REPORTER'S RECORD

TRIAL COURT CAUSE NO. 2019-CCV-60513-4

GULF SHORE ANESTHESIA ASSOCIATES, P.A.	)	IN THE COUNTY COURT
VS.	)	AT LAW NO. 4
CHRISTUS SPOHN HEALTH SYSTEM CORPORATION, CHRISTUS HEALTH, ET AL	)	NUECES COUNTY, TEXAS

OBJECTIONS, MOTION TO MODIFY & QUASH
SUBPOENAS FOR TELEPHONIC RECORDS
MOTIONS TO COMPEL

(Reported remotely)

On the 9th day of March, 2021, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Mark H. Woerner, Judge presiding, held remotely telephonically in accordance with the Supreme Court of Texas' First Emergency Order regarding the COVID-19 State of Disaster, Section 2.

Proceedings reported by machine shorthand.

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P R O C E E D I N G S

(Open court.)

THE COURT: Before we begin, since we have a plethora of attorneys here, some of whom need to unmute themselves, unless you're not participating, then you don't have to. It doesn't matter. Now, who is going to be speaking for the Defendants?

MR. DEACON: This is Charlie Deacon.

THE COURT: Okay. Got you.

MS. ALEXANDER: Sherri Alexander.

THE COURT: And who is going to be speaking for Gulf Shore Anesthesia Associates?

MS. CAMINA: Your Honor, it's going to be mostly Krisina, but it may be me on occasion, Ophelia Camina.

THE COURT: It's going to be mostly Krisina, but what?

MS. ZUNIGA: It's me. Krisina Zuniga, Your Honor.

MS. CAMINA: But on occasion, depending on which matter, it may be myself Ophelia Camina.

THE COURT: Okay, is Mr. Bright just here for entertainment purposes, or --

MR. BRIGHT: I am all set to entertain, Judge.

THE COURT: All right. Well, let's call 2019-CCV-60513-4, and I'm assuming nothing's been worked on this; is that correct?

MS. CAMINA: No, Your Honor. That's not correct. The -- the first matters that were set were the Third and Fourth Motions to Compel Spohn. Ms. Alvarado and I have worked out an agreement with regard to the third motion, so we can take that off the docket for today and we can turn to the fourth motion.

THE COURT: Okay. Which would be which motion?

MS. CAMINA: It is the motion with regard to the documents that have been withheld by Spohn under the Medical Committee Privilege.

THE COURT: Okay.

MR. DEACON: Judge, I -- I don't know if we're following the order of when the motions were filed, but the first motion to be up after their Third Motion to Compel would be the Objections, Motion to Modify and Quash Subpoenas for the Telephone Records.

MS. CAMINA: I was just using the order in which they were set, Charlie.

MR. DEACON: I thought that's what I -- I'm reading from too.

MS. CAMINA: Okay.

THE COURT: Okay. Let's do this. We have Defendant C.H. Wilkinson Physician Network and Non-Party Michael Melnyk's Objections; is that the one you're referring to?

MR. DEACON: That is, Your Honor.

THE COURT: All right. And you think we should take that up first?

MR. DEACON: Might as well.

THE COURT: Okay. Let's begin with that, then.

MS. ALEXANDER: All right. Your Honor, I'm Sherri Alexander, and Adam Chilton and I together represent C.H. Wilkinson Physician Network, and in this case we're also representing Mike Melnyk who's an individual, and at the relevant time in 2017 and 2018 he was an employee of Wilkinson. Mr. Melnyk worked with Spohn to draft the Anesthesia RFP that's at issue in the lawsuit that was sent out to the bidders, including GSAA the Plaintiff, and administered and was involved in the RFP process, and as you know, Emergenc was eventually awarded the contract.

The documents show that all of the process was initially discussed with Mr. Melnyk in July of 2017. The Plaintiff first served a subpoena on AT&T in February of 2021 last month for all of Mr. Melnyk's

cellular data regarding phone records and the non-content text from April 1st, 2017, through March 31st, 2018. And in this matter in connection with our Motion to Modify, we are basically requesting that the subpoena be modified in two ways. We recognize that the request for the cellular data is relevant as to persons that were involved in the RFP process, but it's broad enough that it's including cellular data that does not fall within the scope of discovery pursuant to the Texas Rules of Civil Procedure, and specifically rule number --

THE COURT: Hold on. Can you repeat that. You broke up a lot during that.

MS. ALEXANDER: Oh, sure. I want to make sure you hear me.

THE COURT: Okay. Now, you --

MS. ALEXANDER: The request --

THE COURT: Hold on. Sherri, hold on. A large part of what you said immediately proceeding this was unintelligible, so we need to go back and have you repeat it. I don't think your connection is the best.

MS. ALEXANDER: Okay.

THE COURT: Okay. Say that again. The court reporter couldn't understand it either.

MS. ALEXANDER: Okay. All right. The

subpoena is broad enough that it's requesting information that falls outside the scope of discovery as allowed by the Texas Rules of Civil Procedure. Can you hear that?

THE COURT: Yes, I heard that.

MS. ALEXANDER: Okay. Good. All right. So under the Texas rules the scope of discovery is, is that the information being requested has to be relevant to the subject matter of the lawsuit or reasonably calculated to lead to the discovery of admissible evidence. In this case the subpoena is so broad that it's encompassing phone calls that include information and phone calls about Mr. Melnyk's family. He calls his physicians, his personal friends, and that isn't relevant, and so we are proposing a solution whereby that information would not be turned over to the Plaintiffs. And so here is our solution to avoid turning over irrelevant information to the Plaintiffs.

Adam, can you share the documents. So here is the proposal. If Mr. Melnyk is a non-party, the AT&T documents would be produced to us, Polsinelli. Plaintiff's counsel would provide the phone numbers and the names of the people that are relevant to the lawsuit to us, and then we would provide back to Plaintiff's counsel and the other parties the cellular data that's

relevant to the information that Plaintiff's counsel provided. So in other words, Susman Godfrey will provide us the names and the numbers of the people that they believe are relevant to the lawsuit. Okay. Adam, you can remove it.

THE COURT: Okay. And Susman's one of the Plaintiff's counsel?

MS. ALEXANDER: Yes.

THE COURT: And Polsinelli is the defense counsel?

MS. ALEXANDER: Yes. Correct.

THE COURT: Okay.

MS. ALEXANDER: And, Your Honor, this is not work product that they would be providing us the names and the telephones numbers of the persons that are involved, because they are required to provide us that information under Rule 194.2 under the disclosures. That rule requires all of us to provide the names and the telephone numbers and more to each other of the persons who have knowledge of facts of the lawsuit. So by doing this, this provides the Plaintiff the information they're entitled to. At the same time it withholds from them information that's completely irrelevant to this lawsuit.

Now, you may have covered this with a

Confidentiality Agreement, but, Your Honor, you and I know the purpose of a Confidentiality Agreement isn't to give the other side nonrelevant information. That isn't the purpose of a Confidentiality Agreement. You may also hear Plaintiff's counsel say, well, you know, that could take a long time --

THE COURT: Okay. Hold on a moment, Ms. Alexander.

MS. ALEXANDER: -- to, you know, redact the information and give the other side --

THE COURT: I'll tell you what, Ms. Alexander, why don't you sign off and sign on again.

MS. ALEXANDER: Let me try my computer. Would that be better?

THE COURT: Well, it might. It couldn't be much worse, I don't think, so. Try your computer instead of using the iPad.

