

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 5899

SOUTHEAST ANESTHESIOLOGY
CONSULTANTS, PLLC; AMERICAN
ANESTHESIOLOGY OF THE
SOUTHEAST, PLLC; MEDNAX
SERVICES, INC.; and RUSSELL A.
SAUDER, M.D., M.B.A.,

Plaintiffs,

v.

THE CHARLOTTE-
MECKLENBURG HOSPITAL
AUTHORITY, d/b/a CAROLINAS
HEALTHCARE SYSTEM and d/b/a
ATRIUM HEALTH; THOMAS M.
WHERRY, M.D.; TOTAL
ANESTHESIA SOLUTIONS, LLC;
and SCOPE ANESTHESIA OF
NORTH CAROLINA, PLLC,

Defendants.

**ORDER ON DEFENDANT'S MOTION
TO ESTABLISH BRIEFING
SCHEDULE AND HEARING DATE
FOR PLAINTIFFS' MOTION FOR
INJUNCTIVE RELIEF
AND NOTICE OF HEARING**

1. THIS MATTER is before the Court on Defendant Charlotte-Mecklenburg Hospital Authority's ("Atrium") motion to establish a briefing schedule and set a hearing date for Plaintiffs' motion for temporary restraining order or preliminary injunction (the "Scheduling Motion") filed on May 13, 2018. (ECF No. 27.)

2. On May 11, 2018, Plaintiffs Southeast Anesthesiology Consultants, PLLC ("SAC"), American Anesthesiology of the Southeast, PLLC ("AAS"), and Mednax Services, Inc. ("Mednax") (collectively "Plaintiffs"), but not Plaintiff Russell A. Sauder, M.D., M.B.A., filed a Motion for Temporary Restraining Order and/or Preliminary Injunction (the "TRO Motion"). (ECF No. 17.)

3. The TRO Motion asserts that SAC is party to professional service contracts with Atrium (the “Atrium Agreements”) whereby SAC provides exclusive anesthesiology services at various Atrium facilities. (Pls.’ Mot. TRO and/or Prelim. Inj. ¶ 1, ECF No. 17 [“TRO Mot.”].) The TRO Motion further asserts that Mednax provides management services to SAC. (TRO Mot. ¶ 1.)

4. The TRO Motion states that Atrium represented to SAC that Defendant Thomas M. Wherry, M.D. (“Wherry”) and his company Total Anesthesia Solutions, LLC (“Total Anesthesia”) had been retained to evaluate anesthesiology services at Atrium facilities to assist Atrium and SAC in negotiating the renewal of the Atrium Agreements. (TRO Mot. ¶ 3.) The TRO Motion represents that, in reliance on confidentiality provisions contained in the Atrium Agreements, SAC and Mednax shared their confidential, proprietary, and trade secret information with Wherry and Total Anesthesia to assist Wherry and Total Anesthesia in evaluating anesthesiology services at Atrium facilities. (TRO Mot. ¶¶ 4–5.)

5. The TRO Motion represents that, on January 15, 2018, Atrium informed SAC that Atrium intended to terminate the Atrium Agreements, effective June 30, 2018. (TRO Mot. ¶ 6.) The TRO Motion represents that Atrium instead plans to contract with Wherry’s newly formed company, Defendant Scope Anesthesia of North Carolina, PLLC (“Scope”) (collectively, with Wherry and Total Anesthesia, the “Wherry Defendants”). (TRO Mot. ¶ 10, 14.) Plaintiffs contend that the Wherry Defendants used Plaintiffs’ confidential and trade secret information to compete with Plaintiffs for the service contracts with Atrium in violation of the Atrium Agreements’

confidentiality provision. (TRO Mot. ¶¶ 8–11.) Plaintiffs further contend that the Wherry Defendants are acting in violation of the Atrium Agreements’ non-solicitation provision by improperly soliciting SAC physicians. (TRO Mot. ¶¶ 11–13.)

6. Plaintiffs filed the TRO Motion requesting that the Court grant a temporary restraining order and a preliminary injunction that enjoins the Wherry Defendants from providing anesthesiology services at certain Atrium facilities. (TRO Mot. ¶ 15a–b.) The TRO Motion further seeks to enjoin all Defendants from (1) using or sharing Plaintiffs’ confidential information, (2) encouraging, enticing, soliciting, or hiring SAC physicians to join any competing practice, or (3) claiming that a public health crisis requires that SAC physicians be permitted to work for Defendants. (TRO Mot. ¶ 15c–e.)

7. On May 13, 2018, Atrium filed the Scheduling Motion requesting that the Court set a deadline of May 25, 2018 for Defendants to file their opposition to the TRO Motion and a deadline of May 31, 2018 for Plaintiffs to submit a reply brief. (Mot. Atrium Health to Establish Briefing Schedule and Hearing Date for Pls.’ Mot. TRO and/or Prelim. Inj. 1, ECF No. 27 [“Scheduling Mot.”].) The Scheduling Motion requests that a hearing be set for the week of June 4, 2018, or as soon thereafter as the Court’s schedule permits. (Scheduling Mot. 1.)

8. The Scheduling Motion represents that Defendants’ proposed schedule will provide Plaintiffs with prompt consideration of the TRO Motion while allowing Defendants adequate time to assess and respond to Plaintiffs’ TRO Motion and supporting affidavits. (Scheduling Mot. ¶ 2.) Defendants assert that Plaintiffs have

known since January 15, 2018 that Atrium intended to terminate the Atrium Agreements but has waited nearly four months to seek injunctive relief. (Scheduling Mot. ¶ 8.) Defendants further argue that, contrary to Plaintiffs' assertions, the record does not reveal a single instance in which Scope has hired Plaintiffs' employees and that Plaintiffs' basis for its request that the Wherry Defendants be enjoined from entering a service contract with Atrium is not recognized under North Carolina law. (Scheduling Mot. ¶¶ 6, 9–12.)

9. Plaintiffs filed a response to the Scheduling Motion on May 14, 2018, opposing Atrium's proposed schedule. (ECF No. 30.) Plaintiffs represent that the imminent takeover of the Atrium Agreements by Scope on July 1, 2018, along with Defendants' misappropriation of Plaintiffs' trade secrets and improper solicitation of SAC physicians, require that the TRO Motion be heard as soon as possible, preferably in the present week, with a preliminary injunction hearing within ten days of the Court's ruling on the TRO Motion. (Pls.' Resp. Br. Opp'n Defs.' Proposed Briefing Periods 3–4 ["Pls.' Br. Opp'n"].)

10. A Court may properly grant a temporary restraining order where "it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition." N.C. Gen. Stat. § 1A-1, Rule 65(b). Notwithstanding Plaintiffs' assertions that its physicians and employees are presently being solicited by Defendants, Plaintiffs' submissions to the Court disclose that such alleged misconduct has occurred since at least "early to mid-March

2018” (Aff. of William C. Buhrman, M.D. ¶ 13, ECF No. 21.). Yet Plaintiffs waited several months to file the TRO Motion. The Court concludes, in its discretion, that the alleged harm to Plaintiffs is not so immediate that the motion cannot be briefed and heard on an expedited basis prior to the Atrium Agreements’ termination on June 30, 2018.

11. THEREFORE, it is hereby ORDERED that the schedule for Plaintiffs’ TRO Motion will proceed as follows:

- A. Defendants’ response in opposition to the TRO Motion, including their brief and any supporting materials, shall be filed with the Court by 5:00 p.m. on May 30, 2018.
- B. Plaintiffs’ reply brief will shall be filed with the Court by 5:00 p.m. on June 12, 2018.
- C. The Court will conduct a hearing on the Motion on June 18, 2018 at 10:00 a.m. at the North Carolina Business Court, 1834 Wake Forest Road, Worrell Professional Center, Room 3205, Winston-Salem, North Carolina 27109.

This the 15th day of May, 2018.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases