IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

REV. XIU HUI "JOSEPH" JIANG,	)	
	)	
Plaintiff,	)	Case No. 4:15-cv-01008
	)	
v.	)	JURY TRIAL DEMANDED
	)	
TONYA LEVETTE PORTER, ET AL.,	)	
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE SNAP DEFENDANTS' MOTION TO RECONSIDER TWO RULINGS ON MOTION TO COMPEL DIRECTED TO THE SNAP DEFENDANTS

On June 27, 2016, this Court ordered the SNAP Defendants to comply with several of Plaintiffs' discovery requests by July 11, 2016. Doc. 131. In the early-morning hours of July 12, 2016—an hour after the deadline for complying with the Court's order had passed—the SNAP Defendants filed a motion to reconsider that order. *See* Doc. 132. As of this filing, the SNAP Defendants have not produced *any* of the documents or information directed by the order. They are therefore in clear contempt of the Court's order. The SNAP Defendants' motion to reconsider constitutes yet another frivolous attempt to evade their clear obligations under the Federal Rules—and this Court's Orders—and to obstruct discovery in this case. More than five months have passed since Plaintiff served his discovery requests on the SNAP Defendants, without receiving any meaningful response. Enough is enough. The Court should reject SNAP's latest gambit and promptly deny the Motion to Reconsider.

ARGUMENT

The SNAP Defendants' Motion to Reconsider rests largely on erroneous arguments that the Court has already rejected. The few new arguments that they do raise lack any plausible merit,

and most of them could have been raised during briefing on the Motion to Compel. All of their arguments fall far short of showing the manifest error and clear injustice required to justify reconsideration of this Court's plainly correct discovery order, Doc. 131.

Under Rule 54(b), a court may reconsider an interlocutory order to "correct any clearly or manifestly erroneous findings of fact or conclusions of law." *Bancorp Servs., L.L.C. v. Sun Life Assur. Co. of Canada*, No. 4:00-CV-1073-CEJ, 2011 WL 1599550, at *1 (E.D. Mo. Apr. 27, 2011) (quotation omitted). "A motion to reconsider under Rule 54(b), however, may not serve as a vehicle to identify facts or raise legal arguments which could have been, but were not, raised or adduced during the pendency of the motion of which reconsideration was sought." *Id.* (quotation omitted); *see also Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988) (explaining that motions for reconsideration "cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the" motion to be reconsidered, "[n]or should a motion for reconsideration serve as the occasion to tender new legal theories for the first time"). A court "should be loath to [reconsider its prior rulings] in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *Evans v. Contract Callers, Inc.*, No. 4:10-CV-2358-FRB, 2012 WL 234653, at *2 (E.D. Mo. Jan. 25, 2012) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988))). Nothing in the SNAP Defendants' Motion to Reconsider establishes "extraordinary circumstances," "clear error," or "manifest injustice." On the contrary, this Court's prior ruling was undeniably correct.

I. There Is No Basis for Reconsidering the Court's Ruling Regarding Communications with and Payments from Chackes, Carlson & Gorovsky.

In its June 27 Order, the Court ordered the SNAP Defendants to produce documents constituting or reflecting communications with and payments from attorneys at the law firm

Chackes, Carlson & Gorovsky ("Chackes Carlson"). Doc. 131, at 11-13. The Court agreed that these materials are relevant, because "the history of referrals and contributions between the lawyers of Chackes, Carlson & Gorovsky and SNAP . . . would give the SNAP defendants a financial incentive to participate in a conspiracy to secure plaintiff's conviction and to make false statements about plaintiff with reckless disregard for whether accusations against plaintiff were true." *Id.* at 11-12. The Court rejected the boilerplate objections interposed by the SNAP Defendants. *Id.* at 12.

In their Motion to Reconsider, the SNAP Defendants rehash their feeble argument that the requested materials have no relevance to this case. *See* Doc. 132, at 2-3. The Court has already rightly rejected this argument. *See* Doc. 131, at 11-13; *see also* Doc. 116, at 11-13 (Motion to Compel); Doc. 129, at 14-15 (Reply in Support of Motion to Compel). "A motion to reconsider should not be employed to relitigate old issues but rather to afford an opportunity for relief in extraordinary circumstances." *U.S. Energy Servs., Inc. v. U.S. Energy Savings Corp.*, Civ. No. 07-4628, 2008 WL 4287349, at *1 (D. Minn. Sept. 15, 2008) (quotation omitted). "A motion for reconsideration is not a means to rehash previous arguments . . . ." *Walker v. Segway Inc.*, Civ. No. 11-cv-382, 2013 WL 3104920, at *2 (D.N.H. June 18, 2013).

The SNAP Defendants inaccurately assert that the Court's Order rested on "a mistake of fact" stemming from a sentence in Plaintiff's Motion to Compel that was "simply untrue." Doc. 132, at 2. This argument lacks merit for at least four reasons. First, the sentence to which the SNAP Defendants object appeared in Plaintiff's Motion to Compel, yet they raised no objection to it in their Response. *See* Docs. 132, at 2; 116, at 11. Having had ample opportunity to raise this argument during the briefing on the Motion to Compel, they cannot raise it for the first time in a motion to reconsider. *See Bancorp Servs.*, 2011 WL 1599550, at *1; *Hagerman*, 839 F.2d at 414.

Second, the SNAP Defendants plainly mischaracterize the quotation from Plaintiff's Motion to Compel. The SNAP Defendants assert that Plaintiff misleadingly implied that Chackes Carlson had represented a party suing Plaintiff for the entirety of the ten-year period from 2005 until 2015. *See* Doc. 132, at 2. That is not correct. On page 11 of the Motion to Compel, Plaintiff noted that several entries in the SNAP Defendants' Redaction Log demonstrated that N.M.'s attorneys "had been extensively communicating with the SNAP Defendants about Plaintiff long before the filing of this lawsuit." Doc. 116, at 11 (citing Ex. 19 to Doc. 116, at 4, 10-11). All of these logged communications occurred after July 12, 2013. *See* Ex. 19 to Doc. 116, at 4, 10-11. In reference to these communications, Plaintiff stated that, "[a]t the time of the communications, that law firm was already pursuing a civil lawsuit based on false allegations against Fr. Jiang." Doc. 116, at 11. When read in this context, which the SNAP Defendants omit, Plaintiff's statement is indisputably true. Indeed, because the SNAP Defendants have refused to log any of their other communications with Chackes Carlson, Plaintiff does not know what other communications occurred, and whether those communications occurred before July 12, 2013. The only statements that he knows with certainty to have occurred are those logged by the SNAP Defendants, and all of those communications occurred after July 12, 2013.

Third, the SNAP Defendants' argument does not undermine the relevance of these materials. Past referrals, contributions, and communications between the SNAP Defendants and Chackes Carlson are highly relevant even if Chackes Carlson did not represent any person suing Plaintiff until July 12, 2013. It will be extremely relevant if, in prior cases, the SNAP Defendants have referred potential plaintiffs to Chackes Carlson and, in return, Chackes Carlson has made substantial payments to SNAP. *See* Doc. 116-18, at 6 (noting that such a history exists and that many observers have questioned the propriety of such an arrangement); *see also United States v.*

Gardiner, 463 F.3d 445, 457-58 (6th Cir. 2006) (holding that payments among co-conspirators and their associates supports the existence of a conspiracy). If such payments occurred in prior cases, they would give the SNAP Defendants a strong financial incentive to participate in a conspiracy against *Plaintiff*, because the history of referrals and contributions would suggest that such conduct could result in a significant payment from Chackes Carlson. Moreover, if a longstanding pattern of referrals and payments relates exclusively or primarily to referrals involving cases against Catholic priests, the pattern may have particular relevance to Plaintiff's claim that the Defendants targeted him based on his religion and/or religious vocation. Thus, the general pattern of referrals and payments—not simply the referrals and payments relating to Plaintiff—are plainly relevant to this case. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (explaining that relevant information "encompass[es] any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case"); *Carlton v. Union Pac. R.R. Co.*, No. 8:05-cv-293, 2006 WL 2220977, at *3 (D. Neb. Aug. 1, 2006) ("Discovery requests should be considered relevant if there is any possibility that the information sought is relevant to any issue in the case and should ordinarily be allowed, unless it is clear that the information sought can have no possible bearing on the subject matter of the action."). The Court correctly rejected the SNAP Defendants' relevancy arguments in its June 27 Order, and it should do so again here.

Fourth, the SNAP Defendants still have failed to provide any proper basis to conclude that Chackes Carlson did not represent N.M. prior to the filing of this case. The SNAP Defendants rely entirely on the self-serving, carefully couched assertions of their counsel in pleadings. *See* Doc. 132, at 2-3. Statements of counsel in a pleading are not evidence. *See, e.g., United States v. Hammer*, 3 F.3d 266, 271-72 (8th Cir. 1993) ("Statements of counsel are not evidence." (quotation

and brackets omitted)); *Travelers Property Cas. Co. v. Nat'l Union Ins. Co.*, 250 F.R.D. 421, 424 (W.D. Mo. 2008). The Court should deny the SNAP Defendants' Motion to Reconsider.

II. The Court Should Decline to Conduct a Redaction-by-Redaction *In Camera* Review Based on the SNAP Defendants' Boilerplate Objections.

The SNAP Defendants contend that they should not have to produce the materials that they withheld on the basis of a purported rape crisis center privilege, because they also interposed other objections to disclosing those materials. Doc. 132, at 3-4. The SNAP Defendants request that the Court review these materials *in camera* to determine whether the materials should be withheld on the basis of these objections. This request is extraordinary and should be rejected.

The objections on which the SNAP Defendants base this remarkable request are all boilerplate objections. *See generally* Exs. 12, 13, 14, and 15 to Doc. 116. The Court's June 27 Order explained, in no uncertain terms, that "[b]oilerplate objections are unacceptable." Doc. 131, at 13 (quoting *Nye v. Hartford Accident & Indemn. Co.*, Civ. No. 12-5028-JLV, 2013 WL 3107492, at *8 (D.S.D. June 18, 2013)). Moreover, citing Federal Rule of Civil Procedure 11(b), the Court explained that it would "not assume that defendants are withholding further documents or information on the basis of an asserted privilege or objection that are not already identified and described in their privilege log." *Id.* Nevertheless, despite this admonition, the SNAP Defendants now ask the Court to review their numerous redactions to determine *sua sponte* whether any of their boilerplate objections might justify each redaction.

The scope of this task would be extraordinary. A careful review of the SNAP Defendants' production reveals that at least 131 pages of the document production contain redactions, and the majority of those pages contain multiple redactions. For at least 51 pages, all or substantially all of the page is redacted. Moreover, the SNAP Defendants interposed at least eight separate boilerplate objections to most of the Requests for Production. *See, e.g.*, Doc. 116-13, at 2. The

SNAP Defendants have not identified the specific redactions that they wish the Court to review, nor have they specified which boilerplate objections they wish the Court to consider. *See* Doc. 132, at 3-4. In fact, despite interposing 131 pages of redactions, the SNAP Defendants address only two redactions in their Motion to Reconsider, which they do not identify by Bates number. *See* Doc. 132 at 4. The privacy concerns belatedly raised by the SNAP Defendants as to these two redactions are fully addressed by the stipulated protective order. The Court should decline the SNAP Defendants' invitation to perform this daunting and wholly unnecessary task.

Moreover, the SNAP Defendants have not established a legal basis for any *in camera* review, let alone the wide-ranging and burdensome review that they propose. "*In camera* review is generally disfavored." *Diamond State Ins. Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 700 (D. Nev. 1994). "*In camera review* is not to be used as a substitute for a party's obligation to justify its withholding of documents." *Campero USA Corp. v. ADS Foodservice, LLC*, 916 F. Supp.2d 1284, 1288 n.4 (S.D. Fla. 2012) (quotation omitted). "Courts make a principled attempt to try to avoid *ex parte* proceedings, including *in camera* review of documents, as it is fundamentally contrary to our adversarial system of dispute resolution. *In camera* review puts the Court in the undesirable position of attempting to think of arguments that the excluded counsel might make if he or she had access to the documents in question . . . ." *Id.* "Such a procedure is appropriate only after the burdened party has submitted detailed affidavits and other evidence to the extent possible." *Id.*; *see also Diamond State*, 157 F.R.D. at 700.

Here, the SNAP Defendants have sought to use *in camera* review as a substitute for providing specific explanations why certain objections justify withholding particular documents and information. *See* Doc. 132, at 3-4. They also have failed to present any evidence supporting the need of *in camera* review or the conclusion that such review will reveal any merit to their

boilerplate objections. *See Diamond State*, 157 F.R.D. at 700 (denying *in camera* review because party seeking review had not "submitted the required affidavits or other sufficient evidence supporting its claim of privilege and protection"). Thus, the SNAP Defendants have failed to establish a legal basis for *in camera* review. "Under these circumstances, granting an *in camera* review would be tantamount to permitting [the SNAP Defendants] to shirk their duty of justify the withholding of the documents. *In camera* review is therefore inappropriate." *Id.* The Court should deny the SNAP Defendants' Motion to Reconsider.

Finally, if burdensome *in camera* review were appropriate here—which it is not—then the SNAP Defendants could have proposed such an approach in their Response to the Motion to Compel. They did not do so. *See* Doc. 124. They may not raise new arguments in their Motion to Reconsider that they could have raised previously. *See Bancorp Servs.*, 2011 WL 1599550, at *1; *Hagerman*, 839 F.2d at 414. The Court should deny the Motion to Reconsider.

III. There Is No Basis for Reconsidering the Court's Ruling That the Rape-Crisis Center Protection Under Missouri Law Does Not Apply in This Case.

