

**Alexander Infusion, LLC v Professional Home Care
Servs., Inc.**

2013 NY Slip Op 34188(U)

June 12, 2013

Supreme Court, Nassau County

Docket Number: 006855-09

Judge: Timothy S. Driscoll

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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
ALEXANDER INFUSION, LLC,

Plaintiff,

-against-

PROFESSIONAL HOME CARE SERVICES, INC.,

Defendant.
-----X

TRIAL/IAS PART: 16
NASSAU COUNTY

Index No: 006855-09
Motion Seq. Nos. 3 and 4
Submission Date: 4/18/13

Papers Read on these Motions:

- Notice of Motion, Affirmation in Support and Exhibits.....x
- Proposed Order.....X
- Notice of Cross Motion.....X
- Affirmation in Opposition/Support.....X
- Reply Affirmation in Support and Exhibits.....x

This matter is before the court on 1) the motion by Defendant Professional Home Care Services, Inc. ("PHCS" or "Defendant") filed on April 1, 2013, and 2) the cross motion by Plaintiff Alexander Infusion LLC ("Alexander Infusion") filed on April 11, 2013, both of which were submitted April 18, 2013. For the reasons set forth below, the Court 1) grants the motion; and 2) denies the cross motion. The Court will sign the Proposed Order provided by Defendant.

BACKGROUND

A. Relief Sought

Defendant moves for an Order compelling the disclosure of confidential information, specifically compelling non-party Hodgson Russ LLP ("Hodgson") to comply with a subpoena ("Subpoena") and produce the settlement agreement ("Settlement Agreement") executed in the related action of *Chipetine, Neu & Silverman, LLP v. Alexander Infusion, LLC d/b/a Avanti*

[* 2]

Health Care and New Hyde Realty Group, LLC, Nassau County Supreme Court Index Number 10361-09 (“Chipetine Action”).

Plaintiff opposes the motion and cross moves for an Order, pursuant to 22 NYCRR § 216.1, sealing the papers on Defendant’s motion to compel and Plaintiff’s cross motion to seal.

B. The Parties’ History

The parties’ history is outlined in detail in a prior decision (“Prior Decision”) of the Court dated October 26, 2009 in which the Court denied Defendant’s prior motion to dismiss the Second Cause of Action in the Complaint. As noted in the Prior Decision, the Complaint alleges as follows:

Plaintiff is a New York limited liability company that, *inter alia*, provides licensed home health care and pharmacy services. Alexander Infusion has an office located in Nassau County, New York. PHCS is a Delaware corporation that transacts business in the State of New York.

On or about June 20, 2008, Alexander Infusion and PHCS entered into a written agreement (“Purchase Agreement”), pursuant to which, *inter alia*, PHCS would acquire all the membership interests in Alexander Infusion, and Alexander Infusion would assign certain of its licenses and leases to PHCS. Pursuant to this Purchase Agreement, PHCS was to pay to Alexander Infusion a total of not less than \$12,125,000, in the form of cash and the assumption of certain liabilities. The Purchase Agreement provided that the closing for PHCS’ acquisition, as described above, was to take place within three (3) business days of Alexander Infusion satisfying certain conditions, or PHCS’ waiver of this requirement.

Pursuant to the Purchase Agreement, PHCS was permitted to terminate that Agreement only 1) if one hundred eighty (180) days had passed since June 20, 2008; 2) Alexander Infusion became unable to comply with a condition, through no fault of PCHS; or 3) there was an occurrence that had a materially adverse effect on Alexander Infusion’s financial condition.

As of October 27, 2008, Alexander Infusion had fully performed its obligations under the Purchase Agreement by, *inter alia*, 1) taking all necessary actions to transfer the membership interests to PHCS; 2) taking all necessary actions to transfer the licenses and leases to PHCS; 3) providing PHCS with all information that PHCS requested of Alexander infusion; 4) converting its accounting computer software to software that was compatible with PHCS’; and 5) providing PHCS with access to Alexander Infusion’s financial books and records.

On October 27, 2008, PHCS sent a letter to Alexander Infusion ("Termination Letter") terminating the Purchase Agreement on the grounds that 1) Alexander Infusion was unable to satisfy one or more of the conditions precedent to closing on the Purchase Agreement; and 2) there were occurrences that materially affected Alexander Infusion's financial condition. Alexander Infusion alleges, however, that, on or before October 27, 2008, PHCS waived Alexander Infusion's performance of the conditions to which the Termination Letter referred. In light of this waiver, there were no conditions precedent that Alexander Infusion had to satisfy prior to the closing and PHCS' refusal to close constituted a breach of its obligations pursuant to the Purchase Agreement. Alexander Infusion alleges, further, that PHCS in fact terminated the Purchase Agreement due to PHCS' inability to raise money for the acquisition contemplated by the Purchase Agreement, as well as similar acquisitions.

The first cause of action is for breach of contract, for PHCS' allegedly unreasonable refusal to close under the Purchase Agreement. Alexander Infusion seeks damages of not less than \$3,500,000 (\$3.5 million) on that cause of action.

The second cause of action is for common law fraud. In addition to the factual allegations outlined herein, Alexander Infusion alleges, *inter alia*, that 1) beginning on or before June 20, 2008, a representative of Critical Homecare Solutions, Inc. ("CHS"), acting on behalf of PHCS, repeatedly advised representatives of Alexander Infusion that PHCS would purchase all the membership interests in Alexander Infusion; 2) beginning on or before June 20, 2008, representatives of CHS, acting on behalf of PHCS, repeatedly advised representatives of Alexander Infusion that Alexander Infusion had satisfactorily responded to PHCS' inquiries regarding Alexander Infusion's finances and operation; 3) beginning on or before June 20, 2008, legal counsel for PHCS repeatedly advised Alexander Infusion's legal counsel that PHCS had sufficient assets to close pursuant to the Purchase Agreement, and would proceed with the closing, even if PHCS lacked sufficient assets to make other similar acquisitions; 4) PHCS knew or had reason to know that the above representations were false; 5) Alexander Infusion reasonably relied on these false representations in deciding to enter into the Purchase Agreement; and 6) as a result of this reasonable reliance, Alexander Infusion suffered damages. The damages allegedly flowed, *inter alia*, from 1) Alexander Infusion's principal pharmaceutical wholesaler terminating it as a customer, 2) Alexander Infusion's loss of the services of key

employees and incurrence of the costs of hiring replacement employees, 3) Alexander Infusion's incurrence of legal and accounting fees, and 4) the decline of Alexander Infusion's financial strength.

In support of Defendant's motion to compel, counsel for Defendant ("Defendant's Counsel") affirms that Chipetine, Neu & Silverman, LLP ("Chipetine") served as Plaintiff's accountants and maintained Plaintiff's accounting records during most of the period relevant to this action, including up to and including the Termination. Defendant submits that "the facts underlying PHCS's decision to terminate its acquisition of [Alexander Infusion] lie at the heart of the present dispute" (Brown Aff. in Supp. at ¶ 6).

Defendant's Counsel affirms that, following the Termination, Plaintiff terminated its relationship with Chipetine and provides a copy of the January 19, 2009 letter from Plaintiff to Jerrold Silverman ("Silverman") of Chipetine (Ex. 4 to Brown Aff. in Supp.). In that letter, Plaintiff advised Chipetine that Plaintiff retained a different accounting firm as its new corporate accountants but planned to continue using Chipetine as the financial advisor and consultant for Plaintiff's business ventures.

On May 28, 2009, Chipetine filed the Chipetine Action seeking payment of unpaid fees from Alexander Infusion, including fees incurred in connection with PHCS' contemplated acquisition of Alexander Infusion. In response, Alexander Infusion asserted counterclaims for breach of contract and negligence alleging, *inter alia*, that Chipetine overstated Alexander Infusion's accounts receivable, failed to maintain Alexander Infusion's financial records in generally accepted accounting principles ("GAAP") compliant format, and caused PHCS to terminate its acquisition of Alexander Infusion. Defendant provides copies of Alexander Infusion's Amended Verified Answer to Verified Complaint and Counterclaims in the Chipetine Action (Ex. 5 to Brown Aff. in Supp.).

