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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF DESCHUTES

6 DEBORAH LYNN SMITH, and DARRELL
7 RAY SMITH, Oregon citizens,

8 Plaintiffs,

9 v.

10 DAVID ANTHONY DODSON, an Oregon
11 Citizen; DODSON ORTHOPEDICS, INC.,
12 an Oregon Corporation; and SMITH &
13 NEPHEW, INC., a Delaware Corporation,

14 Defendants.

Case No. 19CV14048

**DEFENDANTS MOTION FOR
TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE WHY
PRELIMINARY INJUNCTION SHOULD
NOT ISSUE AND ALTERNATIVE
MOTION TO MODIFY STIPULATED
PROTECTIVE ORDER**

15 **MOTION**

16 Defendants are about to become the victims of plaintiff's counsel's decision to have
17 a fire sale on defendants' confidential documents which are the subject of a stipulated
18 protective order, signed by this court on April 1, 2020. To prevent the irreparable harm that
19 defendants would suffer if plaintiff's counsel follows through on his stated intent to violate
20 the stipulated protective order, pursuant to ORCP 79 and the provisions of the Stipulated
21 Protective Order entered in this case ("the SPO"), defendants request the court enter a
22 temporary restraining order and require plaintiff to show cause why a preliminary injunction
23 preventing plaintiff from violating the SPO should not issue. In the alternative and pursuant
24 to the terms of the SPO, defendants ask the court to amend the SPO to state with even
25 greater specificity that confidential documents may only be used in cases where the
26 attorneys in this matter are counsel of record. In support of their motion, defendants rely on
the pleadings and papers on file with the Court, the points and authorities below, and the
Declaration of Kirstin L. Abel ("Abel Decl").

SUMMARY OF FACTS

The present case is in fact one of four similar cases being litigated between plaintiff's counsel and Smith & Nephew, Inc., ("Smith & Nephew"). The others are *Wayne Shammel v. Smith & Nephew et al.*, Case No. 19CV40784, pending in Lane County, Oregon (*Shammel*), *Jesse Eugene Kemp v. Pure Play Orthopaedics et al.*, Case No. D-202027 pending in Jefferson County, Texas (*Kemp*) and *Tracy Fleming et al. v. Brian Childress et al.*, Case No. DC-128-08923, pending in Dallas County, Texas (*Fleming*). Each case has its own nearly identical stipulated protective order.¹

On April 1, 2020, the parties in this matter entered into a stipulated protective order ("SPO") which among other things, prevents the disclosure of documents either party designates as confidential, except under very limited circumstances:

Confidential Material shall be treated as confidential and used (1) by counsel in this case solely for litigation of this case or (2) by counsel in other actions arising out of the same or similar set of facts, transactions, or occurrences that are asserted in the petition filed in this case solely for the litigation of such actions.

Abel Dec., Ex. 1, Section 4. Section 6 provides that counsel in this case may show, disclose or disseminate confidential materials to: attorneys of record for the parties in this case including members of their law firms (Sec. 6(a)); retained experts and consultants (Sec. 6(b)); retained translators (Sec. 6(c)); the court (Sec. 6(d)); and attorneys representing a party in other present or future litigation against the party asserting confidentiality and arising out of the same or similar facts or occurrences (Sec. 6(e)). *Id.* at Sec. 6. However, counsel may only share confidential documents with attorneys under Section 6(e) after obtaining a signed agreement under penalty of perjury from that attorney. *Id.* at Ex. A to the SPO. Furthermore, under Section 7 of the SPO, neither experts, translators, nor attorneys representing a party in similar litigation can share the confidential documents "with any other

¹ Defendants are simultaneously filing an identical motion in *Wayne Shammel v. Smith & Nephew et al.*, Lane County Circuit Court Case No. 19CV40784.

1 person or entity.” *Id.* at Sec. 7.

2 This SPO was based on the SPO entered the *Kemp* matter. At the time the *Kemp*
3 SPO was being negotiated, counsel for both plaintiff and Smith & Nephew had a discussion
4 on the record about the parameters for the SPO and the rationale behind it. Counsel for
5 Smith & Nephew expressed concerns that without the SPO, its confidential documents may
6 not be appropriately protected. In response, plaintiff’s counsel argued that defendants
7 wanted to “silo” his cases. Abel Dec., Ex. 2, p. 4. He noted that he had two cases in Oregon,
8 two in California and the Texas cases and argued that defendants wanted to “silo him off,”
9 and not allow him to share documents with his Texas co-counsel in the *Kemp* case. *Id.*
10 When discussing the proposed confidentiality agreement (Exhibit A) to the SPO, the
11 document he prepared and wanted signed, plaintiff’s counsel reiterated that he needed to
12 be allowed to share confidential documents with his co-counsel, stating those lawyers would
13 have to sign Exhibit A, and then he would be able to share it with them for the purposes of
14 pursuing their joint cases:

15 I keep it. I have a record. I know who I’m sharing it with. And, by the way, I don’t
16 really want to share with the whole world. I’ve got good documents. I’m not really in
17 the business of giving it away. It’s - - it’s good stuff. So - - but I’ve got co-counsel in
Oregon - - Eugene, Oregon. I’ve got Bend, Oregon, two cases in LA. I’ve got to be
able to share with them.

18 *Id.* at p. 5. Counsel was very clear on who he wanted to share the documents with and why
19 he wanted to be able to share them.

20 There is no question from the discussions had on the record, and plaintiff’s counsel’s
21 representations to the court, that the parties intended to limit the disclosure of confidentially
22 designated materials to those cases in which the attorneys in *Kemp* were counsel of record.

23 After the present case was filed, counsel began discussions regarding entering a
24 stipulated protective order. Plaintiff’s counsel was the one who provided the draft SPO and
25 tailored the draft SPO based on “the agreement we reached on the Amended Confidentiality
26 Order in *Kemp*...” Abel Dec., Ex. 3, p. 4. Counsel for plaintiff also noted that he did not

1 want to substantially change the SPO in this case from what the parties negotiated and
2 agreed to in *Kemp*. *Id.* at p. 3. The parties agreed to a nearly identical SPO to that entered
3 in *Kemp* and the SPO was submitted to the court. The parties have engaged in discovery,
4 agreed to produce documents and produced documents with the understanding that the
5 SPO, as previously negotiated, would apply in this case.

6 On October 1, 2020, counsel for plaintiff notified defense counsel via email that he
7 intended to take actions that would violate the SPO. Specifically, plaintiff's counsel advised
8 defendants that he intends to "find numerous [plaintiffs'] lawyers," who will share in discovery
9 costs and "all they have to do is sign [Exhibit A of the SPO]" and that he "really [doesn't]
10 need to get [defendants'] agreement..." Abel Dec., Ex. 4, p. 12. Defense counsel advised
11 plaintiff's counsel that doing so would violate the SPO because the SPO limits the use of
12 documents designated as Confidential to cases where plaintiff's counsel is attorney of
13 record. *Id.* Plaintiff's counsel responded that he can "freely give your so-called 'Confidential'
14 documents to any lawyer in America who signs Exhibit A of the Order," and "can make any
15 deal or arrangement [he] want[s] with such lawyers," because the SPO does not restrict him
16 from doing so in any way. *Id.* at p. 9. Defense counsel reiterated that this would violate the
17 SPO and that both parties know the SPO's language clearly reflects an intent to allow
18 plaintiff's counsel to talk with lawyers who may be interested in bringing a suit with him;
19 plaintiff's counsel doubled down. *Id.* at p. 8. He claimed there are no limitations on his
20 sharing documents with other attorneys aside from having them sign Exhibit A to the SPO
21 and reiterated his belief that the SPO does not limit the use of Confidential records to cases
22 where he is counsel of record and advised defendants that he intends to solicit additional
23 lawyers to bring suits against Smith & Nephew:

24 I will send a mass email to every lawyer I know of with cases against Smith &
25 Nephew. There are at least one hundred. I will set up a Zoom next week where I
26 invite all of them to listen to me explain why cases should be filed in state court
instead of Federal. Anyone interested in learning more can sign the [SPO] and start
gathering documents and depositions that will hopefully convince them to file in

1 state court, but that will not be a condition of me providing them with the [SPO] and
documents and depositions.

2 *Id.* at p. 6, 7.² He went on to say "...hopefully it will result in more state court cases for you,"
3 and invited defense counsel to attend his seminar, which they declined. *Id.* at 5,6. Plaintiff's
4 counsel also indicated that if defendants have a problem with his plan, they should "file
5 something" to involve the court because "emails will not convince me to change my plans
6 for Friday morning [to send an invitation for the Zoom call]." *Id.* at p. 7. After defense counsel
7 laid out the arguments as to how counsel would be violating the SPO, he responded on the
8 morning of October 9, 2020 that he would "not disclose any 'confidential' information without
9 complying with the [SPO]." *Id.* at p. 2-4. He then described various non-confidential
10 documents produced by defendants that he intends to share on his Zoom call. *Id.* at p. 2.
11 Significantly, he still refused to confirm whether he agreed that "complying with the SPO"
12 means not using confidential documents as part of a mass marketing campaign against
13 Smith & Nephew.

14 Without that clarification and after being previously told that defendants needed to go
15 to the court and nothing in the emails would prevent plaintiff's counsel from taking the action
16 he intended to take, defendants determined it was necessary to involve the court. On the
17 afternoon of October 9, 2020 defendants put plaintiff on notice that they would seek this
18 temporary restraining order. *Id.* at p. 1. Plaintiff's counsel responded that he would not
19 "disclose any 'confidential' information without complying with the [SPO]." *Id.* However, he
20 still did not clarify how he views compliance. Plaintiff's counsel has clearly stated that he
21 has a drastically different perspective on permissible actions under the SPO. For that
22 reason, and in order to prevent the irreparable injury that counsel's intended mass disclosure
23

24
25 ² This entire conversation arose out of an email exchange discussing a Privilege Log in the *Kemp* matter.
26 It is telling that after raising his argument that he could disclose confidential documents to whomever he
wished as long as they signed the confidentiality agreement referred to as "Exhibit A," in the SPO, he
changed the Subject in the ongoing email string from "KEMP Meet and Confer re: Ruling on In Camera
Review of Privilege Log Documents," to "KEMP Protective Order No Limits."

1 of confidential documents would cause, defendants file this motion.

2 **LEGAL ANALYSIS AND ARGUMENT**

3 Oregon's standards for obtaining a temporary restraining order and preliminary
4 injunction are one in the same. ORCP 79. Where it appears that a party is "doing or
5 threatens, or is about to do...some act in violation of the rights of a party," a court may enter
6 a temporary restraining order or preliminary injunction. *Id.* at A(1)(b). A party is entitled to
7 preliminary injunctive relief if they show: 1) a likelihood of success on the merits; and 2) a
8 likelihood of irreparable harm absent a preliminary injunction. *Elkhorn Baptist Church v.*
9 *Brown*, 366 Or 506, 518-19 (2020). The court will also balance the harm to the movant
10 against the harm to both the opposing party and the public in determining whether to grant
11 the motion. *Id.* A preliminary injunction is a way to prevent the irreparable loss of rights and
12 to preserve the status quo.

13 Both a temporary restraining order and a preliminary injunction are appropriate here
14 in order to prevent the irreparable harm that would be caused by plaintiff's counsel's
15 disclosure of defendant's confidential documents.

16 **I. Defendants will likely defeat plaintiff's claims and prove that counsel** 17 **intends to violate the Stipulated Protective Order.**

18 Defendants have a strong probability of success on both the merits of the case and
19 in proving plaintiff's counsel intends to violate the SPO. Though the case is still being
20 litigated, defendants have vigorously defended all claims by plaintiff and have evidence to
21 refute each of the claims against them. Further, defendants have retained unnamed
22 qualified expert support as necessitated by the legal standards applicable to plaintiff's claims
23 for their defenses.

24 On its face the SPO is clear that defendants' confidential documents cannot be used
25 outside this litigation except where plaintiff's counsel is also counsel of record. Abel Dec.,
26 Ex. 1. According to the SPO, Confidential Material shall be treated as confidential and used

1 (1) by counsel in this case solely for litigation of this case or (2) by counsel in other actions
2 arising out of the same or similar set of facts, transactions, or occurrences that are asserted
3 in the petition filed in this case solely for the litigation of such actions. *Id.* at Ex. 1, Sec. 4.
4 Counsel is permitted to share confidential documents with certain categories of people for
5 the litigation of his case. *Id.* at Sec. 6. However, retained experts, translators and attorneys
6 representing a party against the party asserting confidentiality in the same or similar set of
7 facts must state under penalty of perjury that they will not share the documents with any
8 other person or entity. *Id.* at Sec. 7; Ex. A.

9 Plaintiff's counsel's own representations in the attached Exhibit 4 show a flagrant
10 disregard for the SPO entered by this Court. There is no question that the parties here
11 based their SPO on the SPO in *Kemp*. Abel Dec., Ex. 3. This is important because the
12 terms of the SPO in *Kemp* were negotiated and very specific limitations were agreed on as
13 to who could receive and use confidential documents. *Id.* at Ex. 2, p. 4, 5. Furthermore, the
14 *Kemp* SPO terms were based on plaintiff's counsel's representations about who he intended
15 to share documents with. *Id.* A year after negotiating and entering into the amended *Kemp*
16 SPO and six months after entering into the SPO here, plaintiff's counsel wants to change its
17 terms to accommodate a mass marketing campaign against defendants. The record reflects
18 that plaintiff's counsel intends to violate the SPO.

19 **II. Plaintiff will cause irreparable harm to defendants by disclosing**
20 **confidential documents.**

21 The parties specifically negotiated and entered into the SPO to limit the disclosure of
22 confidential documents but to also permit plaintiff's counsel to use defendants' confidential
23 documents across his cases so they did not have to be reproduced. Defendants produced
24 those confidential documents knowing that further disclosure would be limited by the terms
25 of the SPO. All counsel contemplated that use of confidential documents would be limited
26 by the SPO; specifically that when negotiating the terms of the SPO, counsel for plaintiff

1 represented to the Texas judge he did not want to share the documents with the “whole
2 world,” but needed to be able to share documents with “co-counsel in Oregon...I’ve got to
3 be able to share with them.” Abel Dec. Ex. 2, p. 5. Defendants relied on those
4 representations made by counsel in *Kemp* when they entered into a substantially similar
5 SPO here.

6 By his own admissions, plaintiff’s counsel is planning to disseminate Smith &
7 Nephew’s confidential documents. Once he does so, there is no way to un-do the harm -
8 attorneys outside of this lawsuit who have no association with this case or any other case
9 pending against Smith & Nephew will not be able to unsee those confidential documents.
10 Not only that, but there is nothing Smith & Nephew can do to protect the documents from
11 further dissemination and use. Moreover, plaintiff’s counsel is planning to distribute these
12 documents in a direct effort to increase the number of state court lawsuits against Smith &
13 Nephew; “...hopefully it will result in more state court cases for you.” Abel Dec., Ex. 4, p. 6.
14 While defendant certainly does not intend to limit any person with a valid claim from bringing
15 such claim, plaintiff’s efforts may well result in claims being brought which otherwise may
16 not have been. At minimum, its confidential documents will be available for all to see and
17 use, without the restrictions the parties agreed to and as ordered by this Court.

18 **III. There is no hardship to plaintiff or the public from enforcing the**
19 **Stipulated Protective Order.**

20 Plaintiff will suffer no hardship if the SPO is enforced. His case against Smith &
21 Nephew is not weakened if his counsel is not allowed to violate the SPO in order to further
22 his personal agenda against Smith & Nephew. Plaintiff has access to the confidential
23 documents and is permitted to use them in his case for the litigation of his case. Likewise,
24 there is no hardship to the public at large if plaintiff is enjoined from disseminating
25 defendants’ confidential documents. Any plaintiff in any other case against Smith & Nephew
26 can enter into their own SPO and gain access to a set of confidential documents relevant to

1 that case.

2 In sum, all three factors weigh in favor of granting a temporary restraining order or
3 preliminary injunction. Defendants are likely to prevail on the merits and have shown that
4 plaintiff's counsel's conduct will violate the protective order. Defendants will suffer
5 irreparable harm if the protective order is violated, and there would be no hardship if the
6 parties are held to the terms of the SPO they stipulated to and this Court entered.

7 The relief defendants seek is simple and straightforward – a court order preventing
8 plaintiff from violating the SPO and maintaining the status quo regarding the use of
9 confidential documents.

10 **IV. Alternative Motion to Modify the Stipulated Protective Order**

11 If the Court concludes that defendants are not entitled to a temporary restraining
12 order or preliminary injunction preventing plaintiff from disclosing their confidential
13 documents, then defendants ask the court to exercise its inherent authority and that authority
14 set forth in Section 8 of the SPO to modify the SPO and order that “counsel,” as
15 contemplated in Section 4 of the SPO means “counsel of record.” Though this is the only
16 reasonable conclusion given the language of the SPO, plaintiff's counsel has adopted his
17 own unique interpretation. If plaintiff's counsel's interpretation were true and “counsel” in
18 Section 4 of the SPO means “any lawyer in America,” then it would effectively render
19 important provisions of the SPO meaningless.

20 The SPO contemplates that plaintiff's counsel may need to provide the confidential
21 documents to other persons in order to litigate plaintiff's case. As such, it includes terms for
22 doing so. See, Abel Dec., Ex. A, Sec. 6, 7 and Ex. A (to the SPO). However, Section 7
23 prohibits any attorney who receives the documents under Section 6, even after signing the
24 confidentiality agreement at Exhibit A, from using the documents unless plaintiff's counsel
25 is also counsel of record.

26 ////

1 The entire point of the above provisions was to limit any attorney in America from
2 using any confidential documents it obtains under Section 6 to prosecute a case. This was
3 contemplated, negotiated and agreed to before the court as set forth above and in Ex. 2 to
4 the Abel Dec., filed herewith.

5 Any use of the documents under the SPO must be construed in light of Paragraphs
6 4, 6, 7 and Exhibit A of the SPO, all of which indicate that the use of confidential documents
7 is limited to "counsel," which means "counsel of record."

8 CONCLUSION

9 For the reasons stated herein, defendants respectfully request the court enter an
10 order temporarily enjoining plaintiff from showing, disseminating or disclosing confidential
11 information to attorneys in matters where plaintiff's counsel is not counsel of record and
12 ordering plaintiff to show cause why a preliminary injunction should not be entered.
13 Defendants are prepared to post a bond required by the court under ORCP 82 A.

14 In the alternative, defendants ask the court to exercise its broad discretion on
15 discovery matters and other matters before it, as well as the jurisdiction retained under
16 Section 8 of the SPO, and modify its SPO to state with even greater specificity that "counsel,"
17 means "counsel of record in this matter."

18 Dated this 12th day of October, 2020.

19 BODYFELT MOUNT LLP

20
21 BY: 

22 Kirstin L. Abel, OSB No. 035046
23 Email: abel@bodyfeltmount.com
24 Jamie T. Azevedo, OSB No. 050370
25 Email: azevedo@bodyfeltmount.com
26 Phone: (503) 243-1022
Fax: (503) 243-2019

Trial Attorney: Kirstin L. Abel, OSB No. 035046

Of Attorneys for Defendants

1 CERTIFICATE OF SERVICE

2 I hereby certify that I served a true copy of the foregoing **DEFENDANTS MOTION**
3 **FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY**
4 **PRELIMINARY INJUNCTION SHOULD NOT ISSUE AND ALTERNATIVE MOTION TO**
5 **MODIFY STIPULATED PROTECTIVE ORDER** on the following attorneys on the date
6 noted below by the method indicated:

7 Leslie W. O'Leary
8 Johnson Johnson Lucas & Middleton PC
9 975 Oak Street, Suite 1050
10 Eugene, OR 97401
11 Email: loleary@justicelawyers.com
12 *Of Attorneys for Plaintiffs*

13 Kip A. Petroff
14 Law Office of Kip Petroff
15 8150 N. Central Expressway, Suite 500
16 Dallas, Texas 75206
17 Email: kpetroff@petroffassociates.com
18 *Of Attorneys for Plaintiffs*

19 Method: US Mail, postage prepaid
20 Courtesy Copy via Email
21 Facsimile
22 Email Service Pursuant to ORCP 9G
23 Electronic Service Pursuant to UTCR 21.100

24 Dated this 12th day of October, 2020.

25 BY: 
26 Kirstin L. Abel, OSB No. 035046
Email: abel@bodyfeltmount.com
Jamie T. Azevedo, OSB No. 050370
Email: azevedo@bodyfeltmount.com
Phone: (503) 243-1022
Fax: (503) 243-2019

Of Attorneys for Defendants