

19TH JUDICIAL DISTRICT COURT  
FOR THE PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA

NO. 621271

SECTION 22

CLIENT NETWORK SERVICES, INC.

VERSUS

STATE OF LOUISIANA; STATE, DEPARTMENT OF HEALTH AND HOSPITALS;  
KATHY H. KLIEBERT, in Her Capacity as Secretary, Department of Health and Hospitals;  
STATE, DIVISION OF ADMINISTRATION, OFFICE OF STATE PURCHASING;  
KRISTY H. NICHOLS, in Her Capacity as Commissioner of Administration; SANDRA G.  
GILLEN, in Her Capacity as Director of State Purchasing; THE HONORABLE BOBBY  
JINDAL, in his Capacity as Governor, State of Louisiana

FILED: \_\_\_\_\_

DEPUTY CLERK

**MEMORANDUM IN SUPPORT OF  
MOTION TO CONDUCT DISCOVERY REGARDING  
CERTAIN ACTIVITIES OF THE AG'S INVESTIGATOR**

FILED  
EAST BATON ROUGE PARISH, LA  
23 MAY 22 PM 2:58

DEPUTY CLERK OF COURT

Client Network Services, Inc. ("CNSI") submits this memorandum in support of its motion for an order allowing it to take the deposition of the investigator of the State of Louisiana Attorney General's Office (the "AG") – Scott Bailey – and to conduct other discovery as to Bailey's tampering with a witness and the evidence in this case.

**I. INTRODUCTION**

On May 1, 2014, CNSI deposed its former employee, Stephen A. Smith, who at one time had been CNSI's project manager for the Louisiana Medicaid Management Information System ("LMMIS") project with the Department of Health and Hospitals ("DHH"). The deposition was not concluded in one day and was recessed until a later date. When the deposition reconvened, CNSI learned that Scott Bailey, the lead investigator in the AG's criminal investigation into the awarding of the LMMIS Agreement to CNSI, had tampered with Smith's deposition testimony by calling Smith on the phone twice and flying to Orlando, Florida to meet with Smith during the deposition recess.

During the in-person meeting in Orlando, Bailey showed Smith documents, including what was described as an "edited" version of Bailey's "Interview Report" from a two-day interview with a then-confidential informant identified as "Kunego" – who CNSI has confirmed to be Smith (the "Kunego Report"). This "edited" interview report has never been disclosed or produced to CNSI in this case. As a result of Bailey's tampering, and as shown in more detail below, Smith altered his prior testimony.

Bailey's tampering with a key witness in this civil matter is outrageous and should not be countenanced. This Court should order that Bailey appear for a deposition concerning his communications with Smith, the documents relating to those communications, and Bailey's communications with others related to Smith's deposition testimony.

Further, any contention that Bailey should be shielded from discovery by an alleged "investigative privilege," is wholly without merit. The "investigative privilege," if it even exists, was never intended to allow the AG to manipulate the discovery process and the evidence in a civil lawsuit. By meeting with Smith about his testimony during the recess and showing him documents, including the "edited" Kunego Report, to suggest altered testimony, Bailey and the AG waived any privilege that may have protected Bailey's communications with Smith, as well as any and all documents that Bailey showed Smith and any communications Bailey had with others about Smith's testimony.

Accordingly, the Court should order that (1) the AG and Defendants produce any and all documents shown to Smith or used during Bailey's meetings and telephone calls with Smith; (2) the AG and Defendants produce any and all documents including the "edited" version of the Kunego Report; and (3) Bailey submit to a deposition under oath on (a) all of his communications with Smith, (b) the documents that Bailey showed Smith or that Bailey used in his communications with Smith, and (c) Bailey's communications with any other persons or entities about Smith's deposition testimony, including Norm Nichols of Molina Medicaid Solutions ("Molina").

## **II. BACKGROUND**

It is important to understand the full background and timing behind the AG's use of the Kunego Report. Assuming that "unedited" and "edited" versions of the Kunego Report

existed before Smith's deposition, the background makes it clear that the AG knowingly misled this Court by submitting the "unedited" version of the Kunego Report in an effort to stop this civil case from moving forward. The AG also sought to influence the public by disclosing the "unedited" version that the AG knew was not based on statements from "Kunego." The only way for CNSI and ultimately this Court and the public to fully understand the AG's manipulation of these proceedings is to allow CNSI to depose Bailey on his communications with Smith, the Kunego Report, and Bailey's efforts to influence Smith's testimony.

A. **The AG Files with the Court and Ultimately Releases Interview Notes that AG's Investigator Would Later Disclose To Be Inaccurate and Misleading.**

On May 6, 2013, CNSI filed this lawsuit against the State of Louisiana; the Division of Administration; Kristy Nichols, in her capacity as Commissioner of Administration; the Office of State Purchasing; Sandra Gillen, in her capacity as Director of State Purchasing; the Department of Health and Hospitals; Kathy Kliebert, in her capacity as Secretary, Department of Health and Hospitals; and the Honorable Bobby Jindal, in his capacity as Governor (collectively, "Defendants"). The lawsuit arises out of the sudden, wrongful termination of the Agreement for the Operation and Enhancement of the Louisiana Medicaid Management Information System (LMMIS) through a Fiscal Intermediary Type Arrangement between the Louisiana Department of Health and Hospitals and CNSI (the "LMMIS Agreement"). Along with its Petition, CNSI served two sets of interrogatories and requests for production of documents, one on the Department of Health and Hospitals and Ms. Kliebert, and the other on the Division of Administration, the Office of State Purchasing, Ms. Nichols and Ms. Gillen.

1. **Immediately After CNSI Initiates Discovery in this Lawsuit, the AG Submits Documents Under Seal in an Effort to Secure a Stay.**

Almost immediately after CNSI filed its lawsuit and served discovery, the AG, acting on behalf of the State, filed a "Motion to Stay Civil Proceedings." In that motion, the AG represented that it was conducting a "criminal investigation into the facts and circumstances of the awarding of a state Medicaid billing contract" to CNSI.<sup>1</sup> Among the reasons the AG cited for

---

<sup>1</sup> Ex. 1, Motion to Stay Civil Proceedings, ¶ 1.

imposing a stay was "the protection of cooperating witnesses" – in effect asserting that CNSI would tamper with witnesses in the course of the civil action.<sup>2</sup>

The Court held a contradictory hearing on the motion to stay on May 23, 2013. At the outset of the hearing, the Court announced that it would be returning documents that the AG had provided for *in camera* inspection in connection with the motion.<sup>3</sup>

The AG did not present any witnesses or other evidence in support of the stay motion. The AG did, however, present testimony from Bailey in connection with the hearing of the related case in which CNSI's counsel sought a Writ of Mandamus to compel the State to produce public records. Bailey identified himself at that time as the chief investigator in the AG's criminal investigation into the awarding of the LMMIS Agreement to CNSI.<sup>4</sup> Bailey also revealed that the AG had initiated its investigation after receiving a copy of an email sent by an anonymous informant.<sup>5</sup>

The Court denied the motion to stay, finding that the AG failed to establish that good cause existed for a stay. The AG filed an "Emergency Application for Supervisory Writs" in the First Circuit. The First Circuit denied the writ application on June 7, 2013.

**2. The AG then Pursues a Motion To Limit Discovery in the Civil Case and Once Again Submits Documents Under Seal.**

Having failed to secure a stay, the AG changed tactics by filing a Motion for Protective Order and/or Motion to Quash Subpoenas Duces Tecum ("Motion for Protective Order/Quash"). Through that motion, the AG sought a targeted protective order aimed at certain specific document requests made by CNSI in subpoenas duces tecum issued to third-party businesses (including the incumbent contractor, Molina) and in the Requests for Production of Documents that CNSI had served with its Petition.

At the AG's request, the Court set the Motion for Protective Order/Quash for expedited hearing on June 13, 2013. Prior to the hearing, the Court disclosed the fact that Lewis

---

<sup>2</sup> See *id.* at ¶ 4. The aspersions that the AG cast upon CNSI make the AG's later actions all the more outrageous.

<sup>3</sup> Ex. 2, Excerpts from Transcript of May 23, 2013 hearing at 5.

<sup>4</sup> *Id.* at 67.

<sup>5</sup> *Id.* at 82-83.

Unglesby had previously represented Judge Kelley. When the Court convened the hearing, the AG's representatives indicated their intent to file a motion to recuse.

At that point, the Court returned certain additional documents that the AG had provided for *in camera* inspection. CNSI had been given no notice that the AG had provided additional documents to the Court for *in camera* review, however. CNSI's counsel understandably believed that the documents pertained to the pending targeted motion for protective order, as CNSI had no idea that the AG was still secretly trying to convince the Court to enter a stay.

The Court continued the hearing on the Motion for Protective Order/Quash so that the State's recusal motion could be heard. The State's recusal motion was denied by Judge Caldwell on July 1, 2013. The Court ultimately reset the State's Motion for Protective Order/Quash for hearing on July 30, 2013 at 3:00 p.m.

**3. The Court Announces a Stay of All Proceedings Based on the Documents Presented by the AG Under Seal.**

The parties began the July 30, 2013 hearing of the Motion for Protective Order/Quash by arguing the limited discovery issues implicated by the pending motion. After hearing argument for a period of time, the Court made the following unexpected announcement:

Now, let me just say, I have examined *in camera* documentation that they've brought to me. Before I made a decision the first time, they had brought me documentation and before the last hearing, which we did not have a hearing on because we recessed it, they brought me additional information for my *in camera* review. It was probably brought *in camera* because it was investigatory materials of the law enforcement agency. And I will tell you that at the last hearing, had it gone forward, I was going to do just what I'm going to do now, based upon the materials I have seen. And what I'm going to do, because I can cut this to the quick, is I'm going to grant a motion to stay.<sup>6</sup>

The Court went on to specify that it was staying this entire civil proceeding for six months based on review of the documents that had been provided for *in camera* review.<sup>7</sup> The Court signed its Judgment imposing the six-month stay on August 13, 2013.

On August 16, 2013 CNSI filed a Motion to Lift Stay of Civil Proceedings ("Motion to Lift Stay"). One of CNSI's primary arguments was that a stay of all proceedings

---

<sup>6</sup> Ex. 3, Excerpt from Transcript of July 30, 2013 hearing at 12.

<sup>7</sup> *Id.*

not only CNSI, but others including Governor Jindal.<sup>16</sup> After reviewing these utterly unbelievable documents, CNSI decided not to oppose the AG's motion to unseal. Therefore, the Kunego Report became public with the AG's blessing.

**B. The AG Tampers with the Deposition Testimony of a Key Witness.**

As discovery proceeded in the case, CNSI decided to depose its former employee, Stephen A. Smith. Smith had at one time been the project manager on CNSI's LMMIS project.

On May 1, 2014, CNSI commenced Smith's deposition in Orlando, Florida.<sup>17</sup> David Caldwell was present, as were attorneys for each of the Defendants in this lawsuit.<sup>18</sup> CNSI showed Smith a copy of the Kunego Report that the AG had previously submitted to the Court.<sup>19</sup> Smith confirmed he was in fact "Kunego."<sup>20</sup> Smith also confirmed that he was the individual who sent the anonymous email that Bailey had described at the May 23, 2013 hearing.<sup>21</sup>

When questioned about the specific statements in the Kunego Report, Smith indicated many of them were either not made by him or were inaccurate.<sup>22</sup> Smith underlined the portions of the report that he believed accurately reflected his statements to Bailey.<sup>23</sup> The portions of the report without underlining contain statements that Smith testified he did not say or did not accurately reflect information he provided.<sup>24</sup>

Smith also disclosed in his deposition that he had been contacted by Norm Nichols, Molina's top executive in Louisiana, prior to providing information to the Center for Medicaid & Medicare Services ("CMS") about his alleged concerns about the bidding process

<sup>16</sup> Ex. 8, Kunego Report. The version of the Kunego Report attached to this memorandum is the version that was marked up at the deposition of Steve Smith, as discussed below.

<sup>17</sup> Ex. 9, Transcript of Deposition of Stephen A. Smith ("Smith Depo.") at 1.

<sup>18</sup> *Id.* at 2-3.

<sup>19</sup> *Id.* at 49-54.

<sup>20</sup> *Id.* at 56.

<sup>21</sup> *Id.* at 74.

<sup>22</sup> *See id.* at 49-54, 236-59.

<sup>23</sup> *Id.* at 49-56.

<sup>24</sup> *See id.*

for the LMMIS Agreement.<sup>25</sup> Molina, CNSI's direct competitor, was at the time of the contact with Smith (and is currently) the incumbent provider of Medicaid processing services for the State, having held the contract for over 30 years. CNSI was to replace Molina under the LMMIS Agreement. According to Smith, the meeting with Nichols took place in a Mexican restaurant in Baton Rouge.<sup>26</sup>

Smith testified that, at the meeting, Nichols told Smith that although Molina had lost the protest on the award of the LMMIS Agreement to CNSI, "there were still things in the process that were questionable."<sup>27</sup> Smith further testified that he left the meeting "afraid."<sup>28</sup> Smith stated that, sometime after the meeting with Nichols, he emailed Jeffrey Branch at CMS – under the "Kunego" alias – and relayed to CMS his purported concerns about the LMMIS Agreement.<sup>29</sup> That email to CMS was the same anonymous email that was later forwarded to the AG. Upon questioning by CNSI's counsel, Smith admitted that he emailed CMS even though he did not know of anything illegal or improper (such as a bribe or "quid quo pro") that CNSI or its employees had done in connection with the bidding process.<sup>30</sup> After the questioning on the Kunego Report, his meeting with Norm Nichols, and his communication with CMS, the parties recessed Smith's deposition with plans to resume on a later date.

On July 8, 2014, Smith's deposition resumed.<sup>31</sup> Attorneys for each of the Defendants were present, but neither Caldwell nor any other representative of the AG attended. Smith revealed that he had had two telephone conversations and an in-person meeting with Bailey in Orlando while his deposition was recessed.<sup>32</sup> According to Smith, when Bailey met with him, Bailey "walked [him] through the timeline." Bailey also showed him a credit card

<sup>25</sup> *Id.* at 74-87, 134.  
<sup>26</sup> *Id.* at 134-35.  
<sup>27</sup> *Id.* at 138-39.  
<sup>28</sup> *Id.* at 140, 142.  
<sup>29</sup> *Id.* at 134.  
<sup>30</sup> *Id.* at 102-04, 122.  
<sup>31</sup> *Id.* at 268.  
<sup>32</sup> *Id.* at 367-68, 371.

AG's office has based on its star witness

receipt for a meal at a Mexican restaurant that Nichols had allegedly provided.<sup>33</sup> Smith then testified that his meeting with Bailey and review of the receipt Bailey provided "indicated" to him that his anonymous email to CMS actually took place *before* he met with Molina's Nichols and that, contrary to his prior testimony, the meeting actually did not prompt him to email CMS.<sup>34</sup> Smith added that he understood from Bailey that the AG had obtained the receipt through a request to Nichols, but Smith did not believe that his name was even printed on the receipt.<sup>35</sup> In fact, aside from Bailey's assurances, Smith was not aware of any fact that tied the receipt Bailey showed him to the meeting he claimed to have had with Nichols.<sup>36</sup>

Interestingly, Smith also testified that he learned from either David Caldwell or Bailey that Nichols had provided Smith's name as someone the AG should talk to in connection with the investigation.<sup>37</sup> Molina recently provided a privilege log to CNSI that shows that Nichols was regularly providing Bailey and the AG with information about CNSI and the bidding process starting as early as January 2012 – *i.e.*, before CNSI and the State executed the LMMIS Agreement. The information that Nichols provided to Bailey includes Bruce Greenstein's cell phone number and Smith's telephone number.<sup>38</sup> The Molina privilege log shows that there were over 50 communications between Nichols and Bailey about CNSI, and creates a very real impression that Molina – the incumbent MMIS contractor and one of CNSI's chief competitors – was leading the AG's investigation.

Smith did not stop at recanting his prior testimony based on Bailey's intermeddling. He went on to disclose that Bailey had shown him another version of Bailey's report of Smith's 2012 interviews. According to Smith, Bailey stated that this new version was the "edited" version.<sup>39</sup> Smith claimed that Bailey told him that the AG had provided the wrong

---

<sup>33</sup> *Id.* at 355-56, 367-70.

<sup>34</sup> *Id.* at 356-57.

<sup>35</sup> *Id.* at 368-69.

<sup>36</sup> *See id.* at 367-70.

<sup>37</sup> *Id.* at 418-19.

<sup>38</sup> *See Ex. 10, Molina Privilege Log.*

<sup>39</sup> *Ex. 9, Smith Depo.* at 380-81.