On February 26, 2013, PHCS served the Subpoena on Hodgson.¹ Defendant's Counsel affirms that the Subpoena (Ex. 1 to Brown Aff. in Supp.) seeks non-privileged communications and documents sent in connection with the Chipetine Action that are material and relevant to PHCS' claims and defenses in the instant action ("Instant Action"). Hodgson advised

¹ Defendant affirms its belief that Chipetine's malpractice insurer retained Hodgson who substituted in as counsel for Chipetine after Alexander Infusion interposed its counterclaims (Brown Aff. in Supp. at n. 7).

Defendant's Counsel that it was willing to comply with the Subpoena as long as it was able to do so without causing Chipetine to breach the Settlement Agreement.

Defendant's Counsel affirms that on February 28, 2013, in an effort to accommodate Hodgson, he requested that Plaintiff stipulate that 1) Hodgson would be directed to produce documents responsive to the Subpoena; and 2) PHCS would treat all documents produced by Hodgson, including the Settlement Agreement, as "highly confidential" under the Stipulated Protective Order ("Protective Order") executed by the parties in the Instant Action on May 6, 2011, and so-ordered by the Court on June 13, 2011 (Ex. 3 to Brown Aff. in Supp.). By email dated March 4, 2013 (*id.* at Ex. 7), Plaintiff's Counsel advised Defendant's Counsel that "Alexander Infusion is not willing to waive the confidentiality provision in its settlement agreement with [Silverman]. Moreover, that settlement agreement bears no relationship to Alexander Infusion's claims against [PHCS]."

In opposition, counsel for Plaintiff ("Plaintiff's Counsel") affirms that on March 22, 2013, Hodgson Ross provided Plaintiff's counsel with a copy of Hodgson Ross' response ("Response") to the Subpoena. The Response consists of a single PDF file of 697 pages. On March 28, 2013, Plaintiff's Counsel received a copy of Defendant's motion to compel and on April 5, 2013, Defendant's Counsel provided Plaintiff's Counsel with a copy of Hodgson Ross' Response. Plaintiff's Counsel notes that Defendant's motion does not mention the Response. Plaintiff's Counsel affirms that the Response fully complies with the Subpoena with the exceptions that the Response 1) does not include a copy of the Settlement Agreement; and 2) contains redacted portions of correspondence between counsel for the parties in the Chipetine Action that might reveal the substance of the Settlement Agreement.

C. The Parties' Positions

Defendant notes that, in the Instant Action, Alexander Infusion seeks to recover for 1) PCHS' alleged breach of the Purchase Agreement caused by PHCS' Termination of its acquisition of Alexander Infusion, and 2) PCHS' alleged fraud in representing to Alexander Infusion that PHCS intended to close its acquisition of Alexander Infusion. Under the Purchase Agreement (Ex. 8 to Brown Aff. in Supp.), PCHS' obligation to close was subject to certain conditions, including the production on the 20th day of each month between execution of the Purchase Agreement and the closing of the transaction of the following:

the unaudited balance sheet of the Company as of the end of the immediately preceding month and the related unaudited monthly statements of income for each month of such fiscal year (the "Latest Interim Financials"), prepared in accordance with GAAP and in a manner consistent with the preparation of the Financial Statements. In addition, to the extent delivered in accordance with the immediately preceding sentence, the Latest Interim Financials shall have been prepared in a manner consistent with the Latest Balance Sheet and shall be deemed a part of the Historical Financials.

Purchase Agreement at ¶ 8.1(k) (underlining in original).

Defendant contends that, if the Latest Interim Financials were not provided to Alexander Infusion on the 20th of each month as required, then PHCS was not obligated to close. If PHCS was not obligated to close, Defendant argues, then Alexander Infusion's claim for breach necessarily fails. Defendant notes that the Purchase Agreement also provided that PHCS' obligation to close its acquisition of Alexander Infusion was not triggered 1) unless PHCS was "reasonably satisfied with the results of its legal, accounting, environmental due diligence investigations" (Purchase Agreement at ¶ 8.1(n)); and/or 2) unless "no Material Adverse Effect to the Business shall have occurred" (*id.* at ¶ 8.1(w)).

Defendant argues that 1) Alexander Infusion's ability to produce the Latest Interim Financials, and the format in which Alexander Infusion could produce those financials, 2) Alexander Infusion's ability to produce reasonably satisfactory results to PHCS' accounting due diligence, and 3) whether a Material Adverse Effect occurred to Alexander Infusion's business are all issues addressed by Alexander Infusion's counterclaims in the Chipetine Action ("Chipetine Counterclaims") (*see* Ex. 5 to Brown Aff. in Supp. at ¶¶ 60, 66, 74 and 79). Defendant contends that Alexander Infusion's factual bases for making the allegations in the Chipetine Counterclaims would be directly relevant to the question raised in the Instant Action which is whether PHCS' obligation to close under the Purchase Agreement was triggered. By way of example, if Chipetine overstated Alexander Infusion's accounts receivable by as much as \$500,000, as alleged in paragraphs 66 and 79 of the Chipetine Counterclaims, that would directly influence whether PHCS concluded that a Material Adverse Effect had occurred.

Defendant notes, further, that the Chipetine Counterclaims allege that, as a result of Chipetine's breach of contract and negligence, "PHCS terminated its written contract with Alexander Infusion to, *inter alia*, acquire all of the membership interests in Alexander Infusion"

(Chipetine Counterclaims at ¶ 68). Defendant contends that PHCS could not have committed fraud if the “true cause” of PHCS’ termination (Brown Aff. in Supp. at ¶ 23) was Chipetine’s breach of contract and/or negligence because Alexander Infusion could not then establish the causation component of detrimental reliance. Thus, Alexander Infusion’s underlying factual bases for alleging that Chipetine, not PHCS, caused PHCS’ termination are clearly relevant to PHCS’ defense of the fraud claim asserted against it in the Instant Action. Defendant argues, further, that Alexander Infusion may not deprive PCHS of its right to seek disclosure of materials covered by the Settlement Agreement simply by invoking the confidentiality of that information.

Plaintiff opposes Defendant’s motion submitting that neither the Settlement Agreement nor correspondence authored by Hodgson Ross or by Plaintiff’s Counsel that expressed impressions, arguments or opinions concerning the Instant or Chipetine Action is admissible at the trial of the Instant Action because it is not probative of any material issue. Plaintiff contends, further, that the Settlement Agreement and correspondence of counsel could not lead to the discovery of evidence admissible at the trial of the Instant Action because they contain no admissions of liability. Plaintiff also argues that the reasons that Alexander Infusion entered into the Settlement Agreement are protected by the attorney-client privilege and work product doctrine. Thus, Plaintiff submits, Hodgson Ross has fully complied with the Subpoena and Defendant’s motion is moot.

Plaintiff contends that “[a]lmost all”) (Johnson Aff. in Opp./Supp. at ¶ 12) of the allegations in the Chipetine Action were directed to professional services performed by Silverman, unrelated to the transaction at issue in the Instant Action. Plaintiff submits, further, that the claims of counterclaim plaintiff New Hyde Park Realty Group, LLC in the Chipetine Action bear no relationship to the claims in the Instant Action. Moreover, the allegation in the Chipetine Counterclaims that Alexander Infusion’s accounts receivable were overstated related only to its 2007 tax returns and the contract at issue in the Instant Action was not entered into until July of 2008. Plaintiff contends, further, that it is undisputed that PCHS had full access to the data from which Silverman calculated Alexander Infusion’s accounts receivable in 2007 and 2008 and made its own calculations of Alexander Infusion’s accounts receivable from those data.

Plaintiff affirms that its final electronic document production was served on PCHS on December 19, 2011 and notes that, for 15 months thereafter, PHCS never moved to compel Alexander Infusion to produce the documents now sought in the Subpoena. Plaintiff submits that if PCHS genuinely believed that the Settlement Agreement and correspondence of counsel were proper subjects of disclosure, PCHS would have sought those documents prior to completing the depositions of Alexander Infusion and Silverman.

In support of its motion to seal the motion and cross motion, Plaintiff affirms that the Settlement Agreement contains non-public financial information of Alexander Infusion, a privately held company, which is explicitly designated as confidential in the Settlement Agreement. Plaintiff submits that disclosure of that information would place Alexander Infusion at a competitive disadvantage, and argues that there is no genuine public interest in how Alexander Infusion and Silverman resolved their dispute.

In reply, Defendant submits that Plaintiff is asking the Court simply to accept the representation of Plaintiff's counsel that the information sought is not related to the Instant Action. Moreover, it is irrelevant whether the Confidential Information at issue is admissible at trial and Defendant has demonstrated that the Confidential Information appears to be material and necessary to its defense of the Instant Action.

With respect to Plaintiff's motion to seal, Defendant affirms that "while there is nothing yet to seal" (Brown Reply Aff. at n. 2), Defendant does not oppose Plaintiff's motion to seal. Defendant's Counsel affirms that Defendant has been offering to treat the Confidential Information as Highly Confidential since the inception of this dispute.

RULING OF THE COURT

A. Relevant Discovery Principles

CPLR § 3101(a) provides that there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof. *See Allen v. Cromwell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968); *Spectrum Systems International Corporation v. Chemical Bank*, 78 N.Y.2d 371 (1991); *Quevedo v. Eichner*, 29 A.D.3d 554 (2d Dept. 2006). The Court of Appeals in *Allen, supra*, held that "[t]he words 'material and necessary' are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and

reducing delay and prolixity. The test is one of usefulness and reason.” 21 N.Y.2d at 406. See also *Andon v. 302-304 Mott Street Assocs.*, 94 N.Y.2d 740, 746 (2000); *Spectrum Systems International Corporation v. Chemical Bank, supra*; *Parise v. Good Samaritan Hosp.*, 36 A.D.3d 678 (2d Dept. 2007). This statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise. *Spectrum Systems International Corporation v. Chemical Bank*, 78 N.Y.2d at 376, citing 3A Weinstein-Korn-Miller, N.Y. Civ. Prac. paragraphs 3101.01-3101.03.

The purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding. *Velez v. Hunts Point Multi-Service Center, Inc.*, 29 A.D.3d 104, 112 (1st Dept. 2006). While CPLR § 3120 was amended effective September 1, 2003 to dispense with the requirement of a motion and require only the service of a subpoena duces tecum on a non-party witness for production of documents, the subpoena must specify the time, place and manner of making the inspection, copy, test or photograph, and set forth individually or by category the items to be inspected and describing each item and category with reasonable particularity. *Velez v. Hunts Point Multi-Service Center, Inc.*, 29 A.D.3d at 109. The amendment did not change the requirement of CPLR § 3101(a)(4) that, where disclosure is sought from a nonparty, the nonparty shall be given notice stating the circumstances or reasons such disclosure is sought or required. *Id.* at 111. CPLR § 3101(a)(4) provides that there shall be full disclosure by “any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.”

In *Kooper v. Kooper*, 74 A.D.3d 6 (2d Dept. 2010), the Second Department discussed the issue of whether it is appropriate to continue to require a showing of special circumstances with respect to nonparty discovery. The Second Department concluded that, in light of its elimination from CPLR § 3101(a)(4), further application of the special circumstances standard is disapproved, except with respect to discovery from expert witnesses, for which applicable statutory language remains (*see* CPLR § 3101(d)(1)(iii)). *Id.* at 16. The Second Department declined to set forth a comprehensive list of circumstances or reasons that would be deemed sufficient to warrant nonparty discovery in every case, noting that circumstances vary from case to case. *Kooper v. Kooper*, 74 A.D.3d at 17. The supervision of discovery, settling of reasonable terms and conditions for disclosure, and determination of whether a particular

discovery demand is appropriate are all matters within the discretion of the trial court, which must balance competing interests. *Id.*, citing, *inter alia*, *Wander v. St. John's Univ.*, 67 A.D.3d 904, 905 (2d Dept. 2009).

B. Waiver of Attorney-Client Privilege

A waiver of the attorney-client privilege may be found where the client places the subject matter of the privileged communications in issue, or where invasion of the privilege is required to determine the validity of the client's claim or defense and application of the privilege would deprive the adversary of vital information. *Clark v. Clark*, 93 A.D.3d 812, 816 (2d Dept. 2012), quoting *New York TRW Tit. Ins. v. Wade's Can. Inn & Cocktail Lounge*, 225 A.D.2d 863, 864 (3d Dept. 1996) (internal quotations omitted).

