UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA *ex rel.* ALON J. VAINER, M.D., F.A.C.P., and DANIEL D. BARBIR, R.N., Plaintiffs, v. DAVITA INC. et al., Defendants.	CIVIL ACTION NO. 1:07-CV-2509-CAP

ORDER

This action is set down for hearing today on the Relators' motion to compel [Doc. No. 1001]. At issue is the application of the attorney-client privilege with respect to communications between the defendants and their attorneys, which includes communications between lawyers and DaVita employees or former employees. While the Relators' motion to compel seeks "all communications between DaVita witnesses and counsel and any work product relating to Snappy and Venofer dosing," the court will begin its evaluation with specific assertions of privilege that occurred during the depositions taken in the re-opened discovery period that occurred between November 13, 2014, and January 12, 2015.

I. Factual Allegations of Wrongdoing and Prior Court Findings

The Relators have alleged that DaVita and its attorneys undertook a scheme during discovery to prevent them from learning the truth about Snappy's functionality in connection with suggesting maintenance doses of Venofer. The Relators have asserted that sworn testimony that supported or was consistent with the Relator's allegations about the role of Snappy would be subsequently changed through errata sheets or declarations filed after the subject depositions, during follow-up sessions of the depositions, or after breaks taken during depositions. This court conducted a hearing on the Relators' motion for sanctions in July 2014 at which the Relators offered direct evidence and compelling circumstantial evidence of efforts to align witness testimony with the now discredited statements of the defendants' former Rule 30(b)(6) witness, Richard Tetley. At the July 2014 hearing the court observed a disturbing pattern of alterations in witness testimony. The following is a timeline of the discovery activities related to Snappy's role in suggesting maintenance doses of Venofer:

4/16/12	Discovery begins.
10/5 & 10/30/12	Rule 30(b)(6) deposition of Tetley in which he states that Snappy did not provide a suggested dose for Venofer but, since 2007, Snappy would provide a recommended dose of Venofer.

12/18/12	Tetley submitted errata sheet changing "2007" to "2010."
December 2012	Marilyn Moulds meets with the defendants' lawyers for three hours and then seeks personal representation.
1/10/13	Sharon Adams testifies in deposition that Snappy did suggest a maintenance dose for Venofer.
1/17/13	Adams meets with the defendants' lawyers for four hours.
1/18/13	The defendants reconvene Adams's deposition for redirect examination during which she changes her testimony to state that Snappy did not provide a suggested maintenance dose for Venofer.
2/13/13	Moulds testifies at deposition and repeatedly avoids answering questions about whether Snappy suggested maintenance doses for Venofer.
5/23/13	Sherita Brown, who worked as a Clinical Services Specialist at DaVita since 2008, testifies in deposition that she did not remember the iron protocol before Ironworks but did remember pre-Ironworks protocols for both Zemplar and Epogen.
5/29/13	Ka Vang, a Facility Administrator and Anemia Manager in a California DaVita clinic from 2005 to 2008, testifies in deposition that she had no knowledge of the iron protocol pre-Ironworks. She testified that Snappy screenshots from 2008 appeared to show Snappy post-Ironworks.
5/30/13	Irina Goykhman testifies in deposition that Snappy did not provide a suggested dose for Venofer. She changed this via an errata sheet almost nineteen months later.
5/31/13	Kristine Marino testifies in deposition and claims that her memory has a "black hole" to how Snappy worked for Venofer, yet she was able to testify about Snappy's function with other drugs.

6/3/13	Teresa Gonzalez, a Clinical Services Specialist at DaVita from 2005 to 2010, testifies in deposition that she does not recall a protocol dose adjustment tool for Venofer before 2011 yet she recalled protocol dose adjustment tools for Epogen and Zemplar.
6/4/13	Janice Hill, a Clinical Services Specialist and DaVita employee since 1991, testifies in deposition that she had never seen the DaVita iron protocol despite training DaVita nurses for a period of six years and despite other nurses claiming to have been trained on the protocol under her instruction.
6/6/13	Shaun Collard testifies in deposition that Snappy did provide a suggested maintenance dose for Venofer.
6/21/13	Deadline for taking fact depositions.
7/30/13	Collard submits an errata sheet changing his testimony 180 degrees to state that Snappy did not provide a suggested dose for Venofer.
10/21/13	Tetley submits a declaration stating that he was mistaken: Snappy did suggest a maintenance dose for Venofer.
7/17/14	Collard submits a declaration saying he spoke to Tetley after his deposition, and, as a result, he submitted the errata sheet, which he admits now is incorrect.

In the August 12, 2014, order addressing the Relators' motion for sanctions, the court set forth its conclusion that "the defendants have spoiled discovery related to Snappy" such that the court was required to reopen

discovery on this issue [Doc. No. 922 at 2]. In the same order, the court made the following finding:

> [A]t best, [Rich] Tetley's initial false testimony led the defendants and their counsel astray during the subsequent months of discovery. Nevertheless, after several witnesses testified that Snappy did indeed suggest Venofer doses, the defendants did not reexamine Tetley's testimony and instead changed and molded the subsequent witnesses' testimony to match Tetley's. At worst, the defendants purposely manipulated the evidence and witnesses to hide the truth from the Relators and the court.

[Doc. No. 922 at 6]. Additionally, the court deemed the defendants' conduct with respect to filing and not correcting a false errata sheet related to the deposition of witness Shaun Collard to be "unacceptable" [Doc. No. 922 at 6].

Based on the spoiled discovery with respect to Snappy's functionality pertaining to Venofer, the court reopened discovery and allowed the Relators to re-depose seven witnesses. After the first deposition in the re-opened discovery period, the Relators filed the instant motion to compel testimony and documents to which the defendants claim attorney-client privilege.

II. Attorney-Client Privilege and the Crime-Fraud Exception

The United States Supreme Court has recognized the attorney-client privilege as "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The central concern of the privilege is "to encourage full and frank

communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration justice." *Id.* at 389. However, because "the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403 (1976). Therefore, "the attorney-client privilege does not protect communications made in furtherance of a crime or fraud." *In re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987).

The court has convened today's hearing to conduct an in camera review of privileged communications between the defendants' attorneys and three DaVita employees/former employees. According to the United States Supreme Court, this court has the discretion to review the communications at issue in camera if there is some factual basis to suggest that an in camera review may reveal evidence to establish the claim that the crime-fraud exception applies. *See United States v. Zolin*, 491 U.S. 554, 572 (1991). This court believes that its August 12, 2014, findings regarding the spoiled discovery as to Snappy's functionality are sufficient to conduct an in camera review of communications that occurred between the defendants' lawyers and the witnesses whose testimony revealed attempts to avoid questions about Snappy's role in suggesting Venofer doses or whose testimony outright

changed. Nevertheless, prior to its exercise of discretion to examine, in camera, the communications between DaVita lawyers and individual witnesses, the court will set forth grounds specific to each witness.

III. Findings as to Individual Witnesses

The re-opened discovery period began with the taking of a third deposition of former DaVita employee Sharon Adams. After a number of troubling revelations by Adams about significant changes she had made in her testimony over the course of a one-week period (between her first and second depositions), the court notified the parties of its intent to examine Adams about the source of those changes [Doc. No. 1005]. Incredibly, Adams has, through an errata sheet, again altered significant portions of her testimony and been deposed for a fourth time. Also, the remaining six witnesses contemplated in the court's order that established the re-opened discovery period have been re-deposed. The court has reviewed those depositions, as well. Due to time constraints, however, the court has limited the witnesses it will examine at this hearing to Adams, Collard, and Moulds. The court may reconvene this hearing at a future date to hear from other witnesses.

A. Sharon Adams

Initially, Adams testified that Snappy did provide suggested maintenance doses of Venofer. Adams Jan. 10, 2013, Dep. at 112-14. Then, under direct examination one week later, Adams disavowed knowledge of how Snappy worked in relation to the Venofer dosing. Adams Jan. 18, 2013, Dep. at 136-37. Adams indicated that she had decided to make the change in her testimony when meeting with the defendants' counsel on January 17, 2013. Adams Jan. 18, 2013, Dep. at 219-26. In her November 13, 2014, deposition, Adams states that she needed to change her answer about Snappy's suggested dosing of Venofer because of "discussion with the attorneys." Adams Nov. 13, 2014, Dep. at 43.

Also, in her November 13, 2014, deposition, Adams admits that she lied in her January 18, 2013, deposition as to whether she had reviewed her earlier testimony with DaVita lawyers in their meeting of January 17, 2013. Adams Nov. 13, 2014, Dep. at 71. The court recognizes that Adams has artfully attempted to alter this admission through an errata sheet and during her fourth deposition by expressing tortured interpretations of plain words. Nevertheless, in the January 18, 2013, deposition, Adams was asked whether she had discussed her January 10, 2013, testimony at all; she answered "No." Adams Jan. 18, 2013, Dep. at 160. Even if the court were to credit the errata

and well-crafted statements in Adams's fourth deposition, the January 18, 2013, statement that she did not discuss her January 10, 2013, testimony at all is directly at odds with her latest version of events, which is that "some topics which were covered in my January 10, 2013, testimony were discussed." Adams Dec. 12, 2014, Errata [Doc. No. 1026].