MS. ALEXANDER: Sure. Okay. Hold on. Okay. I'm going to exit my iPad. Okay. Can you hear me now?

THE COURT: Okay. That seems to be working a lot better. So basically what you're saying is that Susman can provide you with the -- all the relevant phone numbers or people that he needs

information on and basically he'll provide that and delete the personal calls?

MS. ALEXANDER: Correct. Correct. And then we will provide them with the information that they're requesting for the persons that are relevant to this lawsuit. Correct.

THE COURT: Okay. All right. Let me -- I forgot who's responding. Ms. Zuniga, are you responding to it?

MS. ZUNIGA: That's right, Your Honor.

THE COURT: What's your response to that?

MS. ZUNIGA: If I may, I'm going to share my screen, and I have several points in response, Your Honor. The first, this issue is not new to the Court, Your Honor. You should be able to see a slide with your November 9th Order. Can you see that?

THE COURT: I think so.

MS. ZUNIGA: So we were here before you several months ago on the exact same issue. We served a subpoena on AT&T for certain of its records, and the Defendants objected and moved to quash and they moved for protection from production of the records. Your Honor denied that request and allowed the production of non-content phone records, which is exactly what we are requesting again here.

We filed a second subpoena to AT&T with additional phone numbers. That is exactly the same as the subpoena we issued earlier in the year -- at the end of 2020. And, Your Honor, this subpoena has four phone numbers in it. Only two of those numbers are at issue today, and the owner of only one of those numbers actually joins in the motion, and that's Mr. Michael Melnyk. But the truth is that neither he, nor Spohn, nor Wilkinson has any standing or ground for leave, because the subpoena has nothing to do with them. This is a subpoena to AT&T for AT&T's records and at AT&T's expense. So the movants can't show burden, expense, harassment, annoyance, or invasion of their rights, which is what's required for protection under Texas Rule of Civil Procedure 192.6, and that's the rule they're relying on.

The main argument they make -- so Your Honor, this is the subpoena. We make abundantly clear that it's seeking only non-content records. We're not going to get the substance of text messages, what was sent. It's just logs that show what number called what number at what time, or what number sent a text to what number at what time, and AT&T has already produced thousand of pages of records in response to our first subpoena that have been very helpful in this case at

connecting the dots.

So this is the rule. And, Your Honor, movants have focused on their privacy rights here saying, there's all of this very personal, private information in the records, but AT&T makes abundantly clear, and it's the truth, that the cell phone owners have no right to privacy in these records because they're AT&T's records. AT&T has in its publicly available, on its website, privacy policy, its policy that it collects information like phone and text records.

They also say in their transparency report, which is published on an annual basis, that they are "required by law to provide information to government and law enforcement entities, as well as parties to civil lawsuits," like the parties here, and they comply by responding to subpoenas and issuing the requested documents. AT&T has not objected to the subpoena. They stand ready to produce documents as soon as this motion is resolved.

So the only standard that matters here, Your Honor, is relevance, and I believe I heard Ms. Alexander say that the parties do not dispute that certain of the records are relevant. So instead they would have us go through this timely burdensome process

of redacting certain of the records, which is not our typical practice. Parties don't redact for relevance. So we're not saying that the Confidentiality Agreement covers relevance. We're saying it's totally improper to redact for relevance and to the extent you have confidentiality concerns. That's why there's a Confidentiality Agreement in place.

In terms of relevance, Your Honor, I -- I don't believe Spohn has spoken yet, and I -- they're going to be arguing for the same relief, I believe, as to Mr. Dominguez. He owns another one of the cell phone numbers. Both of these people, Mr. Melnyk and Mr. Dominguez, are key players in this dispute.

Mr. Melnyk, who's the individual Ms. Alexander was talking about, was the vice president of hospital-based contracts for Wilkinson. So he not only assisted in the administration of the RFP that's at the heart of this case, but he even helped draft it. He was involved from the beginning. As to Mr. Dominguez, he was the CEO of Spohn and has been at all times relevant to this dispute, since August 2016, contrary to what Spohn says in their response brief. This is their response -- amended response to our request for disclosures.

So, Your Honor, there's no need to modify

the subpoena, the five-step process that Ms. Alexander laid out of serving an amended subpoena, which we would have to do to AT&T that then instructs AT&T to produce documents to choose separate sets of counsel, and that's only for two of the numbers. Remember, there's four numbers. So we would have to say, AT&T, please produce the records for one number to these people, for another number to these people, and for the other two numbers to us. Then they're going to have to get our list of people, which I contend is privileged work product, and then they're going to redact and give it back to us. There's not that much time left in the schedule, Your Honor, for this process. Discovery closes at the end of April, and we have requested these records. We're entitled to them. They're relevant.

THE COURT: Okay. Let me just make sure I got a handle on this. What AT&T is providing to you are just the actual phone numbers that Mr. Melnyk may have text- -- engaged in texting or a call, and it's just the numbers themselves, correct?

MS. ZUNIGA: Correct, Your Honor.

THE COURT: Okay. Ms. Alexander, you agree they're not providing any content. It's just you're saying there may be phone numbers in there that were made to friends, family, or somebody else, that the

number itself is not relevant to the case.

MS. ALEXANDER: That's exactly right, Your Honor. And we're not requesting them issue --

THE COURT: Right. But let me ask you: What -- what are they going do with the numbers of people that aren't related to the case?

MS. ALEXANDER: I don't know what they would do with it, but they're just not entitled. They're -- that is not within the scope of discovery, those numbers, because they don't have anything to do with this case. And so what we're suggesting, Your Honor, is not that they issue new subpoenas. What we're --

THE COURT: Try to speak a little louder if you could, please.

MS. ALEXANDER: Sure. I'm sorry, Your Honor. What we're saying is, that information is not relevant and doesn't fall within the scope of discovery, and so as a result of that, that information should be withheld. So the subpoena -- the information that is provided by AT&T would be provided to us, then we would produce back to Susman the information that is relevant. In other words, the phone number information and the data that is relevant to the people who have knowledge, the rest would be withheld, and then they would get

their relevant information, but the phone number information that is not relevant would be withheld, and that makes sense because they're not entitled to nonrelevant information in this case.

MS. ZUNIGA: Your Honor, if I may. And as a practical point, it's also not possible for us to put together the kind of list that Ms. Alexander is requesting. We -- we can find the phone numbers for some people, but it's also possible, as we found in the AT&T records that have been produced, that other times they talk via conference call numbers, a dial-in number like we use all the time, and we can see who's running that call because we can see the various persons joining the call on their call records. We can't tell Ms. Alexander what those phone numbers would be, because we have no access to dial-in numbers that Spohn or Wilkinson uses, but we can see that they were all talking at the same time when Mr. Doss, Mr. Melnyk, you know, others, for example, are all dialing into the same number on the same date at the same time.

THE COURT: All right. Now, does anybody else from the defense want to be heard on this?

MR. DEACON: Yes, Your Honor. I would like to be heard. I want to take a different perspective from this, because I -- you know, I want to

ask the Court when enough is enough, and I'd like to point out to the Court that they've already issued 14 subpoenas from -- for phone records. That's in addition to six sets of request for production, three sets of interrogatories and we haven't taken a single deposition. But they -- you just -- they are using discovery as a weapon, and just because you may have the strength of Mike Tyson doesn't mean you can go around beating up people, and so I'm asking the Court, when is enough, enough?

If we could go up of the screen shot, actually, of what this case is really about. Could you bring up the screen shot that shows what the Plaintiff signed? When they submitted a request for proposal, they -- they certified that they would not challenge the decision at all, that they would not sue us, that they would not seek recovery, that they would not challenge or question the award of the contract. They certified that when they submitted their request for proposal. But, now, hundreds of thousands of dollars later, because discovery has gotten out of control, we're in this predicament.

I will tell you, Judge, that we are preparing a Motion for Summary Judgment. We will be filing a Motion for Summary Judgment on this issue, but

in the mean time, we're faced with all of this discovery, and on a daily basis we're -- we're sent information request, even informal request. So I'm asking the Court, when is enough, enough? When is somebody's personal cell phone records private? I don't want someone going through my private records. I'm sure Dom Dominguez doesn't want people doing it to his, and he's with Christus Spohn. We've al- -- they've already gotten a lot of phone records. What are they even talking about? They got -- we even turned over -- because we had access to the phone -- the text records from the main person involved in this, and that's Justin Doss. They have that. They know who he spoke to. When is enough, enough?

THE COURT: I think, though, we're getting a little ahead of things regarding this possibly being the subject of a Motion for Summary Judgment, but as far as enough is enough, it's -- it's AT&T's headache, isn't it? They are the ones that are going to provide the numbers. You guys don't really have to do anything.

MR. DEACON: That creates more discovery.

THE COURT: In fact, if we did the proposal as to modify, that'd probably be a lot more work for both sides. I don't know what's going to

happen if they have a number that is to the local pizza place that he might have ordered dinner from, I don't know what they're going to do with that anyway if they have extra numbers that don't pertain to the lawsuit. I don't know if you're worried about them making prank calls to the numbers. Now, Mr. Bright might do that, I'll suspect, but you know, it is pretty harmless, so. Although if anybody has asked if they have Prince Albert in a can, you know, they might be traumatized by that, but --

MR. DEACON: They might.

THE COURT: -- I -- I just don't see this as being a burdensome exercise at all. They're going to look at a lot of numbers and they may not get anywhere with it, but I don't see why I should restrict it. So I'm going to deny the motion. Now, what else do we have?

MS. ALEXANDER: Well, Your Honor, there was one other aspect of that motion, and that was -- and I'm going to try to really speak loudly. I don't know why the connection is so bad, but my client would like the subpoena limited by three months. We had provided *in camera* a document that showed that the Anesthesia RFP was initially discussed for the fist time in July of 2017.

THE COURT: In July?

MS. ALEXANDER: Right. Not in April of 2017. We couldn't find any documents where the client Mr. Melnyk or Wilkinson was having any discussions in April or earlier about the Spohn Anesthesia RFP, and so we're requesting that the time period start for the subpoena in July instead of April.

Now, the Plaintiff indicated in the response that there were some communications with Mr. Melnyk in March and -- about the Anesthesia subpoena, but we couldn't find those documents. We can show the Court that there were some discussions via email in April of 2017, but it's not about the Spohn Anesthesia subpoena -- and so Adam, do you want to put that up -- it's about something else, and so if the Plaintiff has some documents that show that the Spohn Anesthesia subpoena was being discussed, that's one thing, but otherwise, we're requesting that three months be cut off the subpoena so that it starts in July.

THE COURT: So July, August and September?

MS. ALEXANDER: It would start -- it would start in July. July 1st is what we're requesting instead of April 1st.

THE COURT: Okay. So it would be for a

period of three months?

MS. ALEXANDER: Correct. That's what Mr. Melnyk is requesting.

MS. ZUNIGA: I think they're requesting we limit the period to three months.

MS. ALEXANDER: That's correct. That's what he's requesting.

THE COURT: All right. Let me just clarify. And he wants it from July 1st through what date?

MS. ALEXANDER: Through March -- I think it was March 31st, 2018.

THE COURT: March 31st, 2018. That would be reduced from April to July. Ms. Zuniga.

MS. ZUNIGA: Yes, Your Honor, three quick points in response. First, the -- the email that Ms. Alexander cites does not conclusively show that Mr. Melnyk's involvement started in July of 2017. It shows that he emailed requesting an Anesthesia RFP in July of 2017. Of course, he could have been involved in conversations before then, and she's asking you to assume a negative based on that, that he was not involved in any conversations before then based on this email, so it doesn't conclusively show that; and she said that they couldn't find any other evidence showing

that he was involved earlier, but they have Mr. Melnyk, so they could have asked him. They could have submitted a declaration or an affidavit saying, I was not involved in any conversations about the Anesthesia RFP before July of 2017. That's not before the Court. All that's before the Court is arguments of counsel.

And -- and second, Your Honor, so second is the actual evidence point; and third, is the point still remains that neither Wilkinson nor Mr. Melnyk own or have any right to the requested information. Again, it's not their information and it poses not burden on them. There's no reason to reduce this just based on a statement that perhaps he was involved as of July of 2017 and not earlier.

THE COURT: So you're thinking there may be a chance there's some relevant phone numbers that precede July 1st?

MS. ZUNIGA: Yes, Your Honor, and I can give you more context if you'd like. But many months before that a cost-cutting plan was put into place. Part of the cost-cutting plan was this Anesthesia RFP. As I said before, Mr. Melnyk was involved in drafting and designing the Anesthesia RFP, and there are records that suggest he was communicating with the other key players earlier than July 2017, as early as March of

2017. So we believe that the time frame is relevant and applicable.

THE COURT: All right. And maybe, Ms. Alexander, besides yes, you're saying that it's not relevant and they're not entitled to them. Why on earth would he care about AT&T providing three more months of phone numbers?

MS. ALEXANDER: 'Cause, Your Honor, he -- he feels very strongly about this, and the fact is that Plaintiffs --

THE COURT: Why, though? Can you give me context, a reason he feels strong. I feel strongly about a lot of things, but --

MS. ALEXANDER: Yeah.

THE COURT: -- it doesn't mean it always makes sense.

MS. ALEXANDER: Well, I mean, I think for all of us he feels like this is very invasive, and you know, he doesn't think that they should be -- he doesn't think anybody should be requesting these records. And he understands that in connection with the lawsuit that certain of the information, you know, will be produced, but in connection with this matter he understands that the records that have been produced in this case show that his involvement began in July, and that's what he

understands. And in their response they said that there were documents all the way in March that showed it, but they don't. That's not what the records show in March, and so they don't have any records showing that he was involved in --

THE COURT: All right. Are there any phone numbers to his girlfriend in here or his bookie, or something? I mean, I just don't know why on earth he would care if AT&T has to produce three more. In fact, if I was the Plaintiff I would be thinking, dude, that's just more work for me. I got to go through three more months and probably for -- for nothing. I just don't see his -- his privacy concern here. So I'm going to deny the motion in its entirety, and the subpoena will stand as it's written. Now, what else do we have, anything?

MS. ALEXANDER: That's all I have, Your Honor.

MS. ZUNIGA: Yes, Your Honor. We have our Fourth Motion to (inaudible), and I'm ready to argue that.

THE COURT: Okay. You have your what?

MS. ZUNIGA: The Fourth Motion to Compel.

THE COURT: And what are you compelling with that?

MS. ZUNIGA: That has to do with a set of documents that Spohn is withholding basic Medical Committee Privilege, and Your Honor, should I proceed with this motion now?

THE COURT: Yes. In fact, I may -- do I have these? Somebody brought a whole bunch of documents here.

MS. ZUNIGA: Those were not ours. So they might have been the emails that we were just discussing in relation to the subpoena.

MR. CHILTON: Yes, Your Honor. Those are the *in camera* documents that were with Wilkinson's motion.

THE COURT: Okay. Relating to the first motion?

MR. CHILTON: That's correct, Your Honor.

THE COURT: Okay. All right. Let's talk about the -- the Motion to Compel based on the, okay, Medical Committee Privileged Documents. So you're going to be arguing that also?

MS. ZUNIGA: Yes, Your Honor. That will be me.

THE COURT: All right. Go ahead and proceed.

MS. ZUNIGA: Your Honor, this motion is

over a year in the making. Spohn served its original privilege log on February 18th, 2020, over a year ago, which listed a total of 384 documents withheld on the basis of a statutory privilege referred to as the Medical Committee Privilege. That's in addition to 650 documents that it's withholding on the basis of the attorney/client privilege, but we'll save that for another day.

We've had six letters exchanged between counsel on this issue. Two being confirmed calls, and Spohn has twice amended its privilege log. The first time reducing the number of documents withheld based on this privilege to 183 documents, and now we're left with 30 documents that they're improperly withholding based on this privilege, and that's excluding duplicates, so 30 original documents.

And, Your Honor, this is a statutory privilege designed to protect the deliberations of a duly formed hospital committee that is formed to evaluate medical services. It has required elements that must be met before the privilege may apply and the president appears with the general right to evidence. Those elements, based on Texas Supreme Court law, must be strictly construed.

First, Your Honor, there's no dispute that

under Texas Rule of Civil Procedure 193.4(a) Spohn bears the burden of proof to establish the privilege, and it must present evidence necessary to support the privilege. Second, even if Spohn did carry its burden, the privilege still fails, because as I'll explain, Spohn has failed to meet the statutory requirements of the privilege.

So I'm going to start first, Your Honor, with their burden. Here Spohn's only proffered evidence is the declaration of Spohn's former President Justin Doss, but that declaration should be stricken for three reasons. First, it's untimely; second, it's defective; and third, it's burdened with layers of evidentiary objections, inaccuracies, and even internal inconsistencies.

First, Your Honor, it's obviously untimely, because Texas Rules of Civil Procedure 193.4(a) requires affidavits to be served at least seven days before the hearing, and this is a rule that Spohn even cites in its response to our motion. Yet, the Doss Declaration was filed last Friday at 4:58 p.m., so effectively a business day before today's hearing. I want to point out a few important facts relevant to this late Friday filing. The same lawyers who represent Spohn represent Mr. Doss. So we're talking about the

same lawyers who prepared the response and prepared the declaration.

THE COURT: Which is who?

MS. ZUNIGA: That's Mr. Deacon and Ms. Dahlberg.

THE COURT: Mr. Deacon. Okay.

MR. DEACON: Yes, sir.

THE COURT: All right.

MS. ZUNIGA: Also, on its face, the declaration says that it was executed on Monday, March 1st. That's over seven days before today's hearing. Yet, it wasn't filed till that Friday and served that Friday. So presumably Spohn's lawyers had the declaration in-hand in time to file it in compliance with the rules but waited four days to file it late on a Friday.

Our motion challenging the Medical Committee Privilege, Your Honor, this fourth Motion to Compel, was filed on February 12th, nearly a month ago. So Spohn had plenty of time to get this declaration done in time and served by the deadline. Second, in addition to being untimely, the declaration is also defective because Texas Civil Practice and Remedies Code Section 132.001(d) states that a declaration, quote, "must include a jurat." End quote. And a Doss Declaration,

which is a declaration, not an affidavit, has none. It doesn't include his birth date. It doesn't include his address. These are requirements under Texas law. In fact, a resent Texas Supreme Court case, and that's *Hays Street Bridge Restoration Group versus City of San Antonio*, said that if "it lacks the statutorily required jurat a decla- -- for a declaration in lieu of an affidavit, it provides no support." It isn't any evidence, and that's what we have submitted by Spohn here.

Third, Your Honor, as detailed in the objections we filed earlier today to the Doss Declaration, it's littered with numerous layers of evidentiary and credibility issues, as well as internal inconsistencies rendering the declaration essentially of no probative value. As I mentioned earlier, Your Honor, it's Spohn who carries the burden today. They have provided no evidence. All they have is the argument of counsel, and with that we can stop and ask that the motion be granted, but Your Honor, I -- I have argument prepared as to why the statutory requirements are not met either, and I'm happy to proceed if you would like.

THE COURT: I'd like to see the declaration. Can you put that up?

MS. ZUNIGA: Yes, Your Honor.

THE COURT: Okay.

MS. ZUNIGA: And I'm happy to zoom in or scroll as you'd like, Your Honor.

THE COURT: Let's go to the second page. Can you blow it up a little more?

MS. ZUNIGA: Yes.

THE COURT: Okay. Keep going. All right. And it's not notarized, obviously.

MS. ZUNIGA: No, Your Honor.

THE COURT: Okay. All right. Well, let's let Mr. Deacon weigh in on this.

MR. DEACON: All right. Your Honor, this -- I think the problem with GSAA, or the Plaintiff's position on this Medical Committee Privilege is they rely on the Medical Peer Review Privilege. We made it very clear in our conversations -- prior to those conversations -- where we whittled down those documents down to the final 30, is that we were relying on the Medical Committee Privilege. So they put all of these -- these things in their Motion to Compel and their response to our -- our reply -- or their reply to our response, is that, you know, we didn't form the committee properly. We didn't do this. We didn't do that. It's not required under the Medical Committee Privilege.

And there is a case right on point, and it's the *Humble* case that we cite, and that is a situation where the emergency room physicians, they were in a hospital at Memorial Herman for a number of years, lost the -- their contract because of the RFP, and they lost it, and so they sued the hospital, and then sought to get these documents. Well, the Court held, and it was upheld on appeal, that they weren't entitled to those documents because of the Medical Committee Privilege. It was -- we followed a declaration identical to the one used -- or very similar, different people involved obviously, to the one in *Humble*, and we followed that. We -- we identified with a very detailed privilege log, as they already acknowledge, that talked about this 30 documents that we are withholding. They are clearly identified. We have met the prima facia case.

Now, today, about an hour ago, we received their objections to -- to Mr. Doss' Declaration about an hour ago. We are happy, if the Court is so inclined, to say, well, if the T's weren't dotted -- or the I's weren't dotted and the T's weren't crossed, we are happy to go seek a Leave of Court to get whatever you need from the Declaration to make sure it fits all of that, but the bottom line is, we had a medical committee. We

identified the people in the medical committee. The GSA, the Plaintiff in this case, presented in front of the medical committee. We -- we produced documents that show that the nonemployee, the physicians who participated in the medical committee, the -- the committee to evaluate the RFPs, the request for proposals, the responses and the bids to request for proposals, they had to sign and they had to agree to keep the information that Christus Spohn provided about Christus Spohn confidential. They have that information. They have a redacted evaluation form that shows the different categories that the committee considered. They want to argue that this was just a financial situation, which is simply incorrect.

We're not talking about building a new hospital. What we're talking about is anesthesia services at five different campuses, five different campuses; and we're evaluating, do they have the ability to provide it, including the rural areas, who's going to provide the coverage, what is the cost, was part of it, absolutely, what is their model that they're going to follow, and a number of other issues, and that was all evaluated by the committee.

Now, they're not happy with the decision, a decision that they agreed they would not challenge.

They're not happy with it, but guess what? They went through a committee, and the decision was to go with a new provider identical to what happened in the *Humble* case. Identical. They want to cite a Texas Supreme Court case, which I have no problems with. Except, it was on the Medical Peer Review Committee, and that involved a Dr. Gomez who was a cardiothoracic surgeon who decided to go to another hospital, and there was a lot of disparaging remarks made by him in a -- in evaluation and its credentialing, and -- and he filed a lawsuit, in part, under the anticompetitive statute where he said that they were violating the antitrust and anticompetitive statute. And there is an exclusive exception within the Medical Peer Review Committee that carves that out.

Now, the Court -- and the Supreme Court ruled this way -- still found that some of those documents were protected and privileged and did award -- or allowed some of the documents to be turned over because of the exception to the -- the Medical Peer Review Committee. We're not relying on the Medical Peer Review. We're not going in and talking about somebody's credentials or -- or their skills. That wasn't even -- that didn't even get involved at all. This is a committee, and I have it from an impeccable source here.

I don't know if you can see it, but this is the Norton, Rose, Fulbright 22nd Annual Texas Medical Jurisprudence, and we cite the statute in here, and it says that: A medical committee means any committee, including a joint committee, which is following the statute, and it includes appointed ad hoc committees. There is nothing that says that has to be appointed by a governing board, which they site in their motion. They're just using the wrong standards.

So Judge, if we were just fighting here today on their response that was filed an hour ago, I'll be happy to go get Mr. Doss to dot his I's and cross his T's. If that's really what we're fighting about, I'd ask for a leave to do that, but if we're -- if -- if they want to take on and say that their standard is right because it's a -- they're using the Medical Peer Review, we made it clear on a call that we were not -- they ask us pointblank, are we relying on the Medical Peer Review Committee? And we said, no, we are not, only the medical committee.

Now, look at their response. Their response outlines everything about the Medical Peer Review Committee. It's like they decided, let's -- let's not even pay any attention to what they told us. What we are relying on is exactly what was relied on in

the *Humble* case that we have cited to you that involves almost identical situations involving emergency room doctors versus what we have here as anesthesia. There is the case right there. And, so, Your Honor, if -- if we're fighting over the declaration because it didn't meet Ms. Zuniga's exacting standards, we'll be happy to ask for leave to make that correction, but it's going to come back with the same information.

THE COURT: All right. But let me ask you this. Would you agree that it was filed late?

MR. DEACON: I don't believe so.

THE COURT: It's a matter of math. It was either filed within seven days -- or outside of seven days or it was not.

MR. DEACON: It was -- it is correct. We filed it on a Friday.

THE COURT: Which was how many days before the hearing?

MR. DEACON: Well, today's day is Tuesday, so it would only be a payday.

THE COURT: And you'd also agree that it should have been notarized, do you not?

MR. DEACON: I don't know if that was possible. I -- I don't know if it was required. If it is, we'll be happy to do that, and we'd ask for leave,

and we'd also ask for leave if you believe that we need the full seven days. We will be happy to do that as well.

THE COURT: All right. I'll give you a response, Ms. Zuniga.

MS. ZUNIGA: Thank you, Your Honor. Yes, I'm happy to address the substance of the privilege. And we are not confused. GSAA recognizes that Spohn is evoking the Medical Committee Privilege because (inaudible) the Texas Health and Safety Code Section 161.032. The source of our confusion, which we clarified on our call in January, was Spohn's discovery responses. We're -- we're not making it up. They cited Texas Occupation Code Section 160.007. That is the Medical Peer Review Committee Privilege.

This is the boilerplate paragraph they have in numerous discovery responses, and so we clarified during a meeting (inaudible) in January what privilege they were invoking, and that -- that is when they said the Medical Committee Privilege. Again, that's a different statute. What Mr. Deacon was just reading, that's a different code altogether, but we have brief argument based on the applicable statute, and that's the Medical Committee Privilege.

And, Your Honor, the duly formed committee

requirement, which I'll talk about next, is a requirement of the Medical Committee Privilege. I'll share with you now my screen. You should see in front of you Texas Health and Safety Code Section 161.0315(a) cited in our motion, which said, "The governing body of a hospital, may form a medical committee," that's the privilege they're invoking, "as defined by Section 161.031 to evaluate medical and health care services."

The requirements, they're statutory, and the three requirements are that, one, a committee was duly formed by the hospital's governing body; two, it was created to evaluate medical or health care services; and three, that the withholding (inaudible) were created by or at the direction of the committee, and there's case law that establishes that third requirement. It has to be the committee's documents, not just some documents that were handed to the committee, but documents that they created or that were created at its direction.

Here, as to the first element, that it's a duly formed committee, Spohn admits that no committee was duly formed and said it called this requirement, quote, from their brief, "irrelevant." Spohn says that it's allowed to -- to form a committee ad hoc, which is true. And Spohn's bylaws dictate that it can form an

ad hoc or special committee in one of three ways: Its board can create an ad hoc committee; its board chair can create an ad hoc committee, or its CEO can create an ad hoc committee.

Mr. Doss was none of those things. Mr. Doss, who in his declaration says formed the committee, was Spohn's President. He was not its board chair or it's CEO. Different people held those titles, so he had no authority to form a medical committee whose records would be privileged. And this is not irrelevant Your Honor, for two reasons. First, these are not just internal procedures that Spohn follows willy-nilly. These are their bylaws. It's the rules and regulations that govern how the hospital operates. In fact, Spohn can be sued for violating its bylaws. They're not guidelines. They're requirements.

Second, Spohn is also wrong because without the proper authority Doss' committee cannot be that of the governing body of a hospital. Again, it's statutory, Section 161.0315(a). He had no authority to form the committee, Your Honor. It wasn't the hospital's committee. It was Doss' committee. Just like if some resident formed a committee or some administrator formed a committee. It's not Spohn's committee. It's Doss' committee.

And, again, Your Honor, this language, this statutory language must be strictly construed. There's Texas Supreme Court laws such as *In re Memorial Herman Hospital System*, 464 SW3d 686 that says this statute, quote, "must be strictly construed." And Spohn has not pointed to any evidence. Again, they have the evidentiary burden to say that there was no formed Spohn committees that deliberated in any way. The records would be redacted. The -- the irrelevant argument flies in the face of the statute, and the exception would swallow the rule. If anyone at Spohn could just form a committee, they would form a committee for everything and all of the those records would be privileged.

Mr. Deacon also relies heavily on the *Humble* opinion. And Your Honor, the *Humble* opinion is an unpublished opinion from the First Court of Appeals, and it's an outlier. Most of the opinions that cite the -- the Medical Committee Privilege have to do with what you would expect a committee evaluating health care professionals, where confidentiality privilege is important for candor, to make sure that health care decisions are evaluated honestly and candidly and so that there can be some check on a hospital.

Spohn is the only -- I mean, *Humble*, excuse me, is the only opinion Spohn can cite to that

has to do with an RFP, and this case is very different from the *Humble* opinion. It's highly distinguishable. First and significantly, the Plaintiffs in *Humble* never challenge that a committee was duly formed. Mr. Deacon said that they modeled Mr. Doss' Declaration off of the affidavit in *Humble*. Well, here's the affidavit in *Humble*, Your Honor. This was an affidavit, not a declaration like Spohn submitted here, and the affiant specifically said that "An ad hoc medical committee was appointed," quote, "by the System." Not by one of its employees, but "by the System."

