NO.

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IN THE SUPREME COURT

OF THE UNITED STATES

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DR. APARNA VASHISHT-ROTA, an individual, and
AUGUST EDUCATION GROUP LLC

Petitioner,

v.

HOWELL MANAGEMENT

SERVICES,

Respondents.

---

On Petition to the United States Supreme Court

---

**APPENDIX ONE**

Pro Se Petitioner
12396 Dormouse
Road,
San Diego, California 92129
(858) 348-7068

## TABLE OF CONTENTS

**The Order of the Court is stated below:**
**Dated:** January 31, 2023
/s/ John A. Pearce 09:22:08 AM
Justice

**IN THE SUPREME COURT OF THE STATE OF UTAH**

----ooOoo----

August Education Group, LLC and Aparna Vashisht Rota, Petitioners,

v.

Howell Management Services, LLC, Respondent.

**ORDER**

Supreme Court No. 20220985-SC
Court of Appeals No. 20200713-CA
Trial Court No. 170100325

----ooOoo----

This matter is before the Court upon a Petition for Writ of Certiorari, filed on November 9, 2022.

IT IS HEREBY ORDERED that the petition for Writ of Certiorari is denied.
End of Order - Signature at the Top of the First Page

**IN THE UTAH COURT OF APPEALS**

| | |
|---|---|
| HOWELL MANAGEMENT SERVICES, LLC,<br>Appellee,<br>*v.*<br>AUGUST EDUCATION GROUP, LLC, AND APARNA VASHISHTROTA,<br>Appellants. | ORDER<br><br>Case No. 20200713-CA |

Before Judges Christiansen Forster, Tenney, and Appleby

This matter is before the court on a Petition for Rehearing, filed on November 8, 2022. IT IS HEREBY ORDERED that the petition is denied. IT IS FURTHER ORDERED that this case is closed, and this court will not act upon any further filings filed in the above-captioned matter.

DATED this 9th day of November,

2022.

FOR THE COURT:

Kate Appleby

Kate Appleby, Judge[1]

[1] 1. Senior Judge Kate Appleby, sat by special assignment as authorized by law. See generally Utah R. Jud. Admin. 11-201(7).

## CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2022, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:

Aparna Vashisht Rota aps.rota@gmail.com

AUGUST EDUCATION GROUP, LLC

JEFFREY WESTON SHIELDS
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Hannah Hunter

By Hannah Hunter
Judicial Assistant

IN THE UTAH COURT OF APPEALS

| | |
|---|---|
| HOWELL MANAGEMENT SERVICES, LLC,<br>Appellee,<br>*v.*<br>AUGUST EDUCATION GROUP, LLC, AND<br><br>APARNA VASHISHT ROTA,<br>Appellants. | ORDER<br><br>Case No. 20200713-CA |

Before Judges Christiansen Forster, Tenney, and Appleby.[2]

After repeated warnings that violation of court orders by filing inappropriate documents could have negative consequences, Appellant Aparna Vashisht Rota persisted in a course of conduct that results in this

[2] 1. Senior Judge Kate Appleby sat by special assignment as authorized by law. See generally Utah R. Jud. Admin. 11-201(7).

court's decision to dismiss her interlocutory appeal and that of her company, August Education Group LLC, with which Rota has a complete identity of interest. Relevant to today's sanction, Rota, acting pro se despite the fact that she was represented by counsel, repeatedly filed inappropriate materials, including emails, motions, and a reply brief, with burdensome, irrelevant, immaterial, or scandalous content. This court in several orders cautioned her not to do so, and her counsel told her that as well. We review some aspects of the recent filings to the extent necessary to explain today's decision, but note that the background of this appeal and the underlying district court case involve 123 and 596 docket entries, respectively, and although we need not recount each of them here, and although we also acknowledge that not all docket entries involve papers submitted by Rota, we observe that her filings have been extraordinarily voluminous in addition to

including improper and at times scandalous content.

We begin this review by noting a memorandum Rota's counsel filed last August in opposition to the appellee's Motion to Dismiss in which Rota's counsel stated, "counsel for the Appellants apologizes to the Court and counsel for his client's continued failure to communicate through counsel; he has admonished client, again, in that regard." But Rota continued filing documents herself, and in September, the court ordered her counsel to appear to show cause why she should not be held in contempt of court and her appeal dismissed as a sanction for her continued inappropriate filings during the course of the appeal. The court further directed counsel to address whether the LLC's issues on appeal would remain viable if Rota's appeal as an individual were to be dismissed.

During the show cause hearing, counsel stated that Rota may not have understood that in its June 7, 2022 order the court indicated it was considering dismissing her appeal for filing inappropriate materials. The order referred to Rota filing inappropriate materials during the course of the appeal and said it would consider those materials "solely for the purpose of evaluating [the appellee's] claim that this appeal should be dismissed as a sanction." The court is skeptical of counsel's explanation, given the language of its June order and given Rota's formal education, but even giving her the considerable benefit of this doubt, what Rota did after her counsel stated he told her to communicate through counsel, and after the court issued an order to show cause, and after it issued another order stating it would not consider uninvited filings, demonstrate that the court has no meaningful alternative than to dismiss this appeal.

After the court issued the order to show cause and before the hearing, Rota filed a letter and a 296-page document captioned, "Brief for the October 18, 2022 Meeting to Show Cause" (the Brief); approximately 19 pages of the Brief are arguably substantive, with the remainder being exhibits, including a Petition for Writ of Certiorari to the United States Supreme Court in which Rota seeks to challenge a decision in a separate case before this court, see Vashisht Rota v. Howell Mgmt. Services, 2021 UT App 133, 503 P.3d 526 (affirming a district court order in a separate case involving Rota and Howell Management Services in which the district court determined that Rota is a vexatious litigant) ("the vexatious litigant appeal"). The letter stated that what she filed was in her personal capacity and that "Due to Costs, [her attorney] is unable to discuss [August Education Group] issues [at the show

cause hearing]." Contradicting Rota's cover letter, the Brief stated that her attorney "will appear on the date of the Show Cause for [August Education Group] related issues."

Rota also filed a document captioned "Motion to Clarify September 13, 2022 Order"; the 4-page motion has nearly 100 pages of attachments, most of which are not related to this case. In the motion, Rota referred to this court as "the so-called Court of Appeals." She asked the court to allow her counsel to withdraw, or to direct him to appear for the show cause hearing on behalf of the LLC.

On September 20, Rota filed a document captioned "Petitioner's Notice of Supplemental Authority in Support of Her TRO Motion and in Opposition of Appellee's Points Raised for the First Time on Appeal on Pages Related to the Gag Order" (the Supplemental

Authority). There was no temporary restraining order motion pending before the court at that time. The Supplemental Authority characterizes a gag order issued by the district court as "sponsored by the Court of Appeals." It states, "Utah Appeals Using Smallest Errors to Pocket Money." It accuses this court of delaying its rulings, and further lists as alleged issues "not credible rulings; inconsistent; unfair; lack of transparency; and Appellant's rights to assert all her claims for this type of theft" denied for two years.

On September 21, Rota filed a 2-page letter with 31 pages of attachments. The letter, addressed "Dear Panel," reiterates arguments Rota previously made. Rota followed this by filing 94 pages of supplemental exhibits. Those exhibits include a document accusing the Utah judiciary of racism, misogyny, and other biases.

The next day, Rota filed a copy of a Motion to Change Venue she originally filed in the vexatious litigant appeal; it is 392 pages long. In it, Rota requested that the Court of Appeals transfer her case to a federal court in California because she allegedly would not receive a fair hearing in Utah. Attached to it was a "Motion to Change Venue Due to Bias and Racism," in which she accuses the trial court judge, who is the judge in the case underlying this appeal as well as the vexatious litigant appeal, of "extreme prejudice and hatred towards minorities." The motion was accompanied by a letter dated September 22, 2022, in which Rota recounted her reasons for filing the Motion to Change Venue, including the statement that "for sure, the Court of Appeals used it to 'dismiss' all the claims so it can keep covering for [Howell Management Services]."

On the same day, Rota filed a 116-page document captioned "DKT 179 Utah Cases Context Analysis." It appears to be a copy of something she filed in federal court in California; attached to it is a letter dated September 22, 2022, in which Rota accuses the judiciary of letting her "perish" and stated, "had the Judges been in my position, they would have collected what is due to them under the doctrine of it is what it is."

Rota filed another 92 pages of exhibits on September 23, along with a letter of the same date in which she stated, "Everyone was paid except my family. Even Utah Judges paid themselves and not us for years."

Additionally, she filed a 927-page document, also apparently filed in Utah's First District Court in the vexatious litigant appeal case, regarding subpoenas. It includes a letter dated September 23, in which Rota states, "Utah blocked discovery."

Three days later, Rota filed a document captioned "Appellant's Motion for Suggestion of Mootness Pursuant to Rule 37(A) and Motion to Report Incomplete Filing
Pursuant to Rule 26/27." The document is 101 pages long and purports to relate to the Show Cause hearing. The same day, she filed a 34-page document titled "Appellant's Motion for Context Analysis Evidence." In it, Rota states, "Utah that refused to issue discovery and again Judge Hagen Team [Howell Management Services] denied a rule 23 motion for a stand-alone case to issue an independent subpoena under 170100325," and further, "the Court of Appeals did not allow the subpoena or any other motion for 7 years to usurp a fair trial." She characterizes her career as "ruined," and blames this on the Utah courts and complains that the Court of Appeals has allowed her no leeway as a pro se litigant. She characterizes the Court of Appeals panel as

"hoarding someone else's earned money for years."

Also on September 26, Rota re-filed a "Motion to Obtain Permission for Legitimate Business Contact," accompanied by other motions and exhibits already filed; it is 136 pages long, and among other things accuses the currently-assigned district court judge's predecessor on the underlying district court cases, of various forms of misconduct, including having the purpose "to harm Appellant, to make the litigation go as long as possible, to then use Appellant's tears and cries to victim blame Appellant to allow a white privileged male to enslave Appellant and steal all her money, status, and property rights."

Additionally, Rota filed a document captioned "Appellant's Two Updates: Appearance on October 18, 2022: Attorney Robinson." In a section captioned "Apology Letter," Rota stated, "Law is a new language

and Appellant definitely made some mistakes of fact and law. Appellant lost 7 years of income in the most lucrative field while her male counterparts enjoyed life thanks to Utah." She added, "Utah ostracized her family and tried to rob money at gun point for years."

On September 27, Rota filed a 105-page document including attachments captioned "Appellant's Equitable Recission Granted Third Amended Complaint." The same day, Rota filed "Appellant's Two Updates: Appearance on October 18, 2022: Attorney Robinson Correction," this time without a section captioned "Apology Letter."

On September 28, Rota filed a document titled "Proposed Order" that addresses several separate proceedings before other tribunals and was not requested by this court.

Then there were two filings entitled "Request to Leave to File Pursuant to Rule 24(C)," filed September 29 and 30; the first is 218 pages long including exhibits; the second is a modest 7 pages in length.

On October 3, Rota filed "Appellant's Motion [for] Proposed Orders." It is 291 pages long. In it, she says, "Appellant requests the Appellate to honor her deposition under oath which is greater than an email." Attached to it are four documents, one of which is a red-lined edited document, captioned "Draft Proposed Order," purporting to be on behalf of "Appellants"—in other words, not simply on behalf of Rota as an individual. Again, the court had not directed Rota to file such a document and indeed had not made any ruling that would require memorialization of this sort. It appears to repeat much of what was included in Rota's

other proposed order. She followed this with a 212-page filing, then another one 223 pages in length, each containing several more draft orders.

That day, the court on its own motion indicated that "this court, and its staff, will not consider any further filings from either party not provided by rule on the subjects of these hearings except by invitation of the Court." Rota stopped filing documents for a period, but on October 24, she filed a document captioned "Motion (Remade) for Legitimate Business Contact." Then, on October 25, she submitted a "Rule 2: Special Master Appointment," which includes a statement that "Plaintiff needs a fair review as God came to Plaintiff's house to warn her that Plaintiff would not be heard or get a fair trial in Utah."

On October 27, Rota sent the Court of Appeals a series

of emails that included language that continues to attack the integrity of this court and some of the other judges who have been involved in her cases. Examples include "Utah . . . prolonged the trial and the appeals to steal money due"; "I wonder how [a particular judge] has so many hairstyples [sic] on a judges' salary and I also wonder if she decided to sanction me at the outset in 2020 and run out the clock to steal money for her hair"; and "I understand that it may upset you that I am this talented but you only have one degree so try to see this from my point of view." Attached to the emails is a copy of Rota's resume.

And still to this day, despite our continued indications that a motion to dismiss is under consideration, Rota continues to flood the court with her inappropriate filings, including more than 22, with hundreds of pages of attachments, many of them previously filed, received

just yesterday. One of the cover mails characterized the Court of Appeals as "the klepto court."

Based upon Rota's conduct, the court has several options, including striking Rota's briefs and other filings for failure to comply with the Rules of Appellate Procedure or the orders of the court. See Utah R. App. P. 24(i) ("The court on motion or on its own initiative may strike or disregard a brief that contains burdensome, irrelevant, immaterial, or scandalous matters, and the court may assess an appropriate sanction including attorney fees for the violation."); id. R. 40(c) ("The court may, after reasonable notice and an opportunity to show cause to the contrary, and upon hearing, if requested, take appropriate action against any attorney or person who practices before it for . . . conduct unbecoming a member of the Bar or a person allowed to appear before the court, or for failure to

comply with these rules or order of the court.").

Of course, when a litigant appears pro se, she "should be accorded every consideration that may reasonably be indulged." *Nelson v. Jacobsen*, 669 P.2d 1207, 1213 (Utah 1983) (quotation simplified). "However, as a general rule, a party who represents herself will be held to the same standard of knowledge and practice as any qualified member of the bar. Further, 'reasonable' indulgence is not unlimited indulgence. Reasonable considerations do not include attempting to redress the ongoing consequences of the party's decision to function in a capacity for which she is not trained." *Hampton v. Professional Title Services,* 2010 UT App 294, ¶ 3, 242 P.3d 796 (quotation simplified). Moreover, we are reluctant to grant leniency on the basis of pro se status when "an individual avails herself of the judicial machinery as a matter of routine" and "the filings in

question . . . have been brought with the apparent purpose, or at least effect, of harassment, not only of opposing parties, but of the judicial machinery itself," for example, frequently "resort[ing] to collateral attack on the judges who have adjudicated her cases." *Lundahl v. Quinn,* 2003 UT 11, ¶¶ 4–5, 67 P.3d 1000. "[U]nfounded accusations regarding the supposed improper motives of the court of appeals panel . . . are scandalous in that they are defamatory and offensive to propriety." *Peters v. Pine Meadow Ranch Home Ass'n,* 2007 UT 2, ¶ 9, 151 P.3d 962.

Although dismissing Rota's appeal is a sanction we are reluctant to impose, Rota has continued to deluge the court with inappropriate filings that are antagonistic, conclusory, repetitive, and at times barely comprehensible. She accuses this court, the Utah judiciary as a whole, and individual judges of deliberate

the LLC.

Counsel for Rota and the LLC previously moved for leave to withdraw as counsel, both as to the then-pending show cause hearing and as to all other purposes outside the hearing. We previously denied his motion in relation to the pending hearing, but we now grant the remainder of his motion and allow his withdrawal at this time.

IT IS HEREBY ORDERED that this interlocutory appeal is dismissed in its entirety.

Dated this 1st day of November, 2022.

FOR THE COURT:

Kate Appleby

Kate Appleby, Senior Judge

## CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2022, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:

JEFFREY WESTON SHIELDS RAY QUINNEY & NEBEKER JSHIELDS@RQN.COM

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JOHN ROBINSON JR DEISS LAW PC
JROBINSON@DEISSLAW.COM

KENNEDY D NATE MCNEILL VON MAACK
KNATE@RQN.COM

FIRST DISTRICT, LOGAN DEPT ATTN: JANET REESE
CACHE COUNTY HALL OF JUSTICE
logancrim@utcourts.gov

By Tammy Berg
Legal Secretary
FIRST DISTRICT, LOGAN DEPT,
170100325

IN THE UTAH COURT OF APPEALS

| | |
|---|---|
| HOWELL MANAGEMENT SERVICES, LLC,<br>Appellee,<br>*v.*<br>AUGUST EDUCATION GROUP, LLC, AND APARNA VASHISHTROTA,<br>Appellants. | ORDER<br><br>Case No. 20200713-CA |

Before Judges Christiansen Forster, Tenney, and Appleby

This matter is before the court on Appellee's Motion to Strike Filings From September 30 Through The Present, filed on November 1, 2022.

This court dismissed the above-captioned appeal on November 1, 2022.

Accordingly, IT IS HEREBY ORDERED that the Motion to Strike Filings is denied as moot.

IT IS FURTHER ORDERED that Appellee need not respond to any matter identified in Appellee's motion to strike.

DATED this _2nd_ day of November, 2022.

FOR THE COURT:

Kate Appleby

Kate Appleby, Judge[3]

[3] 1. Senior Judge Kate Appleby, sat by special assignment as authorized by law. See generally Utah R. Jud. Admin. 11-201(7).

## CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2022, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:

Aparna Vashisht Rota aps.rota@gmail.com

AUGUST EDUCATION GROUP, LLC
aps.rota@gmail.com

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KENNEDY D. NATE KNATE@RQN.COM

Hannah Hunter

By
Hannah Hunter Judicial Assistant
Case No. 20200713
District Court No. 170100325

| | |
|---|---|
| HOWELL MANAGEMENT SERVICES, LLC,<br>Appellee,<br>*v.*<br>AUGUST EDUCATION GROUP, LLC, AND APARNA VASHISHTROTA,<br>Appellants. | ORDER<br><br>Case No. 20200713-CA |

Before Judges Christiansen Forster, Tenney, and Appleby

This matter is before the court on its own motion and Appellee's motions for dismissal of the appeal.

By Order dated, June 7, 2022, this court indicated that it was considering dismissing Appellant Rota's appeal as a sanction for her filing of inappropriate materials with this court during the course of the appeal. In addition,

Appellant Rota sent the court an email with a subject caption that stated "Withdrawal of Interlocutory Briefing" which is the basis for Appellee's Motion for Dismissal of Petitioner's Appeal," filed August 12, 2022; the court has not yet addressed that motion.

Now, therefore, IT IS HEREBY ORDERED that Appellants' counsel, John Robinson, Jr., will appear before the Utah Court of Appeals on October 18, 2022 at 1:30 p.m. via WebEx and show cause why Appellant Rota should not be held in contempt of this court and have her appeal dismissed as a sanction for her repeated filing of inappropriate materials during the course of this appeal. Mr. Robinson shall also be prepared at the show cause hearing to address which of August Education Group, LLC's issues on appeal remain viable, if any, if Appellant Rota's appeal is dismissed, or whether August Education Group, LLC, should voluntarily dismiss its appeal.

DATED this 13th day of September, 2022.

FOR THE COURT:

Kate Appleby

Kate Appleby, Judge[4]

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2

[4] Senior Judge Kate Appleby, sat by special assignment as authorized by law. *See generally* Utah R. Jud. Admin. 11-201(7).

CERTIFICATE OF SERVICE

l hereby certify that on September 13, 2022, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:
JEFFREY WESTON SHIELDS
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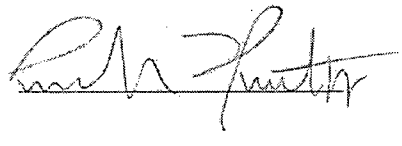

By -------,
Halrn Hunter
Judicial AssistantCase No. 20200713 District Court No. 170100325

Dr. Aparna Vashisht-Rota
Pro Se Litigant
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IN THE UTAH COURT OF APPEALS

| | |
|---|---|
| Dr. Aparna Vashisht-Rota Appellant,<br>v.<br>Howell Management Services and Chris Howell<br>Appellees | MOTION TO STRIKE<br>Appeals Court No. 20200713-CA Trial Court No. 170100325<br>Hon. Angela Fonnesbeck |

## INTRODUCTION

Appellant moves to strike Exhibit A, B, C, D, E and F.

1. Exhibits A, B, C, D are a part of 20210395-CA (Exhibit 1). The AG complaint is represented in the docket sheet (Page 15 of 17) as well as motion to change venue on page 14 of 17.

2. Exhibit E is due to Ahmaud Arbery case and obstruction of justice (Exhibit 2) so Appellant reached out to whistleblower attorneys that suggested to timely lodge to preserve statute of limitations. It should be stricken as not

a part of 170100325.

1. Page 106 of 593 to 190 of 593 should be stricken as not on the record.
2. Pages 192, 196, 197, 204, is not on the record in Exhibit E.
3. Similarly, pages 229 to 272 is not on the record.
4. Pages 300-364 is not on the record in Exhibit E.

3. Parts of Exhibit F is not on the record, specifically,
    1. Pages 417-485 are not on the record.
    2. Pages 538-539 is not on the record

c. Pages 563 to 571 is not on the record

4. Exhibit G is not in the trial Court record. Did the Appellate court delay the record on purpose to set Appellant up with the Order in Exhibit A first and then this appeal when clearly Exhibit A should have been left as voluntarily dismissed. In light of that, Exhibit D is a valid request.

Date: April 14, 2022

/s/ Aparna Vashisht-Rota

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Dr. Aparna Vashisht-Rota

## VERIFICATION

I, Aparna Vashisht-Rota, hereby attest and affirm that the facts set forth herein are true and accurate to the best of my knowledge.

Date: April 14, 2022
/s/ Aparna Vashisht-Rota

_____

Dr. Aparna Vashisht-Rota

## CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2021, I filed the foregoing with the Court of Appeals Clerk by email and copied opposing counsel on the same. Participants in the case who are registered CM/ECF users will be served by the court's CM/ECF system.

Date: April 14, 2022
/s/ Aparna Vashisht-Rota

_____

Dr. Aparna Vashisht-Rota

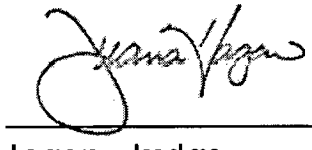
| | |
|---|---|
| HOWELL MANAGEMENT SERVICES, LLC,<br>Appellee,<br>*v.*<br>AUGUST EDUCATION GROUP, LLC, AND<br><br>APARNA VASHISHTROTA,<br>Appellants. | ORDER<br><br>Case No. 20200713 -CA |

This matter is before the court on Aparna Vashisht Rota's "Motion to Strike" and "Motion Under Rule 2 to First Decide Utah Jurisdiction." The motion to decide Utah's jurisdiction lacks any legal analysis. Moreover, any argument concerning the district court's subject matter or personal

jurisdiction over the parties should have been included in Appellant's brief. IT IS HEREBY ORDERED that the motion to strike is denied. However, to the extent that any non-record material is included in the briefs of either party, this court will disregard the non-record material. IT IS ALSO HEREBY ORDERED that the motion to decide Utah jurisdiction is denied.IT IS ALSO HEREBY ORDERED that this court will not consider any further motions filed by Rota concerning issues that should have been included in her brief.

Dated this _29th_ ~~day~~ of April, 2022.

FOR THE COURT:



Diana Hagen, Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on April 29, 2022, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:

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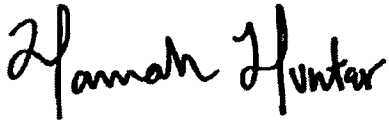


By ___ Hannah Hunter

Judicial Assistant

Case No. 20200713 District Court No. 170100325

IN THE UTAH COURT OF APPEALS

| | |
|---|---|
| HOWELL MANAGEMENT SERVICES, LLC, Appellee, *v.* AUGUST EDUCATION GROUP, LLC, AND APARNA VASHISHTROTA, Appellants. | ORDER<br><br>Case No. 20200713-CA |

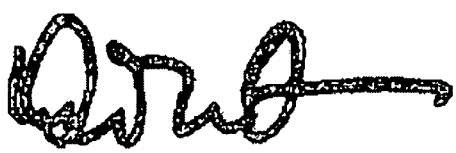
This matter is before the court on Howell Management Services, LLC's request for clarification. On April 29, 2022, this court issued an order stating that it would disregard all non-record material contained in the briefs. Howell seeks clarification concerning whether that includes material included in its argument that the case

should be dismissed as a sanction concerning Apama Vashisht Rota's filing of inappropriate materials with this court during the course of the appeal

IT IS HEREBY ORDERED this court will consider non-record material contained in Howell's brief solely for the purpose of evaluating its claim that this appeal should be dismissed as a sanction.

Dated this 7th day of June, 2022.

FOR THE COURT:



David N. Mortensen, Judge

## CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2022, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:

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JOHN ROBINSON JR.
JROBINSON@DEISSLAW.COM

Case No. 20200713

By: Hannah Hunter
Judicial Assistant
District Court No. 170100325

IN THE UTAH COURT OF APPEALS

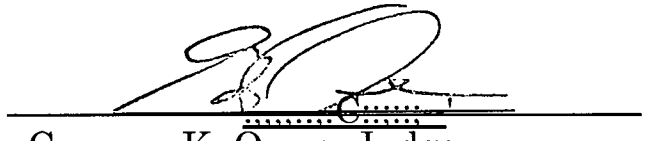
| | |
|---|---|
| APARNA VASHISHT ROTA,<br>Appellant.<br>*v.*<br><br>HOWELL MANAGEMENT SERVICES, ET AL., | ORDER<br><br>Case No. 20200802-CA |

On November 3, 2020 Appellant filed a letter with the court requesting numerous extraordinary procedures to be taken in this case. Appellees responded with a letter requesting attorney fees. Neither request complies with the requirements of Rule 23 of the Utah Rules of Appellate Procedure.

IT HIS HEREBY ORDERED that no action shall be taken on the parties' letters to this court. All requests for relief must be contained within proper motions that explain the factual and legal support for the relief requested.

Dated this 15th day of December, 2020.

FOR THE COURT:



Gregory K, Orme, Judge

## CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2020, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:

Aparna Vashisht-Rota APS.ROTA@GMAIL.COM

JEFFREY WESTON SHIELDS
ELIZABETH BUTLER SHANE
PETERSON
BRENNAN J. CURTIS
JSHIELDS@JONESWALDO.COM
EBUTLER@JONESWALDO.COM
STPETERSON@JONESWALDO.COM
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By _____
Jeffrey Ricks
Appellate Court Coordinator

Case No. 20200802
District Court No. 200100119

## DRAFT PROPOSED ORDER

Appellants appeals from the district court's dismissal of their counterclaims of breach of contract, unjust enrichment, and breach of good faith against Appellee Howell Management Services suit for breach of contract, defamation, injurious falsehood, email harassment, interference with economic relations, stemming from Appellant Rota's reporting of solicitation, sexual favors to university partners after failed contract negotiations that resulted in the district court ordering a 'Gag Order' under Rule 65 (A) and striking her counterclaims and entering a default on September 2, 2020. Exercising jurisdiction, we reverse and remand for further proceedings.

### Background

During contract negotiations when the

Second Agreement was in place, Appellant Rota experienced solicitation for sexual favors on March 14, 2017 "you know there are other places that provide happy endings right?", "how do I get you away from Jerome (Appellant's husband)?", and March 15, 2017 "do you know the Kamasutra?", "are Indians Cannibals?" due to which she rescinded from the alleged Utah agreements on May 6th, 2017 acknowledged by Mr. Chris Howell on May 8th, 2017 with an "Alright, Thank you" prior to countersigned copies of the alleged Utah agreements from Mr. Chris Howell as required by the agreements and prior to express acceptance of Appellant's counteroffers resulting in no Utah agreements. However, on or around June 1st, 2017[5], Howell

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[5] Date of the fraudulent check issuance from HMS that Appellants received on or around June

sent $500 a month after her express revocations, alleged Utah agreements, emailed Mr. Ravi Lothumalla on July 10th, 2017 prohibited Appellant from her trade partners. Mr. Lothumalla called Appellant to inform her that is good she was prohibited and that it means she was not a hooker and that Mr. Howell is a pimp that has women that sleep with anything that moves for $500.

Having just been solicited, Appellant wrote HMS in private emails seeking an explanation as a new entrant about the comments and the harassment. Appellant met HMS at her past university job as the Director of Marketing and Admissions new to higher education, international recruitment, and the law.

On October 27th, 2017, Howell wrote

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6th, 2017.

university partners alleging Appellant is an independent contractor that might reach out to them. On November 2, 2017, it filed a suit in Utah[6].

