THE COURT: Right.

17 MS. AKHIMIEN: But I know that's
18 typical, I believe, for the Court of Chancery.

19 THE COURT: Yeah. So, Mr. Schwartz,
20 couple things. One is -- and, again, I don't have
21 this confidential stipulation in front of me right
22 now, but it sounds like your client is carved out from
23 being able to see things that are stamped in a certain
24 way, probably things that are highly confidential.

1 Whatever the stipulation says it says. You cannot be
2 providing anything to your client that falls in that
3 category, even for the purpose of, from my
4 perspective, of being a transmittal person. It's your
5 responsibility, frankly, to interact with this expert
6 directly to ensure that the confidentiality provisions
7 are adhered to. And, indeed, your expert should be
8 signing an undertaking, which is typical and I suspect
9 is included within this confidentiality stipulation,
10 where he will agree in writing and sign that he's
11 going to adhere to the stipulation.

12 So you need to take charge of this
13 process. And you're --

14 MR. SCHWARTZ: Yes, Your Honor.

15 THE COURT: It would be bad for lots
16 of reasons for your client to be the interlocutor
17 between, you know, you and the expert. You ought to
18 be in charge of that process directly.

19 Now, I have one other question. I
20 read the order lifting the stay in the bankruptcy, but
21 I want to understand what the two of you believe it
22 allows to happen in this case. For example, can this
23 case go to trial? Forget about the preliminary
24 injunction for a moment. Can we just get this case to

1 trial so that if we have factual disputes, we can get
2 them resolved? I recognize that the plaintiff
3 couldn't collect on a judgment. I guess it could just
4 liquidate to an amount of damages. But do you
5 understand that we can go to trial or we can just do a
6 preliminary injunction? What do you understand the
7 scope of what is possible within this case?

8 MS. AKHIMIEN: Your Honor, this is
9 Mary Akhimen. I believe that the bankruptcy order
10 permits us to go to trial. It says that "DPS is
11 permitted to" -- and I'm reading from the order now --
12 "DPS is permitted to prosecute injunctive relief
13 against the Debtor to conclusion, including any
14 appeals therefrom." And just like Your Honor said, it
15 goes on to say that we can obtain a liquidated damages
16 amount but we can't collect on that --

17 THE COURT: Right.

18 MS. AKHIMIEN: -- amount. So my
19 understanding is -- and we weren't bankruptcy counsel
20 in that matter. But my understanding is that we can
21 go to trial, and I could get clarification on that if
22 Your Honor would like. But that's at least my
23 understanding.

24 THE COURT: Mr. Schwartz, do you share

1 the same understanding?

2 MR. SCHWARTZ: Yeah. Well, I'm no
3 bankruptcy expert. I don't practice in Bankruptcy
4 Court. But that's what it -- what the order appears
5 to say, is that the --

6 THE COURT: All right.

7 MR. SCHWARTZ: -- that DPS is
8 permitted to obtain a liquidated damages amount --
9 so -- it's kind of odd language -- "in conjunction
10 with the injunctive relief, DPS is permitted to obtain
11 a liquidated damage amount."

12 MS. AKHIMIEN: And it only applies --

13 MR. SCHWARTZ: No, no. The previous
14 paragraph 1 states: "DPS is permitted to prosecute
15 injunctive relief against the Debtor to conclusion,
16 including any appeals therefrom." So I think that
17 would probably cover it.

18 THE COURT: All right. Well, look, I
19 ask because on the table right now is working towards
20 a preliminary injunction hearing and we're going to go
21 through that process. But there will be issues that
22 remain for further adjudication after that. And I
23 wanted both of you-all to just think about it. My
24 reading was it looked like we could go to trial and

1 resolve them, but I wanted to get each of your
2 perspectives on that.

3 In any event, that's enough for
4 today's purposes.

5 So to sum up where we are is,
6 Ms. Akhimien, once you receive the defendants'
7 answering brief, if there's no expert report in it,
8 the expert issue is moot. If there's an expert report
9 in it, you follow the procedure I outlined. And you
10 can basically take a reasonable amount of time. If
11 you want to live with the two weeks you have because
12 you want to keep things on track, that's fine. If you
13 want more time and it's a reasonable amount, you'll be
14 entitled to more time to do things.

15 And, likewise, what I outlined before,
16 once you submit your reply papers, Mr. Schwartz and
17 his client will have an opportunity to take the same
18 kind of discovery if you put an expert at issue as
19 well. That will involve moving the schedule around a
20 little bit, but it's more important that we get this
21 done right, especially given the context of this case
22 and how long it's taken to get to this point in the
23 first place.

24 As for the discovery requests and

1 interrogatories that we discussed, I'll be waiting to
2 get back from you two within 48 hours a letter
3 outlining your further discussions on those issues.

4 I would hope, given what I've said,
5 that there will be no more fights. And, Mr. Schwartz,
6 I would have you redouble with your client to caution
7 him. The last thing that is going to be good for your
8 client is if we end up finding documents coming from
9 lots of third parties that one reasonably would have
10 expected for him to have in his own files that were
11 not produced, because it goes far beyond just failing
12 to produce the document. It brings into question
13 fundamental issues of his credibility. And I want you
14 to have that conversation with your client.
15 Understood?

16 MR. SCHWARTZ: Yes, Your Honor. Yes,
17 Your Honor.

18 THE COURT: All right. Thank you,
19 Counsel. Have a good day.

20 MR. SCHWARTZ: Your Honor -- Your
21 Honor --

22 THE COURT: Yes.

23 MR. SCHWARTZ: Your Honor, just one
24 thing. The 48 hours, I have a ... Tomorrow I have --

1 I'm not sure yet if I'm going to be well enough to
2 attend it, but I have a cousin who died, and the
3 funeral is tomorrow in Philadelphia. And if I am well
4 enough to attend it, then 48 hours is going to cut it
5 kind of short. I'm wondering if we could extend that
6 to the close of business on Monday.

7 THE COURT: That's fine.

8 MR. SCHWARTZ: All right. Thank you,
9 Your Honor.

10 THE COURT: All right. Have a good
11 day.

12 MS. AKHIMIEN: Thank you. Thank you,
13 Your Honor.

14 MR. SCHWARTZ: Thank you.

15 (The proceedings concluded at 2:48 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Chief Realtime Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 40 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 15 through 18, 25 through 26, 28 through 31, and 38 through 40, which were revised by the Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 22nd day of February 2017.

/s/ Neith D. Ecker

Chief Realtime Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public