



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STEWARD HEALTH CARE SYSTEM)
LLC, STEWARD MEDICAL GROUP,)
INC., STEWARD PGH, INC., STEWARD)
NSMC, INC., STEWARD CGH, INC., and)
STEWARD HH, INC.,)

Plaintiffs and Counter-)
Defendants,)

v.)

C.A. No. 2022-0289-SG

TENET BUSINESS SERVICES)
CORPORATION, TENET)
HEALTHCARE CORPORATION, CGH)
HOSPITAL, LTD., CORAL GABLES)
HOSPITAL, INC., HIALEAH)
HOSPITAL, INC., HIALEAH REAL)
PROPERTIES, INC., LIFEMARK)
HOSPITALS OF FLORIDA, INC.,)
LIFEMARK HOSPITALS, INC., NORTH)
SHORE MEDICAL CENTER, INC.,)
SUNRISE MEDICAL GROUP I, LLC,)
TENET FLORIDA PHYSICIAN)
SERVICES, LLC, TFPS IV, LLC, and)
SHARILEE SMITH, as Trustee for Coral)
Gables Hospital Land Trust Agreement)
Number 1001, and as Successor Trustee)
pursuant to The FMC Land Trust)
Agreement Number 1001,)

Defendants and Counter-)
Claimants.)

**PUBLIC VERSION
FILED FEBRUARY 20, 2023**

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL

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Steward's opposition concedes it filed "extreme" financial hardship applications with CMS to obtain a [REDACTED] extension of AAPP repayment obligations it seeks to collect from Tenet in this litigation (the "Applications"). And it does not dispute that producing the Applications imposes no burden, as they are (at most) five discrete files. Nevertheless, Steward seeks to avoid production based on (1) relevance arguments that strain credulity and (2) the absence of a specific reference to the Applications in the December Stipulation, even though Tenet was unaware of the Applications when the parties agreed to the Stipulation. Steward's arguments fail.

1. *First*, Steward argues that the Applications are not relevant to the interpretation of Section 8.16 because they are dated more than a year after the APA. That argument makes no sense. Steward's AAPP argument rests on the premise that Tenet must repay amounts Steward "anticipated" paying the month before Steward paid them, even if Steward did not actually make the payments in that "anticipated" month. While Tenet disputes that interpretation, the Applications are relevant to assessing whether Steward anticipated making the AAPP payments in the months it invoiced them because the Applications will show what Steward told CMS about when and whether it would or could make those payments. This discovery is necessary to test whether the facts even conceivably fit Steward's interpretation of Section 8.16.

2. Steward also brushes aside the relevance of the Applications to the parties' DPP dispute by again arguing that a document dated a year after the APA cannot aid in interpreting Section 8.22. This argument is meritless. Steward's own discovery shows its interpretation of Section 8.22 is inconsistent with how Steward described and modeled its DPP obligation for at least six months after signing the APA. Evidence that Steward developed its litigation interpretation on DPP long after the parties signed the APA out of financial necessity is relevant to the credibility of that interpretation.

3. Finally, as an example of how far Steward must go to justify its position, Steward claims its sworn representation that it is [REDACTED] [REDACTED] is not contradicted by its Applications, which Steward does not dispute are based on "extreme" financial hardship.

4. *Second*, Steward's request that this Court strictly construe the December Stipulation because Tenet failed to specifically identify the Applications is disingenuous. Tenet did not identify the Applications because Steward concealed their existence until after the December Stipulation. Regardless, the December Stipulation does not preclude production of this discrete set of Applications. By design, none of the discovery categories in the Stipulation identified documents with

specificity so that the parties could continue to negotiate search terms after the Court entered the December Stipulation.

I. THE APPLICATIONS ARE RELEVANT TO STEWARD’S AAPP AND DPP ARGUMENTS.

A. The Applications Are Relevant To The Interpretation *And Application* Of Section 8.16.

5. Steward concedes the “issues pending before the Court” include the “proper interpretation of Section[] 8.16.” Pls.’ Opp. to Defs.’ Mot. to Compel (“Opp.”) ¶ 4; *id.* ¶ 32 (same); *see also id.* ¶¶ 9-16.

