

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 1349

MEDPRO RX, INC.,

Plaintiff,

v.

DOUGLAS FOWLER; INFUCARE
RX INC.; INFUCARE RX, LLC; and
HOMECARE RX INC.,

Defendants.

**ORDER ON INFUCARE
DEFENDANTS' MOTION TO STRIKE
AND DEFENDANTS' MOTION FOR
STAY AND ORDER TO SHOW CAUSE**

1. **THIS MATTER** is before the Court upon Defendants InfuCare Rx Inc., InfuCare Rx, LLC, and Homecare Rx Inc.'s ("InfuCare" or the "InfuCare Defendants") Motion to Strike Portions of Plaintiff MedPro Rx, Inc.'s ("Plaintiff") Complaint ("Motion to Strike") and the InfuCare Defendants and Defendant Douglas Fowler's ("Fowler" collectively with the InfuCare Defendants, "Defendants") Motion to Stay Discovery ("Motion for Stay") in the above-captioned case.

2. On May 15, 2018, the Court held a hearing (the "May 15 Hearing") on various matters in this case, including (i) the Motion to Strike, (ii) the Motion for Stay, (iii) the InfuCare Defendants' Motion to Dismiss pursuant to 12(b)(2)¹ and 12(b)(6) of the North Carolina Rules of Civil Procedure ("InfuCare Defendants' Motion to Dismiss"), and (iv) Fowler's Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (collectively with the InfuCare Defendants'

¹ On May 24, 2018, the InfuCare Defendants filed a Notice of Withdrawal of their Motion to Dismiss to the extent it was brought under N.C. R. Civ. P. 12(b)(2) and indicated their consent to personal jurisdiction in this Court in this action.

Motion to Dismiss, “Defendants’ Motions to Dismiss”), at which all parties were represented by counsel.

3. The Court hereby **ENTERS** this Order memorializing its oral rulings on the Motion to Strike and Motion for Stay at the May 15 Hearing,² and hereby further **ORDERS**, in the exercise of its discretion and based on the conduct set forth below, Plaintiff’s counsel—Donald E. English, Jr., Charles J. Kresslein, and the law firm of Jackson Lewis P.C.—to appear and show cause why this Court should not revoke the *pro hac vice* admissions of Mr. English, Mr. Kresslein and Jackson Lewis P.C. to practice before this Court in this action, why Jackson Lewis P.C. should not be disqualified from further representation of Plaintiff in this case, and why other appropriate sanctions should not be imposed for their conduct as discussed below. The Court hereby further **ORDERS**, in the exercise of its discretion, briefing and hearing concerning appropriate sanctions against Plaintiff, including an award of the InfuCare Defendants’ reasonable costs and fees, including attorneys’ fees, as set forth below.

Motion to Strike

4. Upon a proper motion to strike, “the judge may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter.” N.C. R. Civ. P. 12(f). Any “[m]atter should not be stricken unless it has no possible bearing upon the litigation. If there is any question as to whether an issue may arise, the motion [to strike] should be denied.”

² The Court took Defendants’ Motions to Dismiss under advisement and will address those motions by separate order.

Reese v. City of Charlotte, 196 N.C. App. 557, 567, 676 S.E.2d 493, 499 (2009). A motion under Rule 12(f) is “addressed to the sound discretion of the trial court[.]” *Id.*

5. The InfuCare Defendants move to strike paragraphs 41–45 of Plaintiff’s Complaint (the “Complaint”) on the basis that these allegations contain [REDACTED]

[REDACTED]

[REDACTED] that has no relevance to any of Plaintiff’s claims for relief in this action. Indeed, the allegations reference [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

6. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(InfuCare Defs.’ Mem. Law Supp. Mot. Dismiss and Strike Ex. B, at 1 [hereinafter

[REDACTED], ECF No. 17.2.) The judge further ordered [REDACTED]

[REDACTED]

[REDACTED]

2.)

7. Plaintiff contends that these allegations concerning [REDACTED] show the [REDACTED] of the InfuCare Defendants, provide evidence of whether the InfuCare Defendants [REDACTED] and provide a basis to challenge [REDACTED] (Pl.'s Opp'n InfuCare Defs.' Mot. Dismiss and Strike 17, ECF No. 29.)