C. Sealing Court Records

22 NYCRR § 216.1 provides as follows:

(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.

(b) For purposes of this rule, "court records" shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103(a).

There is a presumption that the public has the right of access to the courts to ensure the actual and perceived fairness of the judicial system, as the "bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud." *Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d 499, 501 (2d Dept. 2009), quoting *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 660 (3d Cir. 1991), *writ of mand. den.*, 951 F.2d 1414 (3d Cir. 1991), and citing *Danco Labs. v. Chemical Works of Gedeon Richter*, 274 A.D.3d 1, 7 (1st Dept. 2000) and *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501, 508 (1984). 22 NYCRR § 216.1(a) was promulgated in response to a concern that, where the parties agreed that court records should be sealed, the Court properly consider and weigh the public interest in accessing those documents. *Mancheski*,

v. *Gabelli Group Capital Partners*, 39 A.D.3d at 501, citing *Matter of Twentieth Century Fox Film Corp.*, 190 A.D.2d 483, 485-486 (1st Dept. 1993).

Given that confidentiality is the exception, the court must make an independent determination whether to seal court records in whole or in part for “good cause.” *Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d at 502, citing *Matter of Hoffman*, 284 A.D.2d 92, 93-94 (1st Dept. 2001). This task involves weighing the interests of the public against the interests of the parties. *Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d at 502, citing *Danco Labs. v. Chemical Works of Gedeon Richter, supra*. The party seeking to seal documents must demonstrate compelling circumstances. *Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d at 502, citing *Coopersmith v. Gold*, 156 Misc. 2d 594, 606 (Rockland Cty. 1992), *aff’d*, 223 A.D.2d 572 (2d Dept. 1996), *aff’d*, 89 N.Y.2d 957 (1997), *rearg. den.*, 89 N.Y.2d 1086 (1997), *rearg. dism.*, 90 N.Y.2d 889 (1997). A finding of “good cause” presupposes that public access to the documents at issue will likely result in harm to a compelling interest of the movant, and that no alternative to sealing can adequately protect the threatened interest. *Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d at 502, citing, *inter alia*, *Application of The Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984).

D. Application of these Principles to the Instant Action

The Court concludes that the materials sought in the Subpoena are discoverable because, as articulated in Defendant’s moving papers, they may bear on relevant issues including

- 1) whether PCHS’ obligation to close under the Purchase Agreement was triggered; and
- 2) whether Chipetine’s alleged breach of contract and/or negligence was the cause of PHCS’ termination and, therefore, whether Alexander Infusion can establish the causation component of detrimental reliance with respect to its fraud claim against PHCS. The fact that the Settlement Agreement or correspondence sought may not be admissible at trial is not dispositive of whether the materials sought are discoverable, and the Court concludes that they are. Moreover, Alexander Infusion may not deprive PCHS of its right to seek disclosure of materials covered by the Settlement Agreement simply by invoking the confidentiality of that information.

Accordingly, the Court grants Defendant’s motion and will sign the Proposed Order provided by Defendant.

The Court denies Plaintiff's motion to seal the motion and cross motion. The Settlement Agreement has not been included with the motion papers, and the Proposed Order provides that Plaintiff and Defendant shall treat all documents produced by Hodgson as Highly Confidential pursuant to the Protective Order. Paragraph 14 of the Protective Order provides that 1) if filed, the Clerk of the Court is directed to maintain under seal all materials designated as Confidential or Highly Confidential; and 2) any document or object that a party wishes to have placed under seal pursuant to the Protective Order shall be filed in the Clerk's office in a sealed envelope or other appropriate sealed container. Accordingly, the Protective Order provides a mechanism for the sealing of Confidential and Highly Confidential materials filed with the clerk of the court and the Court declines to seal the papers regarding the motion and cross motion.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Certification Conference on July 23, 2013 at 9:30 a.m.

ENTER

DATED: Mineola, NY

June 12, 2013



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

JUN 20 2013

**NAUSSAU COUNTY
COUNTY CLERK'S OFFICE**