

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN RE: MEDICAL INFORMATICS)
ENGINEERING, INC., CUSTOMER) CAUSE NO. 3:15-MD-2667
DATA SECURITY BREACH)
LITIGATION (MDL 2667))
_____)
This Document Relates to All Cases)
_____)

CASE MANAGEMENT ORDER NO. 1

This order shall control this MDL proceeding unless and until modified by further order:

I. Transfer and Consolidation

- A. The terms of this order apply to the actions that are part of the MDL proceeding and to all other cases that become part of this proceeding by virtue of being instituted in, removed to, or transferred to this court.
- B. Except as otherwise provided in this case management order, the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Northern District of Indiana govern all procedural matters in this MDL proceeding.

II. Stipulations Regarding Service of Process

Without conceding that they are proper parties to this litigation and without waiving any available defenses as to lack of jurisdiction or improper

venue, the defendant agrees that service process under Federal Rule of Civil Procedure 5(b)(2) can be sent by mail to:

Medical Informatics Engineering, Inc.
c/o Matt Hohman, General Counsel
6302 Constitution Drive
Fort Wayne, IN 46804

III. Cases Directly Filed in the Northern District of Indiana

- A. To eliminate delays associated with transfer of cases from other federal district courts to this court and to promote judicial efficiency, any plaintiff whose case would be subject to transfer to MDL No. 2667 under 28 U.S.C. § 1407 may file the case directly in the Northern District of Indiana.
- B. For a case to be considered a tag-along action and transferred to MDL No. 2667, the plaintiff shall file, in addition to the complaint, a separate “notice of related action” pursuant to Local Rule 40-1(d).
- C. When an action is properly included in MDL No. 2667, whether transferred to or originally filed in this court, the clerk of court shall make an appropriate entry in the master docket case file.
- D. No party waives the right to object to improper consolidation of an action in MDL No. 2667. See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). Any complaint filed directly in this court from this point forward must include a

venue statement, for example, “The venue for this action lies in the Eastern District of Tennessee.” Each defendant shall admit or deny the venue statement in its answer; an answer that denies the venue statement shall set forth an alternate venue statement.

- E. Inclusion of an action in MDL No. 2667 won’t be deemed a determination that jurisdiction or venue is proper in this court.
- F. Inclusion of an action in MDL No. 2667 won’t affect the choice of law to be applied.
- G. Upon completion of all pretrial proceedings in a case filed directly in this court, I will, under 28 U.S.C. § 1404(a), transfer the case to a federal district court of proper venue, 28 U.S.C. § 1391, unless the parties expressly agree to an alternate venue. If the parties expressly agree on a venue, I intend to proceed consistent with that understanding.

IV. ECF Filings

- A. All filings should comply with this court’s ECF Administrative Procedures Manual, and service through Electronic Case Filing shall be deemed sufficient with no additional service required, with the exception of new complaints and subpoenae, which shall be served in accordance with Section II of this order and with the Federal Rules fo Civil Procedure.

B. I expect all attorneys who have filed appearances in this proceeding, or in any tag-along cases to come, to comply with this court's local rules and to abide by the terms of the case management orders and protective orders. I also expect conformance to Seventh Circuit Civility Standards. Any attorney who will be active in this litigation and expects to be served with copies of the court filings in the MDL docket must register as an e-filer with this court's CM/ECF system.

V. State Court Litigation

The parties report that no MIE data breach cases pend in state courts. If the parties learn of such a case, they shall notify me, so I can offer coordination with the state court.

VI. Protective Order

The parties have tendered a proposed protective order relating to the production, disclosure, and use of confidential information. Magistrate Judge Collins is reviewing that order. Once such an order has been approved, it will be entered on the master docket, 3:15-MD-2667, and will be placed on the court's web page at

www.innd.uscourts.gov/judges/RLM/MDL2667.

VII. Claims of Privilege or Protection as Work Product: Inadvertent Production of Documents

A. **Private and Privileged Information.** Pursuant to Federal Rule of Evidence 502(d) and Federal Rule of Civil Procedure 26(b)(5)(B), the production or disclosure of inadvertently produced material — meaning any discovery material made in connection with this case that a party claims was inadvertently produced or disclosed and shouldn't have been produced or disclosed based on privacy, attorney-client and/or work product privilege, or HIPPA — won't be deemed to be a waiver in whole or in part of privacy, privilege, HIPPA, or any other protections to which the party would have been entitled had the affected material not inadvertently been disclosed, either as to the specific information and/or documents disclosed or as to any other information and/or documents in this MDL proceeding and in any other federal or state proceeding.

In the event of a claimed inadvertent disclosure, these procedures shall be followed:

1. The party producing the document shall notify lead counsel for the opposing party in writing within a reasonable period of time from the discovery of the inadvertent production by specifically identifying the affected material;
2. If the producing party requests the return of any inadvertently produced material, those to whom the request is made shall immediately return to the producing party all

copies of the affected material within their possession, custody, or control — including all copies in the possession of experts, consultants, or others to whom the affected material was provided.

3. All notes or other work product of the receiving party that reflect the contents of inadvertently produced material shall be destroyed, and the returned or destroyed material shall be deleted from any litigation-support or other database.
4. If, after being notified of the inadvertent disclosure, the receiving party promptly disputes in writing the claim of privilege, the party must promptly return, sequester, or destroy all copies of the inadvertently produced material in accordance with Federal Rule of Civil Procedure 26(b)(5)(B), as well as any notes or other work product of the receiving party reflecting the contents of such materials and may promptly present the information, including the inadvertently produced material, to the court under seal for a determination of the claim of privilege.
5. Pending resolution of the matter by the court, no use or disclosure shall be made of the inadvertently produced material for any purpose, including, but not limited to, during depositions or at trial.

6. If the court decides that the inadvertently produced material is privileged, the receiving party shall promptly comply with the immediately preceding provisions of this paragraph or any other directives the court might issue. If the court decides that the inadvertently produced material is not privileged, the material is to be returned immediately to the receiving party.
7. If the privilege or privacy at issue can be protected by redacting that information, the producing party shall provide redacted discovery material to replace the inadvertently disclosed documents within five business days after requesting the return of any such discovery.

B. **Confidential Information.** The production, disclosure, and use of confidential information will be governed by the protective order to be entered after review of the parties' proposed order. In the event of a claimed inadvertent disclosure of any confidential information, the procedures which must be followed will be set out in that order.

VIII. Electronic Discovery

The parties have conferred on document preservation. The defendant sent plaintiffs' interim lead counsel a written confirmation about document preservation, and plaintiffs' interim lead counsel sent counsel for defendant a

proposed order on electronic discovery and an agreement on a document production format that is search-capable. The parties are conferring about that order and are also conferring about a privilege log and redaction protocol. The parties anticipate submitting a proposed order to the court on these issues.

IX. Discovery and Case Management Schedule

A. **Topics of Discovery.** The parties anticipate discovery might be sought on these topics:

1. MIE's insurance coverage, financial position, and expenses associated with the breach response.
2. NoMoreClipboard, LLC's insurance coverage, financial position, and expenses associated with the breach response.
3. MIE's relationship with NoMoreClipboard, and NoMoreClipboard's involvement in the breach.
4. The structure of MIE's computer networks and data security controls before the breach, currently, and those to be implemented in the future.
5. Where, how, and when the breach occurred.
6. MIE's investigation and analysis of the breach and its causes.

7. The scope and residency of individuals affected by the breach.
8. The scope and location of MIE's and NoMoreClipboard's clients affected by the breach.
9. MIE's and NoMoreClipboard's relationship and contractual agreements with their clients.
10. MIE's knowledge of potential problems with its security before the breach.
11. MIE's discovery of the data breach, and its decision regarding when and how to notify the public of the breach.
12. MIE's and NoMoreClipboard's publicly stated privacy policies before the breach.
13. The extent to which MIE's practices adhered to or diverged from its publicly stated policies and representations, and from "best practices."
14. Whether the stolen data has been misused by unauthorized individuals.
15. The extent of credit monitoring services claimed by putative class members.
16. MIE's communications with individual putative class members.
17. Damages.

18. Facts regarding the plaintiffs' interactions with or relationship to the defendant.
19. Facts regarding the plaintiffs' interactions with or relationship with the defendant's customers.
20. Whether and to what extent plaintiffs' personal information was exposed or accessed by unauthorized parties.
21. The causal link, if any, between exposure or access of plaintiffs' information and harm and damages.
22. Facts regarding other actors' culpable conduct and its impact on plaintiffs.
23. Any harm suffered and/or damages incurred by plaintiffs.

B. **Sequencing of Discovery.** The court declines to formally sequence discovery, but in the interest of reducing expenses, stays discovery until resolution of an anticipated dismissal motion. The anticipated class certification process will begin shortly after the commencement of discovery, so the court expects (but doesn't require) that most of the early discovery will focus on matters pertinent to class certification.

C. **Changes to Discovery Limitations.**

1. **Depositions.** Both sides expect that the Rule 30(a)(2)(A) ten-deposition limit will be needed, but until initial disclosures are made, neither can say how many. The case

management order addresses this by requiring the parties to file, by May 6, 2016 — four weeks after the Rule 26(a)(1) disclosures — what depositions each intends to take. Based on that information, I will set a limit on the number of depositions to be taken. I don't expect to allow depositions to exceed the seven-hour limit in Rule 30(a)(2)(A), but will consider requests to extend the time for specific depositions.

2. **Interrogatories.** Both sides report that more than 25 interrogatories per side will be needed, but neither is able to say how much more they expect. They should include their proposed interrogatory limits in the May 6, 2016 submission, and I will set a limit.
3. **Requests for Admission.** The plaintiffs object to any limit on requests for admission; in the interests of an orderly discovery process, the court believes that a limit is appropriate, with the parties free to request (with supporting reasons) leave to file more. The defendant seeks a limit of 30 requests, with the plaintiffs limited to 30 in all, and the defendant entitled to 30 per individual plaintiff — an approach that seems very inequitable. The court limits the plaintiffs, collectively, to 50 requests for admission, and

the defendant to 5 requests for each named plaintiff, and 25 requests to the plaintiffs as a group (through plaintiffs' lead counsel).

D. **Discovery and Case Management Schedule.** The MDL docket shall proceed as follows:

- By **February 3, 2016:** Applications and/or recommendations for plaintiff lead and liaison counsel positions must be filed in 3:15-MD-2667.
- By **February 20, 2016:**
 - The defendant provides insurance information and a summary describing how the intrusion occurred and the steps taken by defendant to resolve it; and
 - Parties file proposed document preservation order, ESI protocol and protective order, and any necessary initial and/or amended Rule 26(f) disclosures.
- By **March 22, 2016:** Plaintiffs file consolidated master complaint.
- By **April 8, 2016:** Parties exchange initial disclosures under Rule 26(a)(1).
- By **May 6, 2016:** Plaintiffs and defendant file their respective lists of proposed depositions and proposed limits on interrogatories.

- By **May 24, 2016**: Defendant answers or otherwise responds to consolidated master complaint.
- By **June 23, 2016**: Plaintiffs respond to dismissal motion, if any.¹
- By **July 13, 2016**: Defendant files reply in support of its dismissal motion, if any.
- **September 6, 2016**²: Discovery begins.
- **September 30, 2016**: Plaintiffs' deadline to amend pleadings or join parties.
- **October 31, 2016**:
 - Defendant's deadline to respond to any motion to amend or join parties.
 - Deadline for commencement of any third-party actions.
- **January 4, 2017**: Deadline for plaintiffs to file motion for class certification under Fed. R. Civ. P. 23 and Local Rule 23-1 and to provide any class certification expert reports.

¹ This assumes the defendant filed a dismissal motion, as it presently expects to do. If, for some reason, no such motion is filed, I will adjust this scheduling order.

² This date assumes that I have heard argument and ruled on any dismissal motion by the end of August, as I expect to do. Otherwise, I will adjust this scheduling order.

- **February 1, 2017:** Deadline for depositions of any plaintiffs' class certification experts.
- **March 1, 2017:** Deadline for defendant to file response to plaintiffs' motion for class certification and to provide any class certification expert reports.
- **March 29, 2017:** Deadline for depositions of any defendant's class certification experts.
- **April 26, 2017:** Deadline for plaintiffs to file reply in support of class certification motion.
- **September 26, 2017:** Fact discovery closes.
- By **October 10, 2017:** Simultaneous exchange of expert reports for dispositive motions and trial (parties to schedule depositions).
- By **November 21, 2017:** Simultaneous exchange of expert rebuttal reports for dispositive motions and trial.
- **January 3, 2018:** Expert discovery closes.
- **January 31, 2018:** Deadline for dispositive motions.
- **February 28, 2018:** Deadline for responses to dispositive motions.
- **March 14, 2018:** Deadline for replies to dispositive motions.

X. Settlement/Appointment of a Mediator

The parties believe it is in their mutual interest to initiate early resolution of this action and have engaged in several conversations to that end. Interim lead counsel is working with MIE's counsel to obtain insurance information, financial information, and a narrative about the breach, all of which will significantly inform the possibility of an early resolution to this case. Interim lead counsel and MIE's counsel have exchanged the names of potential mediators and anticipate a mediation date shortly after the consolidated master complaint is filed on or before March 22, 2016.

XI. Structure of Leadership for Plaintiffs' Counsel

The order naming lead and liaison counsel will address the structure of leadership for the plaintiffs' counsel.

SO ORDERED.

ENTERED: February 2, 2016

/s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court