6. Section 8.16 provides that Tenet [REDACTED] Steward [REDACTED] [REDACTED] Ex. M, APA § 8.16 (emphasis added). Because CMS advanced amounts to the hospitals under the AAPP Program prior to Closing, and CMS may recoup (or may forgive) those amounts after Closing, Tenet agreed to [REDACTED] Steward for only the amounts [REDACTED] any given month or [REDACTED] [REDACTED] *Id.* (emphasis added).

7. On Steward’s view, it is entitled to reimbursement for amounts it “anticipates” repaying to CMS in the month it anticipates making those payments. The Applications set out Steward’s request to delay anticipated AAPP payments otherwise due to CMS [REDACTED] (October) and [REDACTED] (November) by [REDACTED]. Because Steward claims that it is entitled to

reimbursement for amounts as though they were paid in October, Steward cannot credibly argue these Applications are irrelevant. The Applications will show when Steward stopped anticipating making those payments, and the basis for such belief. Moreover, Section 8.16 explicitly requires Steward to provide [REDACTED] [REDACTED] reflecting its AAPP obligations to CMS. Nowhere in Steward's brief does it explain how producing a small set of five (or fewer) Applications would be unreasonable.

8. Steward falls back on its claim that “Sellers are not entitled to anything further” than the documents it handpicked—*i.e.*, documents that list the revised payment deadlines [REDACTED]. Opp. ¶ 32. Not so. Neither the CMS Demand Letters nor the Extended Repayment Schedule that Steward produced, *see* Defs.’ Mot. to Compel at Ex. F, say anything about *when* Steward began anticipating a delay in its AAPP obligations or *why* Steward applied for an extension. Indeed, in its opposition, Steward claims it submitted the Applications in October (Opp. at ¶ 4), but Tenet has no way to assess that assertion without the Applications. The Applications also will shed light on when Steward knew it would not make the repayments, notwithstanding Steward’s simultaneous and subsequent representations that it “anticipate[d]” CMS would recoup those amounts in October and November. *See* Defs.’ Mot. to Compel ¶¶ 4-5, 17 (collecting examples).

B. The Applications Are Relevant To Rebut Steward's Assertion That It Was Unable To Satisfy Its Obligations To CMS Because Of Tenet.

9. If there was any doubt about whether the Applications are relevant following Tenet's opening brief, there cannot be after Steward's opposition.

10. In its opposition, Steward blamed Tenet for missing its payment obligations to CMS, claiming it "applied for and received extensions" "*because* Sellers refused to reimburse Buyers for the same." Opp. ¶¶ 16, 27 (emphasis added). This is incredible. By its own admission in the Net Working Capital Award confirmation litigation, Steward already claimed and retained far more than the full benefit of its purported AAPP reimbursement rights (including the "anticipated" amounts that Steward has not paid) by attempting to offset over ██████████ Steward concedes it owes to Tenet against the alleged AAPP liability. *See* Defs.' Mot. to Compel ¶ 5 (collecting examples). Plaintiffs' blame is untethered from reality. Tenet must be permitted discovery to test why Steward told CMS (Tenet's largest ultimate customer) it was and is experiencing financial distress. If Steward blamed Tenet, that will be relevant to Tenet's damages, including for Steward's bad faith breach of Section 8.22.

C. The Applications Are Relevant To Understanding Steward’s Litigation-Driven Interpretation Of Section 8.22

11. Steward does not dispute that the evidence it produced on DPP shows that in the six months after signing the APA its business leaders all agreed: Section 8.22 requires Steward to pay Tenet 10/12th of the DPP Distributions at issue in this case.

12. The Applications will show why Steward’s litigation position contradicts its contemporaneous interpretation of Section 8.22: making the over [REDACTED] [REDACTED] DPP payment, just like the [REDACTED] AAPP payment, presented an “extreme” financial hardship to Steward. Steward argues that the Applications are not relevant to DPP because they do not bear on “the parties’ intent in drafting Section 8.22 of the APA in June 2021.” Opp. ¶ 35. But the extrinsic evidence relevant to the interpretation of Section 8.22 does not end the day the parties executed the APA (June 16, 2021). Nor does it end with the February 28, 2022 date in the December Stipulation. Steward itself produced documents related to DPP dated months later. Steward may not exceed the bounds of the December Stipulation when it wants and then demand strict enforcement of the same to avoid producing unhelpful documents.

D. The Applications Are Relevant To Refuting Steward's Sworn Representations That It Is [REDACTED]

13. Steward does not dispute that its Applications included a showing of “extreme” financial hardship. Instead, Steward argues the Applications are not relevant because they “do[] not” contradict Steward’s prior statements. Opp. ¶ 33. This is wrong. Steward cannot explain how its statements to a federal agency proving Steward’s inability to pay its AAPP debts are not in tension with its sworn interrogatory responses that Steward is [REDACTED]

[REDACTED] Defs.’ Mot. to Compel at Ex. J, Interrogatory No. 8.

14. Falling back further, Steward reraises its objection that Tenet’s [REDACTED] was not properly pled and is now moot. Opp. ¶ 34. This procedural objection is baseless and incorrect. Tenet’s [REDACTED] is not mooted simply because “the TSA has expired.” *Id.* Regardless of whether the TSA has expired, Steward still must pay for the services Tenet provided; Steward has not done so. Even setting the merits of that objection aside, Steward fails to explain why evidence contradicting Steward’s sworn position in this litigation is irrelevant.

II. STEWARD MAY NOT USE THE DECEMBER STIPULATION AS A SHIELD TO EXCLUDE DOCUMENTS IT CONCEALED.

15. The December Stipulation, which requires Steward to “produce records sufficient to show AAPP recoupments by CMS or payments by Buyers” does not preclude, but supports, production of the Applications.

16. According to Steward, Tenet “could have requested” the Applications, but didn’t. *Id.* ¶ 24. As a result, Steward argues, Tenet cannot now “change[] [its] mind about the scope of AAPP discovery.” *Id.* ¶ 22. Steward’s position is problematic for at least three reasons.

17. *First*, Steward ignores that none of the three categories of discovery in the December Stipulation include such specific limits on relevant documents. Intentionally so: the parties planned to (and did) negotiate search terms and targeted document collections after the Court entered the December Stipulation.

18. *Second*, Steward’s claim that Tenet “could have requested” the Applications is disingenuous. Tenet was not aware that Steward had filed any such Applications until it received Steward’s production on January 25th. Indeed, up through the entry of the December Stipulation, Steward repeatedly verified to Tenet and the Court that it could [REDACTED] and would pay (or had paid) the disputed [REDACTED] in October 2022.¹ Tenet cannot be expected to divine what Steward expressly denied.

¹ Ex. N (“INTERROGATORY NO. 27: List all anticipated AAPP Reimbursement Amounts[.] RESPONSE TO INTERROGATORY NO. 27: Plaintiffs’ identify ... [REDACTED] *for October 2022* (non-Hialeah), [REDACTED] for October 2022 (Hialeah), [REDACTED] for November 2022 (Hialeah).”) (emphasis added).

19. Steward’s only response is that in a footnote in an excel spreadsheet attached to the November AAPP Statement, Steward noted the “Oct 22 Beginning Balance and Total Offsets Received are based on amounts contained in Demand Letters received from CMS.” Opp. ¶ 24. Steward did not share those Demand Letters with Tenet until January 25, 2023. Regardless, as Steward tells it, this footnote in the November AAPP Statement that Steward submitted—specifically to seek reimbursement for the [REDACTED] it claimed it had paid in October—should have alerted Tenet that Steward had requested to extend its deadline to pay that amount by [REDACTED] *Id.* It does not.

20. The fact that CMS issued a Demand Letter to Steward provided no indication that Steward filed Applications for “extreme” financial hardship. It also says nothing about whether the so-called “*actual*” October AAPP obligation of over [REDACTED] was *ever actually paid*. Opp. at Ex. E (emphasis added). Instead, even with the caveat in the footnote, Steward’s position in its November AAPP Statement plainly claimed that the “*Oct-22 Actual AAPPs*” amounted to over [REDACTED]:

[REDACTED] > See Support Detail	[REDACTED]
Less: Oct-22 Estimated AAPPs	[REDACTED]
Amount due to / (from) Steward, Previous Month True-up	[REDACTED]

21. *Third*, Steward’s position undermines the purpose of the December Stipulation: to allow for an efficient and minimally-burdensome exchange of

information necessary to complete summary judgment briefing on the parties' DPP and AAPP disputes. Here, Tenet seeks only a handful of readily-identifiable documents that are directly relevant to both issues. Efficiency demands that Steward produce these documents now so the parties may proceed to summary judgment with the relevant materials.

CONCLUSION

For the foregoing reasons, and those set out in its Motion to Compel, Defendants respectfully request entry of the [Proposed] Order Granting Defendants' Motion to Compel.

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