8. The Court finds Plaintiff's purported justifications for the inclusion of these [REDACTED] allegations in the Complaint wholly unpersuasive. Plaintiff has alleged claims against the InfuCare Defendants for tortious interference with contract, tortious interference with prospective business relations, misappropriation of trade secrets, civil conspiracy, and vicarious liability. The Complaint pleads that the InfuCare Defendants hired Defendant Fowler, an employee of Plaintiff, in violation of Fowler's non-competition, non-solicitation, and non-disclosure agreements with Plaintiff, and in the process, InfuCare acquired certain of Plaintiff's alleged trade secrets that enabled InfuCare to attract Plaintiff's existing and potential customers. Plaintiff's [REDACTED] allegations have nothing to do with the claims or defenses advanced or forecasted in this action, are without any connection to any matter that might lead to the discovery of admissible evidence, do not in any way make the occurrence of a fact of consequence in this case more or less likely, and do not supply

background or context needed to understand the transactions or occurrences that are relevant to the dispute between the parties.

9. More specifically, the InfuCare Defendants' allegedly [REDACTED] [REDACTED] is not at issue in this litigation. Plaintiff has not asserted a veil-piercing or alter-ego theory of recovery, and the circumstances of when, how and why the separate InfuCare Defendants were organized is not relevant to any claims or defenses that have been advanced or forecasted by the parties. Similarly, the InfuCare Defendants' alleged [REDACTED] is in no way relevant to or probative of the claims or defenses alleged or forecasted. Finally,

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

10. For each of these reasons, therefore, the Court concludes that the InfuCare Defendants' Motion to Strike should be granted and paragraphs 41–45 of the Complaint stricken from the public record in this case.

11. **WHEREFORE**, the Court, in the exercise of its discretion, hereby **GRANTS** the InfuCare Defendants' Motion to Strike as follows:

- a. As ordered at the May 15 Hearing, the Court has sealed from the public record all filed documents, including the Complaint, that contain discussion or evidence of the allegations found in paragraphs 41–45 of

the Complaint.³ As directed by the Court at the May 15 Hearing, Plaintiff filed a public version of the Complaint, with paragraphs 41–45 redacted, on May 16, 2018.

- b. Plaintiff is hereby ordered to file public versions of the following documents, redacting any discussion of the allegations of paragraphs 41–45, within five (5) business days of entry of this Order:
 - i. Plaintiff's Opposition to InfuCare Defendants' Motion to Dismiss Plaintiff's Complaint and to Strike Portions of Plaintiff's Complaint;
 - ii. Plaintiff's Opposition Brief to Defendants' Motion to Stay Discovery.
- c. The InfuCare Defendants shall file public versions of the following documents, redacting any discussion of the allegations of paragraphs 41–45, within five (5) business days of entry of this order:
 - i. InfuCare Defendants' Memorandum of Law in Support of the InfuCare Defendants' Motion to Dismiss;
 - ii. InfuCare Defendants' Reply Brief in Support of the InfuCare Defendants' Motion to Dismiss and to Strike Portions of the Complaint.
- d. The following documents shall remain under seal and shall not be filed on the public record:

³ Counsel for the InfuCare Defendants identified the filings that contain such information at the May 15 Hearing and in an email to the Court on May 16, 2018.

- i. Exhibit B to the InfuCare Defendants' Memorandum of Law in Support of the InfuCare Defendants' Motion to Dismiss;
- ii. Exhibit 1 to Plaintiff's Opposition to Defendants' Motion for a Temporary Stay of Discovery Pending the Court's Order on Defendants' Pending Motion to Dismiss;
- iii. Exhibit 9 to Plaintiff's Opposition to InfuCare Defendants' Motion to Dismiss Plaintiff's Complaint and to Strike Portions of Plaintiff's Complaint.

Order to Appear and Show Cause

12. In conjunction with its Motion to Strike, the InfuCare Defendants requested that the Court "enter an order for [Plaintiff] to show cause as to its purpose for including [the allegations] so that, if it is found to be improper, appropriate sanctions or further inquiry may follow." (InfuCare Defs.' Mem. Law Supp. Mot. Dismiss and Strike 23, ECF No. 17.)

13. All courts have the "inherent authority to do all things that are reasonably necessary for the proper administration of justice[,]" which includes "the inherent power to deal with its attorneys." *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 665, 554 S.E.2d 356, 362 (2001) (citing *Beard v. N.C. State Bar*, 320 N.C. 126, 129–30, 357 S.E.2d 694, 696 (1987)) (quotation marks omitted). "This inherent authority encompasses . . . the duty to discipline attorneys, who are officers of the court, for unprofessional conduct[,]" *id.* (citing *In re Hunoval*, 294 N.C. 740, 744, 247 S.E.2d 230, 233 (1977)) (quotation marks omitted), and unprofessional conduct is not

limited to violations of the North Carolina Rules of Professional Conduct, *see Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 182, 695 S.E.2d 429, 436 (2010).

14. As discussed above, it appears to the Court that Plaintiff's counsel has included in the Complaint allegations and exhibits that are wholly irrelevant to the claims and defenses in this action [REDACTED]

[REDACTED] Such conduct is improper under North Carolina law and this State's rules of court. *See, e.g.*, N.C. R. Prof. Cond. Rule 4.4 cmt. 2; *N.C. State Bar v. Livingston*, 809 S.E.2d 183, 196–98 (N.C. Ct. App. 2017).

15. In addition, it is undisputed that Plaintiff's counsel referenced [REDACTED] [REDACTED] in paragraph 43 of the Complaint. Plaintiff's counsel represented to the Court at the May 15 Hearing that counsel was not aware that [REDACTED] [REDACTED] until they received the InfuCare Defendants' brief in opposition to the Motion to Strike on March 22, 2018, [REDACTED] [REDACTED] Even if the Court accepts that neither Plaintiff nor Plaintiff's counsel was aware of [REDACTED] [REDACTED] prior to receiving the InfuCare Defendants' brief, Plaintiff's counsel did not remove paragraph 43 from the public record at any time prior to the Hearing, and the material remained in the public domain for nearly two months after Plaintiff's counsel's receipt of [REDACTED] until the Court ordered the Complaint sealed during the May 15 Hearing.

16.

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

18. Despite ample opportunity to do so at the May 15 Hearing, Plaintiff's counsel failed to offer a reasonable justification for including in the Complaint the allegations at paragraphs 41–45 and related exhibits, and, in particular, for not removing the allegations and exhibits [REDACTED] from the public docket for nearly two months [REDACTED]. It appears to the Court that Plaintiff's counsel's conduct is in violation of [REDACTED]
[REDACTED]

19. Based on its review of the Complaint, the briefs and other submissions of the parties, the evidence of record, and the arguments of counsel at the May 15 Hearing, the Court concludes that it should consider the imposition of sanctions or other relief against Plaintiff's counsel for including in the Complaint the allegations at paragraphs 41–45 and related exhibits concerning [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

20. Plaintiff's counsel of record in this action include the following attorneys from the law firm of Jackson Lewis P.C.: Jason V. Federmack, Donald E. English, Jr., Charles J. Kresslein, and Mary M. McCudden.

- a. It appears to the Court that Mr. Federmack is a member of the North Carolina State Bar, an associate in Jackson Lewis P.C.'s Raleigh office, and the junior lawyer on Plaintiff's counsel's team. He signed the

Complaint on Plaintiff's behalf and attended, but did not actively participate in, the May 15 Hearing.

- b. It appears to the Court that Mr. English and Mr. Kresslein are partners in Jackson Lewis P.C.'s Baltimore, Maryland office and that neither is licensed to practice law in the State of North Carolina. By Order dated March 23, 2018, the Court granted *pro hac vice* admission to Mr. English and Mr. Kresslein under N.C. Gen. Stat. § 84-4.1 to appear on behalf of Plaintiff in this action. It appears to the Court that Mr. English and Mr. Kresslein are Plaintiff's lead lawyers in this action. They were each identified in the signature block of the Complaint as "*to appear pro hac vice*," and they were the only attorneys to argue for Plaintiff on the pending motions at the May 15 Hearing. Mr. English advanced Plaintiff's arguments in opposition to the Motion to Strike.
- c. It appears to the Court that Ms. McCudden is an associate in Jackson Lewis P.C.'s Baltimore, Maryland office and is not licensed to practice law in the State of North Carolina. Like Mr. English and Mr. Kresslein, by Order dated March 23, 2018, the Court granted her *pro hac vice* admission under N.C. Gen. Stat. § 84-4.1 to appear on behalf of Plaintiff in this action. Ms. McCudden was not identified on the face of the Complaint and did not attend or otherwise participate in the May 15 Hearing.

21. North Carolina law is clear that *pro hac vice* admission to practice in the courts of this State “is not a right[,] but a discretionary privilege.” *Couch*, 146 N.C. App. at 669, 554 S.E.2d at 365. The authority provided by the statute governing *pro hac vice* admission is to ensure “a means to control out-of-state counsel and to assure compliance with the duties and responsibilities of attorneys practicing in this State.” *Id.* at 670, 554 S.E.2d at 365. “Such a right is ‘permissive and subject to the sound discretion of the Court.’” *Id.* at 669, 554 S.E.2d at 365 (quoting *State v. Hunter*, 290 N.C. 556, 568, 227 S.E.2d 535, 542 (1976), *cert. denied*, 429 U.S. 1093, 51 L. Ed. 2d 539, 97 S. Ct. 1106 (1977)). Particularly, N.C. Gen. Stat. § 84-4.2 expressly “allows a superior court judge the authority and discretion to summarily revoke an earlier order granting *pro hac vice* admission[.]” *Id.* at 663, 554 S.E.2d at 361. This statutory right may be reviewed by the Court “on its own motion and in its discretion.” N.C. Gen. Stat. § 84–4.2; *see generally McCarthy v. Hampton*, 2016 NCBC LEXIS 4 (N.C. Super. Ct. Jan. 7, 2016).

22. Further, for purposes of *pro hac vice* admission, “an entire law firm can be treated as if it were a single lawyer, and thus the actions of the firm [may be] imputed to its members (similar to the North Carolina ethical rule on imputed disqualification, Rule 1.10 of the Rules of Professional Conduct).” *Smith v. Beaufort Cty. Hosp. Ass’n, Inc.*, 141 N.C. App. 203, 215, 540 S.E.2d 775, 782–83 (2000), *aff’d sub nom. Smith ex rel. Estate of Smith v. Beaufort Cty. Hosp. Ass’n, Inc.*, 354 N.C. 212, 552 S.E.2d 139 (2001).

23. Moreover, a trial court's decision to disqualify counsel is within its sound discretion and will not be disturbed, absent an abuse of discretion. *Robinson & Lawing, L.L.P. v. Sams*, 161 N.C. App. 338, 339, 587 S.E.2d 923, 925 (2003). In considering disqualification, "the court's inherent power is not limited or bound by technical precepts contained in the Code of Professional Responsibility," *Swenson v. Thibaut*, 39 N.C. App. 77, 109, 250 S.E.2d 279, 299 (1978), and extends to permit a trial court to disqualify attorneys "[even in] matters which are not pending in the particular court exercising the authority," *Williams v. Williams*, 228 N.C. App. 753, 758, 746 S.E.2d 319, 322 n.3 (2013).

24. Based on the foregoing, the Court concludes, in the exercise of its discretion and for good cause shown, that Mr. English, Mr. Kresslein, and the law firm of Jackson Lewis P.C. should appear and show cause why their *pro hac vice* admissions to represent Plaintiff in the courts of this State for purposes of this civil action should not be revoked, why Jackson Lewis P.C. should not be disqualified from further representation of Plaintiff in this case, and why other appropriate sanctions should not be imposed, for including in the Complaint the allegations at paragraphs 41–45 and related exhibits concerning [REDACTED]

[REDACTED] See generally *Superguide Corp. v. DirecTV Enters.*, 141 F. Supp. 2d 616, 625 (W.D.N.C. 2001) ("[T]he right of one to retain counsel of his choosing is secondary in importance to the

Court's duty to maintain the highest ethical standards of professional conduct to insure and preserve trust in the integrity of the bar.") (applying North Carolina law).

25. In recognition of Mr. Federmack's subordinate role on Plaintiff's team, the Court declines to consider the imposition of sanctions or other specific relief against Mr. Federmack despite the fact that he signed the Complaint. Likewise, given the lack of involvement of Ms. McCudden in this case to date, the Court declines to issue an order for Ms. McCudden to appear and show cause why specific relief should not be considered against her. In the current circumstances, the continuation of Mr. Federmack's and Ms. McCudden's representation of Plaintiff is dependent upon both the continuation of the *pro hac vice* admission of Jackson Lewis P.C. in this action and upon the Court's determination that Jackson Lewis P.C. should not be disqualified from further representation of Plaintiff in this case.

26. **ACCORDINGLY**, the Court, in the exercise of its discretion, hereby **ORDERS** Donald E. English, Jr., Charles J. Kresslein, and the law firm of Jackson Lewis P.C. to **APPEAR** before the Court at 10:00 AM on July 24, 2018 in Courtroom 6370 of the Mecklenburg County Courthouse, 832 East Fourth Street, Charlotte, North Carolina, and **SHOW CAUSE** why their *pro hac vice* admissions should not be revoked in this action, why Jackson Lewis P.C. should not be disqualified from further representation of Plaintiff in this case, and why other appropriate sanctions should not be imposed, for including in the Complaint the allegations at paragraphs 41–45 and related exhibits concerning [REDACTED]

[REDACTED]

[REDACTED] The parties, including Mr. English, Mr. Kresslein, and Jackson Lewis P.C., may, but are not required, to submit briefs of no more than 2,500 words no later than July 13, 2018 in connection with this Show Cause Order.

InfuCare Defendants' Reasonable Costs and Fees

27. “According to well-established North Carolina law, a broad discretion must be given to the trial judge with regard to sanctions.” *Battle v. Sabates*, 198 N.C. App. 407, 412–13, 681 S.E.2d 788, 793 (2009) (internal quotations omitted). The Court concludes, in the exercise of its discretion and for good cause shown, that the Court should consider sanctions against Plaintiff, including the payment of the InfuCare Defendants’ costs and attorneys’ fees incurred in bringing the Motion to Strike, as a result of Plaintiff’s inclusion in the Complaint of the allegations at paragraphs 41–45 and related exhibits concerning [REDACTED]

[REDACTED]

[REDACTED] *See, e.g., Fatta v. M & M Properties Mgmt., Inc.*, 224 N.C. App. 18, 26–27, 735 S.E.2d 836, 842 (2012); *Battle*, 198 N.C. App. at 412, 426, 681 S.E.2d at 793, 801; *see also Bryson v. Sullivan*, 330 N.C. 644, 663, 412 S.E.2d 327, 337 (1992) (holding that, under Rule 11, a party “will be held responsible if his evident purpose is to harass, persecute, otherwise vex his opponents, or cause them unnecessary cost or delay”).

28. **ACCORDINGLY**, the Court, in the exercise of its discretion, hereby **ORDERS** the InfuCare Defendants to file any motion for sanctions arising from

Plaintiff's inclusion in the Complaint of the allegations at paragraphs 41–45 and related exhibits concerning [REDACTED]

[REDACTED] including any request for costs and fees, together with any affidavits and supporting materials, no later than June 22, 2018. Any request for costs and fees shall include:

- a. the total amount of attorneys' fees and costs incurred in obtaining the relief awarded by the Motion to Strike;
- b. the identification of each attorney performing the work on the Motion to Strike;
- c. the hourly rates for each attorney performing the work on the Motion to Strike;
- d. the specific tasks the attorneys performed on the Motion to Strike;
- and
- e. the amount of time the attorneys spent in performing each such task;
- f. but shall exclude any costs and fees incurred in pursuit of the InfuCare Defendants' Motion to Dismiss.

29. Plaintiff shall file any opposition to any InfuCare Defendants' motion for sanctions, including any affidavits and supporting materials, no later than July 13, 2018.

30. The parties' briefs concerning any InfuCare Defendants' motion for sanctions shall comply with Business Court Rule 7.8.

31. In the event the InfuCare Defendants file a motion for sanctions as provided above, such motion will be heard at 10:00 AM on July 24, 2018 in Courtroom 6370 of the Mecklenburg County Courthouse, 832 East Fourth Street, Charlotte, North Carolina.

Motion for Stay

32. On April 20, 2018, Defendants emailed a Business Court Rule 10.9 request to the Court ("Defendants' 10.9 Request") seeking a stay of all discovery pending resolution of the Defendants' Motions to Dismiss.

33. On April 23, 2018, the Court issued an order staying discovery until the May 15 Hearing (the "Temporary Stay") and issued a briefing schedule allowing Defendants to file a motion pertaining to Defendants' 10.9 Request (the "April 23 Order"). The April 23 Order also permitted Plaintiff to file a response brief in opposition to any motion for stay filed by Defendants.

34. On April 24, 2018, Plaintiff emailed a response to Defendants' 10.9 Request and requested that the Court reconsider the Temporary Stay. The Court denied Plaintiff's request for reconsideration.

35. The parties briefed the Motion for Stay, and the Court held a hearing on the Motion for Stay at the May 15 Hearing.

36. Defendants contend that they would be forced to incur undue expense and burden in responding to Plaintiff's discovery when resolution of the Motions to

Dismiss might render discovery moot. Counsel for Plaintiff admitted at the May 15 Hearing that discovery is not necessary at this point and consented to the Motion for Stay.

37. **ACCORDINGLY**, the Court, in the exercise of its discretion and for good cause shown, memorializes its oral ruling at the May 15 Hearing and hereby **GRANTS** Defendants' Motion for Stay. All discovery in this action shall be stayed until the Court's resolution of Defendants' Motions to Dismiss or as otherwise ordered by the Court.

SO ORDERED, this the 4th day of June, 2018.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Special Superior Court Judge
for Complex Business Cases