So there was no dispute as to whether a committee was duly formed, nor did the requesting party object to the affidavit that was submitted, that this was -- it was not on issue. Second, the *Humble* committee actually did create, deliberate and award the contract. Here none of that is true, and in interrogatory and in Doss' Declaration Spohn states that the committees were started on November 29th, 2017. And, Your Honor, that date November 29th, 2017, is the date the RFP went out. So if the committee started working on the day the RFP went out, the committee did not create or draft the RFP. It was obviously already completed because it was sent to the people who ended up responding to it. And, in fact, evidence shows that two

individuals who did not serve on the committee were the ones who created the RFP, including Mr. Mike Melnyk who we were talking about earlier this afternoon.

Third, there was a disconnect between the parties in *Humble* of actually exactly like the one Mr. Deacon says is at issue here, but again, we're not confused. We know which privilege they're invoking, but in *Humble* there was a disconnect. The Plaintiff was negating the application of the Medical Peer Review Committee Privilege, the one I talked about earlier that's housed in the Texas Occupations Code, and the actual one at issue was the Medical Committee Privilege. So there the parties weren't even arguing about the same thing. Here, Your Honor, I assure you that we are.

And as to the third element that I mentioned, Your Honor, there's a number of opinions, such as *Jordan versus Court of Appeals for the Fourth Supreme Judicial District*. This is a Texas Supreme Court case from 1985, and *Barnes v. Whittington*, which is another Texas Supreme Court case. And both of these opinions say, and I can quote from them that, "The deliberations of a hospital committee that are -- are what is protected from discovery." What's protected are correspondence, quote, "relating to the deliberation process." End quote.

And if you look at the 30 documents that Spohn is withholding, these are not deliberations amongst committee members. There are a number of emails, correspondence that involve non-committee members based on Spohn's own list. There are people who are not on the alleged "committee" that are involved in emails that are being withheld. There are also notes that are being withheld by Spohn's CFO, who, yes, served on the committee, according to Spohn, but also was its CFO and was, of course, involved in these cost-cutting measures that were being ruled out at the same time. So these are his notes about that, we presume, but we haven't seen them because Spohn is withholding them.

And then there's a number of emails that are clearly routine communications about contracts, such as the termination of contracts with the existing anesthesia providers and the prospect of contracting with a new provider. Those are the -- the different buckets that the withheld communications fall into, Your Honor. They're not deliberations amongst a duly formed committee. And, Your Honor, if you have any lingering doubt about the applicability of this privilege, we respectfully ask that you conduct and *in camera* review of the documents, which is actually required under Texas Rules of Civil Procedure 193.4(a) and a Texas Supreme

Court opinion *In re E.I. DuPont DeNemours & Co.*, and these say that if you believe Spohn has made a prima facia showing of privilege, and again, there's no evidence, but if -- if you believe that they have, and we encourage you, Your Honor, to rule today so we don't have to come back to the Court on this issue, then the trial Court must conduct an *in camera* inspection of the documents.

And, Your Honor, we have prepared a document-by-document guide that we are happy to provide to you to guide your review of these withheld documents. And -- and, Your Honor, we would ask you to consider, if you do review them, when you review them, are these deliberations correspondence about the RFP between members of a duly formed committee by Spohn, something that has the formality of a Spohn committee, and we submit to you, Your Honor, they're not and they should be produced, and the privilege assertion should be overruled.

MR. DEACON: Your Honor, may I respond?

THE COURT: I'll give you a brief response.

MR. DEACON: The only thing I can agree with what Ms. Zuniga said is that if you're inclined to order that the documents be produced, you must do an *in*

camera inspection. That's the only thing I can agree with what she said. She is again mixing and matching. If you go and read the medical committee, what constitutes a medical committee and how you form one, it's not what she just said. She is absolutely wrong about that. And I know she had that statute up there, but she -- she neglected to point out the "or" in there. But if you go to the Medical Committee Privilege -- or a -- a medical committee and look at that, you'll see what is required, and it isn't that difficult because they set up medical committees for a number of different things. If they had to go to the board of directors for every little thing they did nothing would ever get done.

Now, when you're talking about a Medical Peer Review, you're talking about the livelihood of a physician or a health care provider. So that's a little bit more stringent. I get that, but we're not talking about that here. So the only thing I can agree with is if you're inclined to -- to grant their motion, then you must review the documents *in camera*, and I think if you review the documents *in camera*, you'll realize that we have done extensive work to narrow down to those 30 documents. That's what we've been working on. We have been compromising with opposing counsel to see what really is about the deliberations and the communications

regarding the deliberations.

She made a couple other statements that are simply not correct. We identified who was on that committee. Mike Melnyk is on the committee. Let me just make that very clear. He's on the committee. Plus, the committee is allowed to reach out to people and ask for information, request information. There's nothing wrong with that. That is still protected and privileged. What they can't -- what's not protected or privileged is something -- if something just gives themselves without a request. We're not doing that here. We have narrowed down -- we have given them over 35,000 documents. We have narrowed it down to 30. That's what we're talking about.

THE COURT: Okay. Now, I don't think she's saying, if I'm going to grant the Motion to Compel I have to review the documents *in camera*. I think what she's saying is if you made a prima facia showing that it's -- falls under the Medical Committee Privilege, and I think her argument is that the only supporting evidence for Spohn's position is a declaration that was filed late and not sworn to. Is that pretty much it, Ms. Zuniga?

MS. ZUNIGA: That's correct, Your Honor, and I can respond if you'd like to the two points

Mr. Deacon just --

THE COURT: Oh, I'm sure we could probably keep doing this for the rest of the evening, but I'm going to grant the Motion to Compel. I don't think the prima facia case has been made because I don't think Doss' affidavit can be corrected at this point. Kind of like not filing a sworn denial in a sworn account case. The bottom line is, you don't get to do-over, unfortunately.

MS. DAHLBERG: Your Honor, just to interject. I'm sorry. Mr. Doss' dec- -- affidavit was turned into a declaration in part because of the snowstorm and his inability to get a notary. I don't know if that makes a difference at all to the Court.

THE COURT: Could you say that again slowly.

MS. DAHLBERG: Yes. I'm so sorry. Mr. Doss' item was initially an affidavit, but it was turned into a declaration, Your Honor, with the understanding that that is acceptable to support the motion and that it could not be notarized in light of the snowstorm, that he could not locate someone, and without getting into his personal situation here, there is a reason why it was a declaration, Your Honor.

THE COURT: But you can't tell me.

MS. DAHLBERG: I'm sorry?

THE COURT: You can't tell me why he couldn't get it notarized?

MS. DAHLBERG: No. I thought -- I believe I just did, Your Honor. I'm sorry.

THE COURT: Because of his personal situation?

MS. DAHLBERG: Because of the snowstorm, Your Honor. I'm sorry.

THE COURT: The what?

MS. DAHLBERG: We didn't want to force him to go out and find a notary, Your Honor.

THE COURT: Okay. I'm either not hearing you correctly, or -- why did they not want to force him to go out and find a notary, Ms. Dahlberg?

MS. DAHLBERG: Yes. I'm sorry, Your Honor, because at the time when we were -- we were working on this, no one had any power. Your Honor, I'm sorry.

THE COURT: No power.

MS. ZUNIGA: Your Honor, it was executed on March 1st, so it was executed before the time that it would have been -- it could have been filed, served on time and was executed significantly after the snowstorm, just to remind you about the execution date.

THE COURT: Yeah. The storm was around the middle of February, right? It was what, the 14th or the 15th when it started, so this -- you know, if we were in a different time frame right now, I could see where he couldn't have gotten it notarized, but I -- I don't understand why he couldn't do that at this point and time by March 1st. I thought you were going to tell me he was sick, or something like -- of that nature. But I don't think the lack of power at that point and time is relevant, so -- and actually, you know, if the timing of the aff- -- or the declaration also was at issue, maybe a Motion to Continue this hearing could have been filed, but once you go and bank on this Declaration and it falls short of meeting the standards and it's late, well, I can't consider it, really. So I am striking it, granting the Motion to Compel. I don't have any orders on any of this, so go ahead and follow up with it.

MS. ZUNIGA: Yes, Your Honor. We will.

THE COURT: All right. That's it?

MS. DAHLBERG: Your Honor, we actually have a Motion to Compel that's set for today. It was actually first filed in January, and since discovery closes in April, Your Honor, we -- we just have a few small points for you.

THE COURT: So you have a Motion to Compel?

MS. DAHLBERG: Yes, Your Honor. It was first filed before all of the things we just addressed.

THE COURT: Okay. I didn't see that one. What is it trying to compel?

MS. DAHLBERG: It was filed in January, Your Honor, and it is in large part seeking to compel things that thankfully we have resolved, but the remaining issue, Your Honor, is GSAA's lack of completion, timely completion of its production. And, Your Honor, I -- I can just direct you to a couple of things here in the motion that -- that very briefly, I think, will -- will make the point rather clear.

THE COURT: Go ahead.

MS. DAHLBERG: Yes, Your Honor. If I may share my screen with you?

THE COURT: Yes. Yeah, sometimes when I get a number of motions that are being heard I don't always get copies of all the motions.

MS. DAHLBERG: Understood, Your Honor. Your Honor, this is our motion filed January 8th, and the final item in here asks GSAA to please timely complete its production. The issue is pretty simple, Your Honor. The Plaintiff has represented that its

collection is limited to all GSAA members that are still with GSAA, and Ms. Zuniga has sent me a letter to that effect, which is attached to our motion as Exhibit 5. The Plaintiff has identified at least 14 individuals who were GSAA physicians who are no longer with GSAA.

THE COURT: Okay.

MS. DAHLBERG: A list of those individuals is here, Your Honor, and if you read this response, I think it makes my point. As we discussed, GSAA is not limiting its collection efforts to any sub group within GSAA and has collected responsive materials from all GSAA members that are still with GSAA. We have provided some of these documents already, intend to produce more. You asked us for the names of the individuals who have left GSAA. They are -- and then there's a whole bunch of names, Your Honor. And then the closing, it says, "We will update our discovery responses with our last known address once we collect that information."

So, Your Honor, this initial discussion occurred November 2nd, 2020, and then we filed this motion in January, and here we are because of the various scheduling concerns. We're in March and this motion is being heard. So I had hoped that this would be resolved by now, Your Honor, but unfortunately it

hasn't. You'll see here in response to Interrogatory 4, for example, why materials from these individuals are relevant. It's because GSAA has said that they are relevant. In our first set of interrogatories, many years ago in this case when it first began, Your Honor, we asked GSAA to please identify essentially individuals who had communications concerning the RFP process, and GSAA's response was that "GSAA had internal conversations among its members including...," and then sort of writes a list, and then says that, "In preparing for the response," in its amended response, "GSAA had internal conversations among all of its members."

However, Your Honor, they've indicated that they've only collected materials for one departed physician, and so I've -- I've been asking GSAA to -- to please identify what their, you know, collection efforts have been until this point and why we haven't received now -- when discovery closes in April and Plaintiff filed this case in March of 2019 -- any materials from these departed physicians, except for one, knowing that they're relevant, and GSAA has not told me that they, you know, believe they're somehow not relevant. What they very only recently told me is this, Your Honor. I'm going to share another document with you here.

THE COURT: Just so I'm -- I'm trying to

follow you.

MS. DAHLBERG: Sure.

THE COURT: You kind of lost me a little bit. You want materials from doctors who no longer work with GSAA, right?

MS. DAHLBERG: That's right, Your Honor. And those materials, as I understand them, are relevant, have not yet been collected and have not been produced to us, and there are --

THE COURT: In whose possession are they?

MS. DAHLBERG: Well, that's a good question, Your Honor. They are GSAA former members who used --

THE COURT: Right.

MS. DAHLBERG: -- GSAA's email. However that was done. I have absolutely no access to that, and we would like those materials. And what I -- when I asked, what kind of email program is it, you know, did you preserve them, when did you anticipate litigation, the items I was going to show you, Your Honor, is -- is me asking the Plaintiff about every three or four weeks for some information on when we were going to get these things, if they have been preserved, what has happened to them, and unfortunately, Your Honor, what I was told is that they would investigate it further, and

ultimately about two weeks ago I was told that they didn't see the relevancy of my questions.

And so here we are today, Your Honor, with -- you know, Mr. Doss left Christus, so did Mr. King. We have all their email that's relevant to this dispute that we've been able to produce, go through. We're just asking for the same thing, Your Honor, and to at this point in the case have 13 individuals whose materials I don't have, I think that we -- we need to do that very swiftly, Your Honor.

THE COURT: All right. Now, Ms. Zuniga, there is --

MS. CAMINA: Your Honor, I'll -- I'll --

THE COURT: Excuse me.

MS. CAMINA: I'll address it.

THE COURT: Okay. Ms. Camina, you're going to deal with this?

MS. CAMINA: Yes, Your Honor.

THE COURT: Okay. Do -- does your client GS- -- it's GSA or GSAA?

MS. CAMINA: GSAA. And I think I can shortchange this discussion. As we told Ms. Dahlberg, we have contacted each of these former physicians, and we're in the process of collecting this information. So we are collecting the information that she is asking

for.

THE COURT: Okay. Now, as far as any of the information that's in GSAA's possession, have you furnished everything in your possession?

MS. CAMINA: Yes, we have.

THE COURT: Okay. And you've con- --

MS. CAMINA: But to satisfy Ms. Dahlberg, we are going beyond that, and we are actually contacting each of these former physicians and asking them to retrieve anything that they might have. Okay.

MS. DAHLBERG: Your Honor, my -- my issue is -- I appreciate that, Ms. Camina. Thank you. It's been sometime. We're still waiting on it, still waiting on it, and this is an issue we discussed about six months ago, and part of my issue, Your Honor, is that these materials were within GSAA's possession at one time. This group of physicians left sometime ago, Your Honor, and were only now -- after the case was filed, and then two years later, two years after discovery began, now Ms. Camina is telling me that she's contacting these folks to identify whether they have relevant information. What counsel informed me in an email was that they were using some sort of Gmail sever and that they are -- the emails on there are automatically purged. I don't know what that means,

Your Honor, but if -- if my system, a hospital system has emails that are relevant to a lawsuit and I tell someone that they're automatically purged, well, I expect to be told that it's my duty to preserve them.

THE COURT: Well, this isn't a hospital, but right now you can only compel production of records or materials in their possession. The only way to get materials that are in the possession of someone who used to be associated with them is to subpoena that individual with a duces tecum, and I'm sure Ms. Camina will explain to the doctors they'd probably find it a lot more pleasant to turn over the documents rather than attending a deposition.

So the bottom line is, you know, if -- if you had employees from Spohn who had left and took whatever you -- they wanted with them, I can't hold you responsible for that either. I mean, if they don't want the cooperate, you know, they won't cooperate. Frankly, in terms of getting doctors to do things that don't pertain to them practicing medicine and making money, they aren't generally not very enthusiastic about that sort of thing and are usually not the most cooperative individuals.

So, I mean, I can -- I can grant a Motion to Compel any documents in the possession of GSAA, and

again, if they're making efforts to get these individuals to cooperate, that's your -- your hammer. You can say, look, if you don't turn over this stuff, we're going to depose all of you, and they're not going to want to do that. I could tell you that.

MS. CAMINA: That's exactly what I've told them, Your Honor.

THE COURT: So -- but I can't -- I can't make them produce something they don't have.

MS. DAHLBERG: I understand, Your Honor. I guess, my question that, again, I've been told repeatedly is not relevant, is whether they did have them at one time.

THE COURT: I don't care about the relevance, Ms. Dahlberg. If -- my opinion of relevance, that's a fine objection to make during a trial, but it has limited application in the discovery process. It is, could it lead to relevant information? That's very broad. I mean, if you're sending out a question to somebody, what's your favorite color? I might say, well, that's not going to lead to anything. But if it's something that maybe could lead to something, it's a low standard. It doesn't mean I'm going to find that it's relevant later if you object to it. So if they think it's not relevant to provide that information, well, I'm

already -- I've already ruled that if they have whatever you're seeking in their possession, whether they think it's relevant or not, they need to produce it to you.

MS. DAHLBERG: Yes, Your Honor. My question is whether it's been destroyed in the course of this lawsuit, whether they had it at one time and are now telling me that they no longer have possession of it.

THE COURT: I don't know if it's a spoliation issue, whether or not they -- they destroyed anything that you were seeking. That would be a problem if the lawsuit was ongoing.

MS. CAMINA: I can assure you that nothing has been destroyed by GSAA.

MS. DAHLBERG: Well, if it was purged, Your Honor --

MR. DEACON: Your Honor --

THE COURT: Mr. Deacon wants to be heard. Let me go ahead and let him.

MR. DEACON: I do. Two things here: One, we'd ask that their objections be -- be stricken, because they are objecting to the relevance, and -- and so we'd ask that they be removed. But the second thing is, we're not just talking about physicians. We're talking about owners. We are talking about people that

were shareholders or owners or partners in this organization. So it's not just physicians. These are people who had skin in the game.

THE COURT: True. That's why they can be deposed. I mean, if --

MR. DEACON: Well, yeah. We can depose them, but we should also be able to get their records from them because they were owners. They're part of this lawsuit.

THE COURT: They were owners. They're apparently not owners anymore.

MR. DEACON: They -- they were when they filed the lawsuit.

THE COURT: Well, they were when they filed the lawsuit, perhaps, but it kind of means that if they get any money out of this, I bet you they're not going to give these individuals money out of the settlement, out of the goodness of their heart because they used to be shareholders.

MS. CAMINA: And, Your Honor, I can assure you that those individuals were not owners at the time the lawsuit was filed.

THE COURT: Okay. But in any event, they're -- they're like former employees, more less. So even though they were shareholders they -- you can't

make them do anything because they're not parties to the lawsuit. However, you probably can depose them, but I have a feeling if they're threatened with a deposition, they're going to produce whatever documents are going to get them out of having to attend a deposition. And if it turns out that something was destroyed deliberately while this is going on, well, that would be a problem for the party that did that. But I'm going to take Ms. Camina at her word that that probably didn't happen.

MR. DEACON: Can we have them withdraw their objections?

THE COURT: Well, what about your objection as to relevance?

MS. CAMINA: I -- I don't know. I guess, can you bring that up, what objection you're talking about, actually.

THE COURT: Okay. It's probably -- as you know from being a defense counsel, the typical response is, we object, it's not relevant, and by the way, we don't have it anyway, and you know, it's -- it's -- I don't really take those kind of boilerplate objections seriously, but if there are any objections as to relevance, they're overruled.

MS. CAMINA: Fine.

THE COURT: Produce it if you have it. Try to get the people who have it to produce it and tell them they may be deposed, and if they try to quash the deposition, I probably would be sympathetic to that.

MS. CAMINA: Absolutely. I don't think we made a relevance objection, Your Honor, but if we did --

THE COURT: Well, if you did, it's -- it's overruled.

MS. DAHLBERG: Your Honor, we would also ask -- I'm sorry.

THE COURT: All right. Does that cover everything? Yes? Ms. Dahlberg, you were --

MS. DAHLBERG: No. I'm sorry. Your Honor, there are additionally objections that certain items are premature. As Ms. Camina pointed out, discovery closes in April. I can hardly think of anything that is premature with regard to our questions to GSAA, Your Honor, so we would ask that any of the statements that -- the interrogatories for summaries are premature to be stricken.

THE COURT: Okay. Is there anything you think is still premature, Ms. Camina?

MS. CAMINA: Your Honor, there's still documents obviously that we don't have that are the

subject of today's hearing and the subject of the other motion that we had agreed to, but I think once we get those documents we can remove those. We can voluntarily remove those objections. I think as Mr. -- it was mentioned earlier that we haven't taken depositions yet. I think that's coming soon, and so obviously there's still other things, but I think we can remove that as soon as we get those, and I'm happy to do that voluntarily.

THE COURT: Is that acceptable, Ms. Dahlberg?

MS. DAHLBERG: Yes, Your Honor.

THE COURT: Okay. Well, let's proceed -- when is -- when is this set for trial?

MS. CAMINA: August.

THE COURT: August. Well, we might -- we should be operating by August, I believe -- I think. Well, I -- I would have -- I've made, like, I don't know, ten or 12 predictions as to when we were going to start. They were all completely inaccurate, so. And we got a new Supreme Court order. I don't even understand what they're saying in the order. I think they're saying we can do jury trials.

MS. ALEXANDER: Your Honor, we also have an alternative trial date in December. You may recall

that you did an alternative trial date.

THE COURT: Oh, yeah. I do recall that, but hopefully we can get this thing squared away, because we know that cases don't settle without trial dates.

MS. CAMINA: Correct.

THE COURT: So maybe this could possibly be worked out, but have you gone -- you haven't tried mediating it yet at this point, I don't think, have you?

MS. CAMINA: We did have an early mediation at Defendants' request, and we do have another one scheduled for July.

THE COURT: Okay. Good. With who?

MS. CAMINA: Judge Ashworth in Dallas.

THE COURT: Okay. Good. All right. Sounds promising. We'll adjourn this one.

MS. CAMINA: Thank you.

MR. DEACON: Thank you, Your Honor.

MR. BRIGHT: Thank you, Your Honor. Have a good afternoon.

THE COURT: You too.

(End of hearing.)

REPORTER'S CERTIFICATE

THE STATE OF TEXAS)
COUNTY OF NUECES)

I, Jessica Escobar, Official Court Reporter in and for the County Court at Law No. 4 of Nueces County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred remotely telephonically in accordance with the Supreme Court of Texas' First Emergency Order Regarding the COVID-19 State of Disaster, Section 2., and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost for a copy of this Reporter's Record is $146.52.

WITNESS MY OFFICIAL HAND this the 28th day of March, 2021.

/s/Jessica Escobar
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