EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-60447-CIV-DIMITROULEAS/SNOW

ROBERT PALMISANO

Plaintiff,

v.

PARAGON 28, INC.,

Defendant.

_____/

ORDER

THIS CAUSE is before the Court on Robert Palmisano's and Wright Medical Technology, Inc.'s (Movants) Motion for Reconsideration/Clarification and Incorporated Memorandum of Law. (ECF No. 29, 32)

Factual Background

On April 7, 2021, this Court entered an Order denying Movants' motions for protective order and motions to quash the deposition subpoenas of Robert Palmisano. (ECF No. 27) Movants filed a Motion for Reconsideration/Clarification and Incorporated Memorandum of Law on April 21, 2021. (ECF No. 29) the Court issues this Order prior to full briefing, finding that no response is required for resolution of this Motion.

Discussion

The purpose of a motion for reconsideration is "to correct manifest errors of law or fact or to present newly discovered evidence." Z.K. Marine Inc. v. M/V Archigetis, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992). There are "three major grounds that justify reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice." Association for Disabled Americans, Inc. v. Amoco Oil Company, 211 F.R.D. 457, 477 (S.D. Fla. 2002) (internal citations omitted). It is within the Court's discretion to reconsider its order. See Am. Home Assurance Co. v. Glenn Estess & Assoc. Inc., 763 F.2d 1237, 1238-39 (11th Cir 1985). The Court finds that Movants fail to satisfy any of the requirements for reconsideration or clarification of this Court's prior Order.

I. The Court's factual findings do not warrant reconsideration

Movants argue that the Court mischaracterized the agreement between Wright and Paragon when it stated that the "parties agreed to defer the deposition until after Paragon deposed Wright Medical's Rule 30(b)(6) representative, Patrick Fisher." (ECF No. 29 at 5) According to Movants, the parties agreed that Paragon could re-notice Palmisano's deposition if, after deposing Wright's 30(b)(6) and 30(b)(1) witnesses and reviewing Wright's and Palmisano's documents, Paragon could not obtain discovery, and Palmisano possessed unique, firsthand knowledge. (ECF No. 29 at 2)

First, the Court finds that the facts were correctly characterized. The Court stated that the parties agreed to defer the deposition until after Paragon sought the

information from Wright's Rule 30(b)(6) representative, and Paragon would re-notice the deposition if it believed that Palmisano still possessed personal, unique information. (ECF No. 27 at 2) The Court also noted that Paragon's previous document requests were futile, and Paragon already had deposed more than 25 Wright witnesses. (ECF No. 27 at 2–3, 9) Because the Rule 30(b)(6) deposition was conducted immediately before the discovery deadline, the Court found that Movants should have expected the subpoena to be re-noticed after Wright's 30(b)(6) witness was unable to answer relevant questions. (ECF No. 27 at 2–5) Accordingly, the Court's understanding of the agreement was consistent with that of the Movants: once Paragon deposed Wright's witnesses, including its Rule 30(b)(6) witness, and reviewed relevant documents, it would re-notice the deposition subpoena if it believed Palmisano had unique, personal knowledge.

Even if the Court were to agree with Movants' characterization, it is of no moment. Movants argue that the misunderstanding affected the Court's finding that eight-days' notice was reasonable. (ECF No. 29 at 6) However, Movant's prior notice of the possibility that Paragon would re-notice Palmisano's deposition was one factor, among others, that made the timeframe reasonable. The Court also noted that the subpoena did not require the production of documents and was made promptly following Fisher's deposition. (ECF No. 27 at 4–5) Accordingly, the Court's analysis would have remained the same.

II. The Court's application of the apex doctrine does not warrant reconsideration

Under the apex doctrine, courts generally restrict the deposition of high-ranking executives unless: (1) the executive has unique, personal knowledge of relevant facts, and (2) other less intrusive means of discovery have been exhausted without success. Noveshen v. Bridgewater Assocs., LP, No. 13-61535-CIV, 2016 WL 536579, at *1 (S.D. Fla. Feb. 3, 2016).

a. Palmisano likely has unique, personal knowledge

Movants cite the Court's footnote at page seven to argue that Palmisano does not possess unique, personal knowledge. (ECF No. 29 at 7) Movants argue that even if Palmisano was speaking "off the cuff," his statements most likely were based upon information provided by other Wright employees who were present during the earnings call. (ECF No. 29 at 6–7) Movants' contention, however, is belied by testimony from Wright's Rule 30(b)(6) representative who, when asked whether he knew where Palmisano got the information, said "I don't know." (ECF No. 24-2 at 26) Moreover, Movants' primary arguments in their Motions were that Palmisano relied upon a script, and Wright's Rule 30(b)(6) representative answered all relevant questions. (ECF No. 1 at 7) (ECF No. 4 at 9–10) The evidence shows that Palmisano went off-script, and Wright's representative did not know the basis or source for those statements. (ECF No. 27 at 7) Accordingly, the Court properly founds that Palmisano may possess unique, personal knowledge about statements he made in the earnings reports.

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