When asked why she had lied on January 18, 2013, about reviewing her January 10, 2013, testimony, she was admonished by the defendants' counsel that she was not to disclose communications with counsel. Adams responded by saying that she could not answer the question without disclosing communications with counsel. Adams Nov. 13, 2014, Dep. at. 72.

The inconsistencies in Adams's initial testimony and the subsequent changes thereto in conjunction with her attribution to discussions with counsel in explanation of these changes form a sufficient factual basis for the court to exercise its discretion to conduct an in camera review of the communications between Adams and the defendants' attorneys in January 2013. Also, the December 12, 2014, errata sheet in which Adams blatantly contradicts her November 13, 2014, testimony provides a sufficient factual basis for the court to exercise its discretion to conduct an in camera review of communications between Adams and attorneys involved in her preparation

for the November 13, 2014, and December 17, 2014, depositions as well as the December 12, 2014, errata sheet.

B. Shaun Collard

As stated above, the filing of the false errata sheet by Collard was particularly troublesome to the court during the sanctions hearing, and, when asked about the reason for the filing, counsel for the defendants stated, "We believed Mr. Tetley." [Doc. No. 906 at 26]. However, even after Tetley had submitted a declaration stating that he was wrong on October 21, 2013, neither Collard nor the defendants' counsel made an effort to correct the erroneous errata until after the court had expressed serious concerns about the issue at the July 2014 sanctions hearing. Therefore, Collard's second deposition containing his explanation for creating and filing the false errata was of particular interest to the court.

As the defendants point out in their response in opposition to the motion to compel [Doc. No.1024], Collard's second deposition is replete with his claims that he has always offered the most accurate answer to his awareness. Nevertheless, Collard's explanation of his need to change (incorrectly) his answers with respect to Snappy's role in suggesting maintenance doses of Venofer is undermined by other evidence obtained in the re-opened discovery period. Collard's declaration [Doc. No. 912-3] and his

latest testimony explain that his errata sheet was created because he had a conversation with Tetley during which Tetley informed him that Snappy did not suggest specific maintenance doses of Venofer at the time in question. However, Tetley has no recollection of this conversation. Tetley Jan. 7, 2015, Dep. at 65-67.

The creation of the erroneous errata sheet and the nearly ten months between Tetley's admission of mistake and any attempt to correct Collard's erroneous errata sheet coupled with Tetley's lack of recollection of Collard's phone call to him in June or July 2013 form a sufficient factual basis for the court to exercise its discretion to conduct an in camera review of the communications between Collard and the defendants' attorneys.

C. Marilyn Moulds.

In her first deposition, Ms. Moulds avoided answering the question of how Snappy worked with respect to determining protocol maintenance dose adjustments for Venofer. Moulds Feb. 13, 2013, Dep. at 29-30, 33-38. Her fallback position was that she did not remember. *Id.* at 76-77, 126-27, 134-35, 230, 240.

In her January 12, 2015, deposition, Moulds stated that she was told prior to her February 2013 deposition that Snappy did not provide a suggested dose for Venofer. Moulds Jan. 2015, Dep. at 15-16, 18. When asked

whether it was the defendants' counsel who told her (incorrectly) of Snappy's limitations, Moulds was instructed not to answer by the defendants' counsel. *Id.* at 16. Moulds did, however, state that she knows the answer to the question and would provide it to the court if instructed. *Id.* at 46. Moulds also confirmed that she had had no conversations about how Snappy worked with regard to Venofer prior to being informed that she was to be deposed. *Id.* at 18. And she stated that she had had no such conversations with non-lawyers. *Id.* at 19.

Moulds obtained personal representation after her first meeting with the defendants' lawyers, who prepared her for the February 2013 deposition. Moulds Jan. 12, 2015, Dep. at 16-18. The timing of her request for personal representation coupled with her statement that she was told about Snappy's capabilities form a sufficient factual basis for the court to exercise its discretion to conduct an in camera review of the communications between Moulds and attorneys in preparation for her February 2013 deposition.

IV. Conclusion

Based on the foregoing, the court will exercise its discretion to conduct an in camera review of communications between attorneys and the three witnesses named above. In the event the Relators' allegations of wrongdoing are supported by the evidence obtained in camera, the court will allow the

defendants to present evidence and explanation in rebuttal of the Relators' allegations of wrongdoing during an ex parte presentation to the court.

SO ORDERED this 27th day of January, 2015.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge