UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

Plaintiff.

v.

CIV. NO. 97-362 RLP/DJS

HORIZON/CMS HEALTHCARE CORP.,

Defendant.

ORDER

THIS MATTER comes before the Court upon Plaintiff's Motion to Compel filed April 14, 1998 (Docket No. 66). Plaintiff seeks further answers to various requests for production made in its Second Request for Production of Documents. In its Reply in support of the Motion to Compel, Plaintiff states that the parties have resolved their dispute with regard to Request for Production No. 21.

REQUEST FOR PRODUCTION NO. 22

Request for Production No. 22 seeks all incident reports or other documents which discuss or concern reports of patient injury due to falling or other accidents during patient transfers or patient ambulation at Defendant's New Mexico facilities from 1994 to the present. Defendant objected that the request calls for irrelevant information, is overly burdensome, and seeks patients' confidential medical information. Plaintiff argues that the request is relevant to Defendant's possible defense of its practice of laying off pregnant employees based upon concern for patient safety. Defendant

responds that the requested information would not show whether a pregnant woman can stabilize a resident or keep a resident from falling. Defendant also asserts that production of the requested material would require it to search thousands of medical files from twenty-seven separate facilities.

The United States Supreme Court has construed relevance for the purposes of discovery "broadly[,] to encompass any matter that bears on, or that reasonably could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). However, the Court must also balance a party's right of discovery with the opposing party's right to be free from burdensome or intrusive examinations. A request for discovery is burdensome when the burden to produce outweighs the benefit of discovery. Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975); Flour Mills of America, Inc. v. D.F. Pace, 75 F.R.D. 676 (E.D.Ok. 1977). In this instance, the burden of complying with Plaintiff's discovery request outweighs the benefit of the material sought. Consequently, Plaintiff's motion to compel will be denied with regard to Request for Production No. 22.

REQUEST FOR PRODUCTION NO. 31

Request for Production No. 31 seeks all documents that discuss or concern any changes in organizational or corporate structure of Defendant's New Mexico facilities from June 1, 1997 to present, including documents identifying the name of each of Horizon/CMS Healthcare facility in the state and the number of employees in each facility during that period. Defendant objected that the request is overbroad, unduly burdensome, and seeks irrelevant information. Defendant asserts that it provided Plaintiff with a written stipulation which provides the necessary facts. Defendant further states that it provided Plaintiff with the approximate number of employees as of September, 1997 and a list of employees in each facility as of December 31, 1997. In addition, Defendant contends that to

the extent the request seeks information on New Mexico facilities up to the present time, it no longer has possession, custody, or control of such documents.

Plaintiff contends that this discovery request seeks documents which may lead to admissible evidence regarding whether there has been a substantial continuity of business operations between Defendant and potential successor corporations. Plaintiff also asserts that evidence regarding Defendant's current corporate structure is relevant to the issues of the relief sought by the EEOC. Plaintiff argues that the stipulation of facts does not address corporate structure before and after the sale of Defendant's New Mexico assets and does not adequately address the information sought in the request.

Review of Defendant's stipulation of facts demonstrates that Defendant has not addressed changes in its corporate structure in that document. Further, Defendant has not met its burden and shown that the discovery request is unduly burdensome. See Continental Illinois Nat. Bank & Trust v. Caton, 136 F.R.D. 682, 685 (D.Kan. 1991). Consequently, Plaintiff's motion to compel will be granted and Defendant will provide Plaintiff with documents in its possession or control which are responsive to the request.

REQUEST FOR PRODUCTION NO. 32

Request for Production No. 32 seeks all documents which discuss or concern any agreements or contracts between Defendant and either Health South Corporation or Integrated Health Services for the purchase of Defendant's facilities in New Mexico. Defendant objected to the request by reference to its objections to Request for Production No. 31. Defendant argues that Plaintiff does not require any more information than that contained in the stipulation of facts which it tendered and that, in light of that stipulation, the request is unnecessary and intrusive in seeking confidential and

proprietary information. Plaintiff contends that the documents sought are relevant to the issue of whether there are any successor corporations to Defendant that are or should be liable in this case.

Defendant's concerns regarding proprietary information can be alleviated by the entry of a protective order regarding this information. See Wainright v. Washington Metro Area Transit Authority, 163 F.R.D. 391, 397 (D.D.C. 1995)(ordering production of proprietary data subject to protective order even though the expert for the party seeking discovery was a competitor); ITT Electro-Optical Products v. Electronic Technology Corp., 161 F.R.D. 228, 232 (D.Mass. 1995)(ordering production of trade secrets subject to a "carefully fashioned protective order); and Gohler v. Wood, 162 F. R.D. 691, 696 (D.Ut. 1995)(ordering production of trade secrets in audit manuals subject to a protective order). Plaintiff's motion to compel will be granted with regard to Request for Production No. 32, subject to the entry of an agreed-upon protective order.

REQUEST FOR PRODUCTION NO. 33

This request seeks all documents which discuss or concern any agreements or contracts between Defendant and either Health South Corporation or Integrated Health Services for the performance of personnel or human resources by Defendant's employees for Health South Corporation or Integrated Health Services facilities in New Mexico. In response to the request, Defendant referred to its objections to Request for Production No. 31. Defendant did not address this request in its Response to the motion to compel. Because Defendant has not supported its objections to the discovery request, Plaintiff's motion to compel will be granted with regard to Request for Production No. 33.

REQUEST FOR PRODUCTION NO. 34

Request for Production No. 34 seeks all documents provided by Defendant to either Health

South Corporation or Integrated Health Services in order to provide those entities with notice of this lawsuit. Defendant objected to the request by reference to its objections to Request for Production No. 31. Plaintiff argues that Defendant's stipulation of facts only provides the general information that it provided those corporations with notice of this suit and that Plaintiff may require more information if it pursues one of those corporations as a successor to Defendant. In light of the information sought by Plaintiff and granted by the Court in ruling on the instant motion to compel, Plaintiff's request is unnecessary and therefor burdensome. Consequently, Plaintiff's motion to compel will be denied with regard to Request for Production No. 34.

REQUESTS FOR PRODUCTION NOS. 35, 36, 37, 39, and 43

Defendant objected to each of these requests by reference to its objections to Request for Production No. 31. In its Response to the motion to compel, Defendant asserts that no documents responsive to each of the requests are in its custody or control. The Court cannot compel a litigant to produce material which it does not control of or have access to. Consequently, Plaintiff's motion to compel will be denied with regard to Requests for Production Nos. 35, 36, 37, 39, and 43.

REQUEST FOR PRODUCTION NO. 38

This request seeks all documents which discuss or concern Integrated Health Systems' continuation of business operations which Defendant formerly engaged in during the period from 1994 to the present. Defendant objected to the request by reference to its objections to Request for Production No. 31. In its Response to the motion to compel, Defendant maintains that the documents sought are unnecessary given the stipulation of facts which it has provided. Plaintiff contends that information regarding whether Integrated Health Systems continues unchanged the business operations at the facilities it bought from Defendant is a factor in analyzing successor liability. Given

the relevance of the documents sought to the issue of successor liability, Plaintiff's motion to compel will be granted. Defendant shall provide those documents in its possession responsive to Request for Production No. 38.

REQUEST FOR PRODUCTION NO. 40

Plaintiff's Request for Production No. 40 seeks all documents which discuss or concern current or former employees of Defendant in New Mexico now employed by Health South Corporation and/or Integrated Health Services. Defendant objected to the request by reference to its objections to Request for Production No. 31. In its Response to the motion to compel, Defendant states that there are no documents responsive to the request in its custody or control and that it has provided Plaintiff with lists of employees and their addresses. Plaintiff argues that it should not be compelled to interview Defendant's former employees, which number approximately 13,000, to determine if they are now employed by Integrated Health Services. However, in order to provide documents regarding former employees now working for the company which bought its New Mexico facilities, Defendant would presumably have to undertake a similar interview process. Plaintiff's request is unduly burdensome and its motion to compel will be denied with regard to Request for Production No. 40.

REQUEST FOR PRODUCTION NO. 42

This request seeks all documents which describe the purchase of Defendant's equipment, supplies and other tangible items by either Health South Corporation or Integrated Health Services. Defendant objected to the request by reference to its objections to Request for Production No. 31. Defendant further argues that the request is irrelevant and unnecessary. In light of the stipulation of facts provided by Defendant and the fact that Plaintiff's motion to compel was granted with regard

to Requests for Production Nos. 32 and 33, this Court agrees. Plaintiff's motion to compel will be denied with regard to Request for Production No. 42.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Compel is granted in part. Defendant shall provide the documents requested in Plaintiff's Requests for Production Nos. 31, 32, 33, and 38 within ten days of the entry of this order. The parties shall agree upon and submit to the Court a form of protective order which shall apply to the documents provided in response to Request for Production No. 32. The protective order shall be submitted to the Court within five days of the entry of this order.

DON J. SVET

UNITED STATES MAGISTRATE JUDGE