The SNAP Defendants argue that the Court erred when it concluded that the rape crisis center protection under RSMo. § 455.003 does not create a state-law evidentiary privilege, and thus that the statute provides no basis for recognizing a new privilege under Federal Rule of Evidence 501. *See* Doc. 131, at 6-11. Relying primarily on *State ex rel. Hope House, Inc. v. Merrigan*, 133 S.W.3d 44 (Mo. banc 2004), which considered a closely analogous Missouri confidentiality statute, the Court concluded that "section 455.003 does not establish a legally recognized evidentiary privilege," Doc. 131 at 9, but rather a "confidentiality policy," *id.* at 8. And because § 455.003 does not create a *privilege*, there is no basis for applying the statute in federal court. *Id.* at 9 ("Accordingly, section 455.003 does not provide a basis for the Court to recognize a new federal privilege."). This analysis was plainly correct.

The SNAP Defendants' response to this analysis misunderstands the relevance of *Hope House*. The SNAP Defendants do not dispute that, under *Hope House*, § 455.003 does not create an evidentiary privilege but rather reflects a confidentiality policy. *See* Doc. 132, at 4-6. Instead, without citing any relevant authority, they seemingly contend that the fact that the statute does not create a privilege somehow strengthens their claim to be exempt from almost all discovery in this case. *See id.* This position overlooks the critical fact that, if § 455.003 does not create a *privilege*, then there is no basis for applying it in federal court at all. *See, e.g.*, *Pearson v. Miller*, 211 F.3d 57, 68 (3d Cir. 2000) (holding that state statutes did not justify withholding documents in federal court where "[t]he relevant provisions contained therein speak primarily of *confidentiality*, not privilege"); *Martin v. Lamb*, 122 F.R.D. 143, 147 (W.D.N.Y. 1988) ("Because the New York Legislature did not create a privilege, and because there is no federal analog to [the New York statute prescribing confidentiality for certain documents], the only limitation on disclosure in this action is the relevancy criterion of Fed. R. Civ. P. 26(b)(1)."); *see also Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1205 (9th Cir. 1975) (compelling disclosure of records because "[t]he records are confidential but not privileged"). "Fed. R. Civ. P. 26(b)(1) excludes privileged information from the scope of discovery, but does not preclude from discovery information that is confidential, but not privileged." *Richardson v. Sexual Assault/Spouse Abuse Research Ctr., Inc.*, 270 F.R.D. 223, 227 (D. Md. 2010); *see also DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 682 (D. Kan. 2004) ("[I]nformation and documents are not shielded from discovery merely because they are confidential."). Because the SNAP Defendants do not dispute the fact that § 455.003 does not create an evidentiary privilege, they have failed to present any basis for the Court to revisit its thorough analysis in the June 27 Order. *See Pearson*, 211 F.3d at 68; *Martin*, 122 F.R.D. at 147; *Richardson*, 270 F.R.D. at 227.

Moreover, any confidentiality interests underlying § 455.003 can be fully implemented by production pursuant to the Protective Order entered in this case, to which the SNAP Defendants stipulated, Doc. 125. *See Pearson*, 211 F.3d at 69 (declining to implement state confidentiality statutes in federal court, and noting "that a far more appropriate mechanism exists for protecting the legitimate interests at stake: namely, a Rule 26(c) protective order"); *Bell v. Lombardi*, No. 4:14-cv-0027-CEJ, 2015 WL 402084, at *4 (E.D. Mo. Jan. 28, 2015) (acknowledging the state's "concern about producing sensitive information" deemed confidential under Missouri statute, but concluding that the "privacy and security interests may be protected by a protective order under Rule 26(c)"); *see also Virmani v. Novant Health Inc.*, 259 F.3d 284, 287 n.4 (4th Cir. 2001) ("There is an important distinction between privilege and protection of documents, the former operating to shield the documents from production in the first instance, with the latter operating to preserve confidentiality when produced. An appropriate protective order can alleviate problems and concerns regarding both confidentiality and scope of the discovery material produced in a particular case.").

In addition, even if § 455.003 were to create a state-law privilege, Plaintiff has identified numerous important factors that strongly counsel against recognizing such a privilege under Federal Rule of Evidence 501. *See* Doc. 104, at 4-9; Doc. 112, at 4-6; Doc. 116, at 10-11; Doc. 129, at 2-5; *see also* Doc. 122, at 3-7 (Order overruling N.M.'s assertions of purported rape crisis center privilege). The SNAP Defendants have never directly addressed any of these arguments, let alone rebutted them. Thus, even if § 455.003 did create a state-law privilege, it would not apply in this case, and the arguments contained in the Motion to Reconsider would be moot. The Court should deny the SNAP Defendants' Motion to Reconsider.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny the SNAP Defendants' Motion to Reconsider, Doc. 132.

Dated: July 12, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via the Court's electronic-filing system, on July 12, 2016, on:

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