On March 19, 2018, she issues Rights to Sue and wrote the universities.

On July 17, 2018 (Case 3:18-cv-02010-L-AGS Document 22 Filed 05/28/19 PageID.478 Page 2 of 5)[7], Appellants filed her wages claims till March 2017.

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[6] Mr. Chris Howell is not in the suit in Utah as the matter was set to revert to California as filed with equitable rescission.

[7] Appellants filed her wages claims from October 2015 to March 2017 with counsel. "From October 2015 to March 2017, Defendants employed Plaintiff Aparna Vashisht-Rota ("Plaintiff") to

On March 18, 2019, Appellant filed her harassment complaint with counsel 3:19-cv-

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refer foreign and domestic students to HMS and to have those students enrolled at universities associated with HMS. Plaintiff was not paid for the work she performed for Defendants. On July 17, 2018, Plaintiff filed a complaint in California Superior Court, County of San Diego, North County Division, alleging Defendants' failure to pay her minimum wage, overtime pay, any actual wages, compensation at termination, and failure to reimburse out-of-pocket expenses in violation of multiple sections of the California Labor Code. On August 28, 2018, Defendants removed the case to this Court, claiming diversity jurisdiction, pursuant to 28 U.S.C. §§ 1332, 1441."

00512-L-AGS[8] Document 1 Filed 03/18/19

PageID.2 Page 1 of 18 to 18 of 18.

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[8] 3:19-cv-00512-L-AGS (1) SEXUAL HARASSMENT; (2) UNLAWFUL GENDER/SEX DISCRIMINATION; (3) UNLAWFUL RACE DISCRIMINATION; (4) UNLAWFUL NATIONAL ORIGIN DISCRIMINATION; (5) RETALIATION [PUBLIC POLICY]; (6) RETALIATION [CAL. LABOR CODE §1102.5]; (7) CONSTRUCTIVE DISCHARGE; (8) INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS; (9) FAILURE TO PREVENT AND REMEDY UNLAWFUL DISCRIMINATION AND HARRASSMENT; (10) FAILURE TO CORRECT AND REMEDY UNLAWFUL DISCRIMINATION AND HARRASSMENT; AND (11) VIOLATION OF EQUAL PAY ACT.

The emails to Mr. Chris Howell are the subject of Howell's failed third cause of action email harassment claim as no private cause of action (*Nunes v. Rushton*, 2018) pp. 8 of Judge Allen's Memorandum Decision June 29, 2018 (disputed for other reasons resolved by Rule 2 Motion).

The emails to the universities (fewer than 100 to each university) that are the subject of Howell's TRO and defamation motion and the gist of the action against Appellants. Appellees allege that the university officials were 'annoyed' by the emails Appellant sent but the university officials in turn sent Howell a handful of messages to share annoyance, for example DeWald wrote "and out of the blue" on August 28, 2018 at 11.22 AM to which Mr. Howell responded with Mr. Trocki and Mr. Spencer in copy,

Marylou, "Thanks for keeping us in the loop. I don't think I'd waste my time responding to her if I were you, she's nuts. Chris. On October 18, 2018 at 9.45 p.m. DeWald wrote "Any yet they continue." to which Mr. Trocki responded 'definitely a whacko' on October 18, 2018.

The emails resulted in a gag order on March 4, 2019 under Rule 65 (A) that fell off on March 18, 2019.

On June 10, 2019, Appellant submitted her declaration that her signature was stolen that Mr. Chris Howell abused it after she expressly revoked her digital signatures[9].

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[9] 84. As of May 6, 2017, HMS was not in proper possession of my digital signature I had expressly revoked it and Chris had acknowledged it. I was also clear that I was retreating back to the

On July 23, 2019, Appellant declared under oath there are no Utah agreements and the matter should revert back to California which opposing counsel acknowledged on the record.

On August 12, 2019, Appellants (AEG/Rota) won her trial against Hernandez acquired under the First and Second Agreements with HMS in a niche market 'specialized CPT market' of which she is a founder. The segment

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termination by Chris 'this relationship did not work out' dated March 31, 2017. On May 8, 2017 9.35.51 a.m., Chris responded to my rescission email with his brief email statement: "Alright, thank you." Any use by HMS of my signature after that date was expressly without my permission.

represents millions in ascertainable revenue due to the immigration stop gap it currently represents.

On January 30, 2020 Appellants filed for abeyance of AAA claims[10].

On February 19, 2020, Appellant filed for an equitable rescission in the Southern District Court of California with a leave to amend to add additional Defendants. Appellant further alleged that her digital signature was stolen. Hernandez and HMS conspired with the same strategy to cause confusion on the contracts to avoid paying Appellant at all and usurp her business share resulting in an actionable antitrust injury. Under AB 51, an employee can change her terms of

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[10] Hon. Judge Orfield noted on March 19, 2021 that was closed without prejudice so Appellants did not waive her AAA claims pursuant to AAA Rule 52 (A).

employment and here the Utah agreements were contested to begin with.

On April 17, 2020 and April 18, 2020[11], Appellants filed 20010119 in Utah to split the case by agreements as none of the work arose under the alleged Utah agreements with Utah case law for 1) specific performance 2)

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[11] The action was filed to alert the Utah Court but was dismissed under Rule 41(a) Pursuant to Rule 41 of the Utah Civil Procedure, Plaintiff exercises Rule 41 (a)(1)(A)(i) with this filed notice of dismissal. Pursuant to Rule 41 (a)(1)(B) the dismissal is without prejudice. The Utah Court still ruled on the dismissed Complaint on September 2, 2020 and declared her vexatious presently at the SCOTUS 22-276.

misappropriation of trade secrets under unjust enrichment[12]. She filed for Rule 11 (B) sanctions

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[12] The Utah Supreme Court has ruled that irreparable harm is presumed in a case of trade secret misappropriation. See *InnoSys v. Mercer*, 2015 UT 80 (August 28, 2015)

Utah Code Chapter 24 UTSA: Uniform Trade Secrets Act:

§13-24-1- §13-24-8. 13-24-3: Injunctive relief; 13-24-2: Damages; 13-24-5 Attorney's Fees; 13-24-7: Statute of limitations; 13-24-8: Effect on other law: UTSA does not affect (a) contractual remedies, whether or not based upon misappropriation of a trade secret; (b) other civil remedies that are not based upon misappropriation of a trade secret; or (c ) criminal

for delivery issues for which the trial Court awarded Appellees $4,900.56 without any evidentiary hearing or witness testimony from Mr. Jacobs of a local Utah company, Statewide Process that reported the difficulty in service to Mr. Howell with a dodge of service from opposing counsel in both Utah and California in a trust.

On August 25, 2020, Appellant Rota received a threat from Ms. Taj/BlueChip Defendants actionable under §51.9 and 15 U.S.C. §1.

8/25/20, 06:49 – Mubeen: You do whatever you want but tomorrow morning all recording I'll forward to HMS group .if your not asking

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remedies, whether or not based upon misappropriation of a trade secret.

apologies.. then everyone will put case against you..

8/25/20, 06:49 – Dr. Aparna Vashisht Rota: Go for it

8/25/20, 06:49 – Mubeen: I am not so stupid or cheap to do that with you.

On September 2, 2020, the trial Court issued a default ruling and that Appellants were 'unapologetic' as she used irrelevant documents in an 'unrelated' matter. As she was defaulted without any evidentiary hearings on the show cause, defamation, TRO, etc., Appellant filed an interlocutory appeal in Utah claiming (1) violations of Appellant's due process rights (2) First Amendment Rights (3) violations of Appellant's constitutional rights (4) violations of due process rights upon deposition under oath that forum is contested (5) violations of

Appellant's First and Fourteenth Amendments against various Defendants that she filed in California under the First and Second agreements.

Substantial portions of Appellant's claims should have been in arbitration and based on changed facts and circumstances. An analysis of the emails using any framework Utah or Federal law, the emails are privileged.

**Jurisdiction**

We consider whether we have subject matter jurisdiction to enter judgement or ruling in this matter. Vashisht-Rota argues that because she has rescinded from the alleged Utah agreements, declared under oath there are no Utah agreements, and filed for an equitable rescission or around February 2020, that Utah has no jurisdiction. Or that it has jurisdiction to

consider HMS' motions as collateral motions including the Complaint as it does not meet 12 (B)(6) because the Complaint is based on privileged communications by law; the agreements are contested; facts changed as noted by HMS counsel on August 31, 2020 entitling Appellant to leave to amend and a new trial as filed in California.

In the alternative, the Court can dismiss the matter as no jurisdiction to allow the leave to amend as filed in California to continue.

First, the US District Court in California has the arbitration claims under AAA agreements and granted the Third Amended Complaint on or around November 2020. Appellant's brief on January 10th, 2022, via counsel, Appellants argue that substantial parts of the claims should be in arbitration. Appellants

also filed a Rule 2 motion (April 29, 2022 Order) with counteroffers in the negotiations due to *Shree Ganesh* 2021 and argued that she has a leave to amend to add Defendants pending in California due to changes facts once she won her AAA trial against Hernandez.

Second, we discuss the Rule 2 motion legal analysis on counteroffers, misrepresentations, and deposition under oath as to no Utah agreements. As a result, Utah jurisdiction is not the controlling forum, Appellants claim that the matter can proceed to bench trial under (1) unjust enrichment/ (additional recovery of misappropriation of trade secrets[13]) (2) breach of

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[13] The Utah Supreme Court has ruled that irreparable harm is presumed in a case of trade

good faith, against Howell's claims thereby making all motions filed by the parties' collateral matters. Appellant needs to add Defendants,

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secret misappropriation. See *InnoSys v. Mercer*, 2015 UT 80 (August 28, 2015) Utah Code Chapter 24 UTSA: Uniform Trade Secrets Act:§13-24-1- §13-24-8. 13-24-3: Injunctive relief; 13-24-2: Damages; 13-24-5 Attorney's Fees; 13-24-7: Statute of limitations; 13-24-8: Effect on other law: UTSA does not affect (a) contractual remedies, whether or not based upon misappropriation of a trade secret; (b) other civil remedies that are not based upon misappropriation of a trade secret; or (c ) criminal remedies, whether or not based upon misappropriation of a trade secret.

indispensable parties, and facts changed.

Third, we consider the Orders on appeal March 21, 2019 Order (served on March 22, 2019) herein the "Gag Order" [R. 1182-1184] and September 2, 2020 MEMORANDUM DECISION on Amended Motion for Issuance of an Order to Show Cause Re: Contempt of Protective Order, herein the "Contempt Order" [R. 5897-5918]; September 2, 2020 MEMORANDUM DECISION denying Defendants' Verified Motion to Amend March 21, 2019 Order and, in the Alternative, Motion for Exemption to Existing Order, herein the "Denial Order" [R.5890-5896] and then we discuss the motions pending in the case to dismiss the matter as HMS complaint does not meet 12 (B)(6) de novo.

**Rule 2 Motion Jurisdiction**

Hon. Judge Allen should have used *Cea v.*

*Hoffman*, 272 P.3d 1178 as there is no meeting of the minds, signatures are required, two counteroffers and fraud making *Cea v. Hoffman*, 272 P.3d 1178 more applicable rather than *Commercial Union Associates v. Clayton*, 863 P.2d 29. In this instance, offer and acceptance were less probable than not due to solicitation of sexual favors preceding the agreement negotiations. On March 31, 2017 Appellant terminated the Second Agreement due horrible work conditions and nebulous compensation terms rendering the work untraceable. It is unlikely that Appellant will ever work with HMS or Utah again.

A. Countersigned Copies: First, countersigned copies were expressly required in processing agent contracts. A lack of signature changed the agent classification within the

alleged contract. It is mentioned in the express language of the contract. Appellant's job was to sign agents and the compensation for that agent was depended upon HMS signing a contract with the agent. If there were no signed agreements, it was a 'non-compensable' agent agreement and if there were a signed agreement, it was a 'compensable' agent agreement.

Thus, HMS' countersigned copies were critical to an executed contract. "Additionally, if you could please send me a list of the pending agent agreements if there are any that still require my signature that would be great." See additional examples on pages 8-10.

1.3.3 Agents. HMS authorizes Representative to pursue and develop relationships with various referring agents. Referring agents may include but are not limited

to, educational agents, consultants, staffing companies, immigration attorneys, community colleges, etc. Contractual agreements with referring agents shall be direct agreements between HMS and each individual referring agent. Such relationships developed by Representative shall be referred to and identified as "AEG Agents".

a. HMS agrees to pay Representative a royalty of up to five hundred dollars ($500) for each recruit from an AEG Agent that obtains a visa, pays the required tuition and enrolls at one of HMS' partner colleges or universities.

b. The royalty shall be paid in two installments, two hundred fifty dollars ($250) paid in the first semester the student is enrolled and two hundred fifty dollars ($250) paid in the second semester the student is enrolled.

c. Additionally, HMS agrees to pay Representative a royalty of up to five hundred dollars ($500) as outlined above for each unclassified recruit that obtains a visa, pays the required tuition and enrolls at one of HMS' partner colleges or universities other than Harrisburg University of Science and Technology. An unclassified recruit is a recruit that is not assigned to a specific category or referral source.

d. In the event Representative develops a non-compensable relationship with a referring agent, HMS agrees to compensate Representative as outlined in section 1.3.1 rather than section 1.3.3(a) for each individual student recruited by a non-compensable agent that obtains a visa, pays the required tuition, and enrolls in one of HMS' partner colleges or universities in accordance with the attached

Schedule of Compensation; compensation that otherwise would have been paid to referring agent.

e. HMS agrees to pay Representative no later than ten (10) days after receipt of payment from the university partner.

f. Royalties will be paid to Representative as long as the AEG agent maintains an agreement with HMS and recruits students for any present or future HMS partner college or university.

Alleged Third Agreement

B. Counteroffers: Second, there were two counteroffers in the failed negotiations. "An offeree's proposal of different terms from those of the offer constitutes a counteroffer, and no contract arises unless the original offeror accepts it unconditionally." Id. at 1377; 1 Corbin on

Contracts § 3.27 (1993) ("Any expression of assent that changes the terms of the offer in any material respect may be operative as a counteroffer."). Generally, a counteroffer "operates as a rejection of the original offer." 1 Williston on Contracts § 5.3, at 908 (4th ed.); *Burton v. Coombs*, 557 P.2d 148, 149 (Utah 1976) (noting that a counteroffer rejects the offer). The offeree's power to accept the original offer is thereby terminated. See *Burton*, 557 P.2d at 149. However, "[i]f the original offeror accepts the counteroffer before it is withdrawn, a binding contract is created." *Cal Wadsworth Constr. Co.*, 898 P.2d at 1378 (citing *R.J. Daum Constr. Co.*, 122 Utah 194, 247 P.2d 817, 819 (Utah 1952)). *Cea v. Hoffman*, 276 P.3d 1178, 2012 Utah App. LEXIS 100, 705 Utah Adv. Rep. 27, 2012 WL 1142247.

Counteroffer One: One tearing of the $3,000 check that in the alleged April 24, 2017 agreement. HMS did not move to modify the contract or indicate that it had signed the agreement meaning it knew there was no alleged third agreement. 4.4. Modifications. This agreement may not be modified or amended except by a written agreement that refers to this agreement and is signed both parties hereto.

Counteroffer Two: On May 5th, 2017, Plaintiff sends the alleged Fourth Agreement ["Here it is executed from my side with the retainer removed. I have shredded the check so I think we are all good."] (Counteroffer 2: removal of retainer, condition precedent to enforcement, countersigned copies).

C. Meeting of the minds: There was no meeting of the minds on the various terms. A

meeting of the minds between contracting parties is essential to the formation of any contract. A condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or implicitly, with sufficient definiteness to be enforced. *Pingree v. Continental Group of Utah, Inc.*, 558 P.2d 1317, 1321 (Utah 1976) (quoting *Valcarce v. Bitters*, 12 Utah 2d 61, 63, 362 P.2d 427, 428 (1961)). Here, there was no meeting of the minds on the contract and signatures were required before a contract to be enforced and valid. Appellant revoked her digital signature and was unlikely to sign with HMS. HMS had the signature and conspired with Hernandez to defraud Appellant that she learned in April-August 2019 in the Hernandez trial.

As discussed, there are no Utah

agreements, so the matter is controlled by the AAA agreements and dépeçage is applicable.

**Mistake: Mistakes Mistake of Fact**: A party that interprets a term one way, but has reason to know that another interprets it differently, should bring the issue to light before the contract is closed. Failure to do this often pushes courts to construe the meaning of the term against the party,
which had knowledge of the possible mistake (Wex).

**Mistake:** in general, any error or misconception which is a situation
where the parties did not mean the same thing when they agreed to a term of provision. Also, when at least one contracting party held a belief that was factually or legally false. As a result, the contract may be subject to rescission. (Wex).

Plaintiff understood one thing from the unclassified/non- compensable provisions while the opposition meant something different. Opposition is sophisticated and knew that Plaintiff interpreted the contract differently and knew that Plaintiff made the mistake in calculation and they did not bring this issue to light even though the negotiations show confusion in terms. Opposition added a line surreptitiously to the agreement so he knew that the agreement terms being negotiated were actually futile. Opposition did not bring this issue to light. The confusing terms and mistake is present in both alleged Utah agreements.

**Fraud** by false promises to induce contracts is pending in trial court. She could not file this till the AAA trial was complete.

**"Dépeçage** is the widely approved process

whereby the rules of different states are applied on the basis of the precise issue involved." *Johnson Continental Airlines Corp.*, 964 F.2d 1059, 1062 n.4 (10th Cir. 1992). See also *Ruiz v. Blentech Corp.*, 89 F.3d 320, 324 (7th Cir.1996) (defining dépeçage as "the process of cutting up a case into individual issues, each subject to a separate choice-of-law analysis"); *Underground Solutions, Inc. v. Palermo*, 41 F. Supp. 3d 720, 722-23 (N.D. Ill. 2014) ("[Dépeçage] applies when it is appropriate to apply the law of more than one jurisdiction, such as when the issues to which the different laws applied are separable.") (internal quotation marks and citation omitted). This parsing of issues is consistent with the Restatement § 145 approach, which Utah courts have adopted. See *Ruiz,* 89 F.3d at 324 (the Restatement "enumerates specific factors that

identify the state with the most significant contacts to an issue, and the relevant factors differ according to the area of substantive law governing the issue and according to the nature of the issue itself." (emphasis added); *Townsend v. Sears, Roebuck & Co.*, 879 N.E.2d 893, 901 (Ill. 2007) ("[S]ection 145 explicitly refers to a selective, issue-oriented approach.

Therefore, this Court only has claims under the alleged Third Agreement/Unjust enrichment that has substantial money due that can continue as a bench trial for the claims under the alleged Utah agreements. Arguably, those claims belong in California OR the Utah Court can resolve HMS' Complaint and other motions as collateral matters or the Utah matter is moot is there is no jurisdiction.

**I. AAA Motion**

Ms. Rota's Motion for Partial Summary Judgment filed June 30, 2019. Ms. Rota moved for judgment to enforce the terms of her first two agreements with Howell. [R. 2701, 2764, 2984]. This was subsequently filed in California in the Southern District of California due to (1) rescission (2) deposition under oath (3) fraud in contract formation (4) and the fact that the agreements have been recorded as contested. Therefore, dépeçage is applicable.

**LEGAL GROUNDS**

Under the Supremacy Clause of the United States Constitution, a state
court is legally powerless to restrain federal court proceedings in personam,
regardless of whether the federal litigation is pending. See generally *General Atomic Co. v. Felter*, 436 U.S. 493 (1978). "Early

in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings ... [and] [t]hat rule has continued substantially unchanged to [date]." *Donovan v. City of Dallas*, 377 U.S. 408,412 (1964). Today, federal courts have been congressionally authorized to restrain state court proceedings under certain circumstances, but "the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in in personam actions" remains intact *Id.* Further, "[j]ust as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator. " *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.

Ct. 524, 530 (2019).

**AAA Commercial Rules of Arbitration.**

**R-52. Applications to Court and Exclusion of Liability**

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

**R-47. Scope of Award**

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, *interlocutory, or partial rulings*[14], orders,

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[14] **ISSUES TO TRACK:** Appellant has filed for

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sanctions against Hernandez in AAA under Rule 58 (A) R-58. Sanctions (a) The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.

Appellant has requested specific performance and Appellant is entitled to damages from Hernandez in the interlocutory appeal in 170100325 and

and awards. In any interim, *interlocutory, or partial award*, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts

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sanctions as well as damages from non-circumvention of the enforced agreement and binding order resulting in damages.
Rule 47 (b) allows the right to request partial rulings on the Utah motions as an equitable remedy or have partial rulings in Court on AAA based claims.

as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

i. interest at such rate and from such date as the arbitrator(s) may deem appropriate; and

ii. an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

**Discussion & Analysis**

As all of the work and contacts arose in California, she correctly filed there. The AAA motion is filed in California as 100% of the work and event took place in California. Appellant has the right to change forums and terms of her employment as per AB 51. Consistent with her position, she filed for equitable rescission after

she declared under oath on July 23, 2019 that there are no Utah agreements.

AAA claims aren't waived and Appellant does not have Utah agreements that she has noted since the inception of the dispute. In her previous filings in 2018 and 2019, she indicated, via counsel, that Utah would be impossible to have a trial. She did not get any discovery or all the privileges and rights afforded to a white male.

## II. THE GAG ORDER/TRO LEGAL GROUNDS

**A. Dates of TRO:** The duration of TRO is 14 days from the date of issue as per URCP Rule 65 A governing injunctions. Specifically, Rule 65(b)(3), Appellees did not file for preliminary injunction hearings once the TRO was granted on March 4, 2019 from the bench expired on March

18, 2019.

Appellants did not stipulate to more than 14 days as filed for dissolution on August 22, 2019. URCP Rule 65 (A)(b)(2), "The order shall expire by its terms within such time after entry, not to exceed 14 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record." The Order was issued from the bench at the TRO hearing on March 4, 2019 as indicated by the record, therefore, it fell off on March 18, 2019.

**B. Unpaid Non-Compete:** §34-51-202 (2) of the Post-employment Restrictions Act, Chapter

51 that states that "This chapter does not prohibit a post- employment restrictive covenant related to or arising out of the sale of a business, if the individual subject to the restrictive covenant receives value related to the sale of the business."

**C. Damages: §34-51-301:** Award of arbitration costs, attorney fees and court costs, and damages. If an employer seeks to enforce a post-employment restrictive covenant through arbitration or by filing a civil action and it is determined that the post-employment restrictive covenant is unenforceable, the employer is liable for the employee's: (1) costs associated with arbitration; (2) attorney fees and court costs; and (3) actual damages.

**A. Dates of the TRO:**

Appellant's VERIFIED MOTION TO AMEND MARCH 21 ORDER AND, IN THE ALTERNATIVE, MOTION FOR EXEMPTION TO EXISTING ORDER filed on August 22, 2019.

Footnote 1 of this motion: The Order is dated March 21, 2019 per the Court's signature; however, the Order was not served on the parties until March 22, 2019. The Defendants have been in compliance since it was issued from the bench on March 4, 2019 to date.

See Appellees' brief (page number 36 of 593) "While Appellants take issue with the district court's statement made from the bench (calling it "offhand"), it is within a court's authority to make an oral ruling or finding from the bench.

Therefore, as per their argument, the TRO

was in place from March 4, 2019 till March 18, 2019 as the Order was issued from the bench. Appellees also argue that the Order issued as per Appellee's brief 12 of 593 on March 21, 2019 on page 12 of 593 in Appellees' brief. Therefore, it dissolved on April 4, 2019 by operation of the rule or April 5th, 2019 when it was served on the parties on March 22, 2019.

Footnote 2 of this motion: "The court's notice of hearing for the March 4, 2019 hearing plainly stated that this was a hearing on HMS's motion for a temporary restraining order. The court issued an "order" which presumably is a TRO. What did not occur was the setting of an evidentiary hearing on whether a preliminary injunction should issue. Thus, by operation of rule, the TRO expired 14 days after it was issued.

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|---|---|---|
| Minute: HEARING ON MOTION FOR TRO | 03/04/2019 | 1166 |
| Order: HEARING ON MOTION FOR TRO | 03/06/2019 | 1169 |

The record index on page 2 of 8 shows

Minute: Hearing on Motion for TRO 03/04/2019

Order on Hearing on Motion for TRO 03/06/2019

**B. Rule 65A Motion:** Appellees' motion was brought under U.R.C.P. Rule 65 (A) as on the Order issued March 22, 20192 "THIS MATTER IS BEFORE THE COURT pursuant to the hearing held before the Court on Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction on March 4, 2019. Appellants did not stipulate to the TRO beyond the 14 days.

| | | |
|---|---|---|
| Minute: HEARING ON MOTION FOR TRO | 03/04/2019 | 1166 |
| Order: HEARING ON MOTION FOR TRO | 03/06/2019 | 1169 |

The record index on page 2 of 8 shows on March 4, 2019

Minute: Hearing on Motion for TRO 03/04/2019

Order on Hearing on Motion for TRO 03/06/2019

**C. Rule 65A Non-compliance:** The Order does not comply with Rule 65 A (b)(2) Form of order. Every temporary restraining order shall be endorsed with the date and hour of issuance and shall be filed forthwith in the clerk's office and entered of record. The order shall define the injury and state why it is irreparable. The order shall expire by its terms within such time after entry, not to exceed 14 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

1. **Hour and issuance contested:** March 4, 2019 or March 21 2019 or March 22, 2019.

2. **Fails to State Irreparable Harm:** Fails to state irreparable harm.

3. **Order Expired After 14 days:** Depending on 1, the TRO expired March 18, 2019 or April 4th, 2019 or April 5th, 2019.

**4. No Extension Entered of Record:** Appellants agreed to 14 days. No extension is on the record. Appellants moved to dissolve on August 22, 2019 to reiterate.

Pursuant to URCP Rule 65 (A)(b)(2), "The order shall expire by its terms within such time after entry, not to exceed 14 days, as the court

fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record."

Pursuant to URCP 65 (A)(b)(3) "Priority of hearing. If a temporary restraining order is granted, the motion for a preliminary injunction shall be scheduled for hearing at the earliest possible time and takes precedence over all other civil matters except older matters of the same character. When the motion comes on for hearing, the party who obtained the temporary restraining order shall have the burden to show entitlement to a preliminary injunction; if the party does not do so, the court shall dissolve the temporary restraining order.

There was no preliminary injunction hearing. The TRO motion was heard on March 4, 2019. There was no hearing for a preliminary injunction so the TRO dissolved.

**B. Gag Order Unpaid Non-Compete:**

Furthermore, Appellants did not stipulate to an unpaid non-compete that the so-called TRO imposed on Appellants. §34-51-202 (2) of the Post-employment Restrictions Act, Chapter 51 that states that "This chapter does not prohibit a post-employment restrictive covenant related to or arising out of the sale of a business, if the individual subject to the restrictive covenant receives value related to the sale of the business."

The Utah Code suggests that if there is a restrictive covenant imposed by the Court, there needs to be corresponding value related to the

business. Appellants did not agree to an unpaid non-compete and she had the right to compete prior to the harassment that she had to report. The non-compete from the Court issued on March 21, 2019 and September 2, 2020 is unpaid non-compete.

Therefore, all motions based on the March 21, 2019 are MOOT. Appellant does not understand the Utah Protective Order and prefers California's as it is much clearer, easier to follow, and cheaper to administer.

A. HMS' Motion for Contempt of March 21, 2019 Order and Supporting Memorandum filed on December 9, 2019

    - Moot

B. HMS' Motion for Contempt of Stipulated Protective Order, March 21, 2019 Gag Order, Docket Privacy Order and Mediation Order filed on July 2, 2020.

- Moot
- Person not on HMS witness list or trial witnesses

**LEGAL AUTHORITIES FOR A PRELIMINIARY INJUNCTION**

A plaintiff seeking a preliminary injunction generally must show that: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def.*

*Council, Inc.*, 555 U.S. 7, 20 (2008). A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22.

The Ninth Circuit applies a "sliding scale" approach in considering the factors outlined in *Winter*. A stronger showing of one element of the preliminary injunction test may offset a weaker showing of another. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–35 (9th Cir. 2011). Thus, when the balance of hardships "tips sharply towards the plaintiff," the plaintiff need demonstrate only "serious questions going to the merits." *Id.* at 1135 (internal quotation marks omitted).

Finally, the already high standard for granting a preliminary injunction is further

heightened when the type of injunction sought is a "mandatory injunction." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). To obtain a mandatory injunction, a plaintiff must "establish that the law and facts *clearly favor* her position, not simply that she is likely to succeed." *Id.* (emphasis in original). "In plain terms, mandatory injunctions should not issue in 'doubtful cases.'" *Id.* (quoting *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011)).

**Gag Order**

**Discussion & Analysis**

The Gag Order can be broken into parts.

**A. Private Communications to Howell**

Appellant has not emailed or contacted Howell since February 2019 when he was copied on university emails. The Court has ruled on

HMS' third cause of action on June 19, 2018 (Hon. Judge Allen Memorandum Decision) on page 8 of 9, therefore, the speech does not meet the criteria for a cause of action against Appellants.

**B. Regulation of Independent Contractor Speech at a University:**

HMS sued on the basis of the alleged Third Agreement that has a provision at paragraph 2.1 and 2.2 but only paragraph 3.3[15] is an obligation

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[15] On Tue, Jun 6, 2017 at 6:20 PM, Chris Howell <chris.howell@howellmgmt.com> wrote:
Aparna, I agree that we don't currently have an agreement, you terminated it on May 6th. Despite the fact, I am still obligated to honor section 3.3 "Obligations Upon Termination" of our last agreement that was signed and executed by August and HMS on May 5, 2017 (attached). If you don't want to accept the payment I sent you or any future payments that might be due to you, then that's fine with me. If this is the case, please draft and sign a release of liability releasing HMS of it's obligation to fulfill section 3.3 of the latest agreement. Thanks, Chris

upon termination. Furthermore, paragraph 2.3 of the 'non-solicitation and non-competition' states clearly that HMS understands that "if any of the provisions of this Section 2 are held to be unenforceable, the remaining provisions shall nevertheless remain enforceable, and the court making such determination shall modify, among other things, the scope, duration, or geographic area of this Section to preserve the enforceability hereof to the maximum extent permitted by law."

### C. Utah Contract Fails Statutory Requirement for Employees

Utah law §34-51-102 (3)(a) payments of $913/week that HMS failed to pay so the agreement is not an employment agreement. Pursuant to §34-51-301, Appellant is entitled to damages from an unreasonable restraint in trade as Howell Management Services refused to renew

the alleged agreement forcing Appellant to lose money as a founder.

Howell has no basis to regulate Appellant's private speech and right to report harassment without retaliation. Mahanoy and Tinker further provide high bars for disruption). Furthermore, Ottawa university's policies on harassment reporting expressly covers Appellant. Ottawa has its own software. HMS is interfering in the process provided to independent contractors.

"[a]ll members of the Ottawa University Community are responsible for sustaining the highest ethical standards of the University, and of the broader communities in which it functions. . . the Code applies to administration, faculty, staff, students, **vendors, contractors, and subcontractors,** and to volunteers elected or selected to serve in University positions . . . All persons, regardless of their position, or status within the University or the community, shall be responsible for their conduct throughout their relationship with the University." [emphasis

added]"

> (*See* Ottawa University EthicsPoint website https://secure.ethicspoint.com/domain/media/en/gui/49049/index.html

and

> *See* EthicsPoint – FAQ, https://secure.ethicspoint.com/domain/media/en/gui/49049/faq.pdf, attached hereto at Exhibit B). Moreover, the website specifies that "[t]he EthicsPoint system and report distribution are designed so that implicated parties are not notified or granted access to reports in which they have been named."

**D. Unknown Third Parties**

California law, SB 1135 prevents Appellees from regulating what Appellant discloses about the harassment on page 257 of 568 and that has been the law since 2006. The Gag Order prohibits Appellant from discussing or sending

attachments related to harassment to various third parties but that is against public policy as that limit both constitutional and unconstitutional speech. In addition, California law limits suppression of harassment complaints in settlement agreements and Orders. "However, (b) Notwithstanding any other law, in a civil matter described in paragraphs (1) to (4), inclusive, of subdivision (a), a court shall not enter, by stipulation or otherwise, an order that restricts the disclosure of information in a manner that conflicts with subdivision (a).

(d) Except as authorized by subdivision (c), a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to the claim described in subdivision (a) that is entered into on or after January 1, 2019, is void as a matter of law and

against public policy. The Gag Order was put in place on March 4th, 2019 and it dissolved 14 days later on March 18th, 2019. Therefore, both as a matter of law and procedure, the TRO is non-existent.

**Analysis**

The Court first analyzed Appellant's emails and determined that "it did not involve features that would place it outside the First Amendment's ordinary protection" Id. At 2046-47. (1) Appellant wrote after hours after the independent contractor was terminated (2) Appellant wrote about the harassment, rude, and vulgar comments that came about after HMS emailed Mr. Lothumalla and the sexual harassment from Appellees[16] (3) transmitted to

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[16] Appellant filed against indispensable parties: Mr. Chris Howell and Mr. Justin Spencer in

university officials using private emails to three people as noted in the university policy.

The Court explained that these features, while risking transmission to the school itself, nonetheless . . . diminish the school's interest in punishing B.L.'s utterance." Id. (citation omitted). Here the universities in question have a proprietary software to analyze and lodge complaints regarding sexual harassment.

The Court then weighed HMS' interest in prohibiting Appellant's speech. Appellant's speech is off campus, out of state, protected activity as a founder of the business. While the university officials were annoyed "d[id] not meet Tinker's demanding standard of 'substantial disruption' of a school activity or a threatened harm to the rights of others that might justify the

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California in 2019.

school's action." Id. at 2047–48 (quoting Tinker, 393 U.S. at 514). Mahanoy clarified that risk of transmission to the school does not inherently change the off-campus nature of all speech on social media. Id. at 2047.

HMS pled interference because Appellants threatened to call her agents 'make a few phone calls'. As the list contains over 2,000 agents, and Appellant is a new entrant, that is not possible. Appellant states she was meaning to tag her agents that are not under the alleged Third Agreement to move them as they are her trade secrets that Mr. Chris Howell misappropriated and hid its true value via deception, legal threats, lies, and bad faith conduct towards a new entrant that brought it business in good faith. Appellees assigned her agents acquisition and did not tag them entitling Appellant to contact them to move

them as per the contracts. Furthermore, the Court is not able to limit the factual disclosure of sexual harassment under California law via a Court Order as it is against public policy.

Thus, due to the context of the complaint, the university setting, and the regulation of off campus/off work speech of emails which is a form of social media, Mahanoy's framework for assessing controls our analysis on the Gag Order. For the emails, as they pertain to business, legitimate founder interests in policies, the *Pipkin v. Acumen*, 2020 framework controls. For leave to amend, as facts and circumstances changed including forum, *Shree Ganesh*, 2021 controls on the issues of (1) fraudulent misrepresentation (2) conspiracy to add Defendants in a leave to amend.

Like B.L., Appellant (1) wrote outside of

her work hours off campus from home (2) identified Mr. Justin Spencer and Mr. Howell in emails after with the harassment and solicitation allegations in Rights to Sue as per university policy. Her communications to Appellees ceased on or around February 12 , 2019 and she transmitted her speech through private emails consisting of often the university official to report the vulgar harassment. These characteristics of Appellant's speech with Rights to Sue reporting harassment diminish the university's interest in punishing her report as they have a reporting system themselves."

Further, like Ottawa, HMS' possible interests in prohibiting Appellant's speech would not defeat her First Amendment protections. HMS argues that its actions were appropriate because they must consider the rights of the

university officials to be free from annoyance. But HMS can't prevent legitimate business contact or prevent competition from reporting harassment whatever HMS perceives the motive to be of the report. Based on the Complaint, the university officials seem to have been pre-warned, they ignored all emails, and forwarded a handful to HMS, there is nothing abnormal in the Rights to Sue to prevent Appellant from the privileges of reporting harassment.

Next, HMS argues that it had reasonable expectation of substantial disruption (which it speculates might occur) and/or interference with agents' relationships or university relationships with HMS presumably under interference of economic relations. HMS provides Appellant's repetitious emails with the same allegations to support a reasonable forecast of substantial

disruption but Appellant isn't the one that expanded the nuclei of the dispute. It was HMS that informed the universities and it was Mr. Howell that emailed Mr. Lothumalla after the harassment and solicitation therefore, it is he who is negligently interfering with Appellant's business and agent relationships that she brought to HMS.

Outside of this, HMS complains that Appellant wrote Ottawa in violation of the Gag Order to report suicidal ideation in December 2019. HMS has not reported any meetings or events that might have taken place at the universities as a result. Appellant has not written since 2019 awaiting Orders. The facts, therefore, do not support a reasonable forecast of substantial disruption. See Mahanoy, 121 S. Ct. at 2014-48. Although Appellant's emails to the

universities are fewer than 100 each, these do not support disruption and do not warrant dismissal of the Complaint when Appellant was in compliance all of 2020 till the harmful injunction was placed without any evidentiary hearings.

Moreover, Appellant's speech/Complaints, and other legal actions did not and do not include weapons, specific threats, or speech directed at one official. HMS can't claim a reasonable forecast of disruption. Competition and agent takeovers are a part of business and while the Court can regulate that Appellant's speech to prevent any disparagement of HMS (which Appellant has not done), it is not regulable in this context to prevent Appellant from all trade speech.

HMS' argument of any disruption actually occurring is unconvincing especially as it

preemptively defamed Appellant in July 2017 when he emailed Mr. Lothumalla and wrote common partners and Appellant's business interests on October 2017 before she could speak up. Thus, Mr. Howell actively, intentionally, and recklessly harmed Appellant's work and caused significant disruption with his speech that has no privileges.

**IV. Gag Order Non-Compete:**

**See legal basis page 28 under "LEGAL STANDARDS FOR A PRELIMINARY INJUNCTION"**

The legal authorities are asserted herein for this section.

**Analysis**

HMS has failed to meet any of the preliminary injunction factors while Appellant

has alleged conspiracy to remove her from her business share. 15 U.S.C. §1 prohibits any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. It "is intended to prohibit actions that unreasonably restrain competition." *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1033 (9th Cir. 2005) (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

Appellant is the one that suffered irreparable harm and is likely to lose in a lucrative field as a result. To obtain a preliminary injunction, Plaintiff must also "demonstrate that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis omitted). In its TRO, this Court found that Plaintiff had shown that she has the requisite

skills and is ready to play professional soccer, that the Age Rule is impeding her development as a soccer player in an irreversible manner, that the career of a professional soccer player is short, and that there are no substitutes to actual professional competition to help her realize her full potential. ECF 47 at 16– 17.

Evidence and Facts Favor Appellants:

Although no hearings were held, in Appellee's brief, the Court can see that Appellant was 119% at her job prior and 73% with HMS. She is prepared and ready to compete. She gets referrals from immigration attorneys and is successful at recruitment. Thus, she needs her business access restored as it promotes gender equity. Thus, public interest, her founder status, performance, and the fact that the only thing currently between her aspiration to have her own business

is her gender due to which she was harassed and her race due to which Utah refused to administer justice. Appellant is suffering unilateral antirust injury and she has already suffered irreparable harm due to Utah.

Appellant has established that preliminary injunction granting her business access is appropriate until a trial on the merits can be held. HMS was granted the highest form of injunction without any hearings and the TRO has fallen off as per Rule 65 (A) on March 18, 2019.

**B. SHOW CAUSE MOTION**

In parallel, Rota won her AAA trial against Hernandez that had no idea of HMS and the CPT model prior to meeting Appellant. HMS/Appellees moved for a Show Cause Motion for the alleged disclosure of so-called confidential violation of the

Protective Order. On September 28, 2022, Appellant submitted a motion for suggestion of mootness under Rule 37 (A).

**LEGAL GROUNDS**

**Mootness:** "Generally, we will not decide a case that is moot. *Guardian ad Litem v. State* (State ex rel. C.D.), 2010 UT 66, ¶ 11, 245 P.3d 724." "Where the issues that were before the trial court no longer exist, the appellate court will not review the case. An appeal is moot if during the pendency of the appeal circumstances change so that the controversy is eliminated, thereby rendering the relief requested impossible or of no legal effect." *Guardian ad Litem v. State* (State ex rel. C.D.), 2010 UT 66, ¶ 11, 245 P.3d 724; 2012 UT 23. Although "[i]t is the duty of each party . . . to inform the court of any circumstances which . .. render moot one or more of the issues raised

UTAH R. APP. P. 37(a)," the court may also raise the issue of mootness sua sponte to further "a core judicial policy" of limiting "the scope of its power to issues in controversy." "The strong judicial policy against giving advisory opinions dictates that courts refrain from adjudicating moot questions."; see also, e.g., *McBride v. Utah State Bar*, 2010 UT 60, ¶ 13 & n.1, 242 P.3d 769 (raising mootness sua sponte); *Soc'y of Prof'l Journalists v. Bullock*, 743 P.2d 1166, 1169 (Utah 1987) (same).

**Collateral Estoppel:** "'Issue preclusion, also referred to as collateral estoppel, prevents parties or their privies from relitigating [***7] issues which were once adjudicated on the merits and have resulted in a final judgment.'" *3D Constr. & Dev., L.L.C. v. Old Standard Life Ins. Co.*, 2005 UT App 307, P18, 117 P.3d 1082

(alteration omitted) (quoting *Brigham Young Univ. v. Tremco Consultants, Inc.*, 2005 UT 19, P27, 110 P.3d 678). In order for issue preclusion to apply, four elements must be present: "[1] The party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; [2] the issue decided in the prior adjudication must be identical to the one presented in the instant action; [3] the issue in the first action must have been completely, fully, and fairly litigated; and [4] the first suit must have resulted in a final judgment on the merits." *Zufelt v. Haste, Inc.*, 2006 UT App 326, 142 P.3d 594; *Macris & Assocs. v. Neways*, 2000 UT 93, 16 P.3d 1214 (Sup.Ct.); *Heywood v. DOC*, 2017 UT App 234, 414 P.3d 517; *Copper State Thrift & Loan v. Bruno*, 735 P.2d 387 (Utah Ct. App. 1987).

**AAA Award Deference:** "Though the United States Court of Appeals for the Tenth Circuit does not owe deference to the district court's legal conclusions, it affords maximum deference to an arbitrators' decisions. The Tenth Circuit's task is to assess whether the district court correctly followed the restrictive standard that governs judicial review of an arbitrator's award: The court must give extreme deference to the determination of the arbitrator for the standard of review of arbitral awards is among the narrowest known to law. By agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. So, review is extremely limited. *Gidding v. Fitz*, 2018 U.S. Dist. LEXIS 8892; *THI of N.M. at Vida*

*Encantada, LLC v. Lovato*, 864 F.3d 1080 (10th Cir. 2017).

**AAA Award Judicial Review Narrow:**

"Because "[t]he parties have contracted for an arbitrator to resolve their disputes, not a court," judicial review of an arbitrator's award is "among the narrowest known to the law." *LB & B Assoc., Inc. v. Int'l Bhd. of Elec. Workers, Local No.* 113, 461 F.3d 1195, 1197 (10th Cir. 2006) (internal quotation omitted); *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) (internal quotation marks omitted); *Fette v Peters Const Co*, 310 Mich App 535, 541; 871 NW2d 877 (2015); *Washington*, 283 Mich App at 671 n 4, quoting *Way Bakery v Truck Drivers Local No* 164, 363 F3d 590, 593 (CA 6, 2004), quoting *Tennessee Valley Auth v Tennessee Valley Trades & Labor Council*, 184 F3d 510, 514

(CA 6, 1999). *G&B II, PC v. Gudeman*, 315607 (July 15, 2014). "The trial court issued an opinion and order denying the motion, finding that (1) the language of the arbitration award foreclosed G&B's ability to request sanctions because the issue of sanctions was either not raised during the arbitration or, having been raised, resulted in the arbitrator declining to award sanctions; *Clark v. Garratt & Bachand, P.C., No. 344676*, 2019 Mich. App. LEXIS 4826 (Ct. App. Aug. 20, 2019).

**Show Cause Discussion & Analysis**

Appellant argues her due process rights were violated in the hearing for the Show Cause Motion. Appellees argue otherwise. Appellant Rota and her counsel allege she was not given an opportunity to present her side of the story or evidentiary hearings for an AAA trial that she won on the merits. Appellant had requested a

stay during the AAA trial to complete that trial first, however, the district court denied the motion. Appellant Rota produced three confidential documents. Appellee Howell (and Appellant Rota) have submitted a declaration from Attorney Heinrichs page Appellee's Brief 539 of 593 and Appellant's Brief at 246-247 of 568. Thus, the issue of sanctions was already litigated. Appellant already had the contents of the email 'Aparna' or page Appellant's Brief page 239 of 568 and page 372 of 568 contain the same information that Appellant had prior to the litigation. Thus, that document is moot. The next two documents in the show cause motion, "the so-called Hernandez agreement and addendum" are moot because of the ruling from Arbitrator Kaplan on relevancy [R.2934] Order, the documents [R.2672-2675] are moot. Thus, the

Show Cause motion is moot. In addition, the Show Cause motion is collaterally estopped as the evidence that the sanctions were already litigated as presented in 20210395-CA known to opposing counsel.

**Analysis**

The Appellate finds no violation of the protective order as

**a. Email "Aparna"**: Appellants had the information prior that Mr. Michael Hernandez authored and sent her on January 30, 2017. The email "Aparna" authored by Mr. Michael Hernandez contained the same information (Timeline #94).

**b. Hernandez Agreement and Addendum:** As to the alleged confidential agreement and addendum (b) and (c) that were produced redacted to the drafter or author of the

agreement—Mr. Michael Hernandez. The Protective Order does not specify the percentage authorship switches between author and drafter. The documents were further produced in a confidential setting, only attorneys saw the information, and nothing marked Attorneys' Eyes Only was ever made available to Appellants. Appellant's job was to prepare the agreements. Comparing Appellants' alleged Utah Third Agreement and Hernandez's agreement, several sections, Section 4 for example, are the same, therefore, as the confidential information was redacted, Appellants did not violate the Utah Protective Order. Furthermore, nothing was marked confidential by HMS through the course of the relationship, therefore, it is reasonable that Appellant thought that document with redactions wasn't confidential.

Finally, the underlying Motion to Compel between Hernandez and AEG/Rota stipulated to redacted document production. "Respondent respectfully submits that if any of the documents at issue in this section are required to be produced, the information concerning the rates and amount of payments to and from HMS should be redacted and a protective order should be entered. Claimants' moving papers recognize that limited redactions and a protective order would be appropriate with respect to each of the requests discussed in this section."

**Conclusion:** Appellant has won that motion and she is entitled to damages from the 3-year forced non-compete to be remanded back to the trial Court for damages and double costs to Appellant as she tried to alert opposing counsel of mootness and collaterally estopped issues. The

Court finds that it is HMS that is disobeying two binding orders 1) relevancy of the three documents 2) AAA binding award. The alleged violation of the protective order is moot as the US District Court has ruled the Order moot.

**III. HMS' DEFAMATION MOTION**

HMS mis-cites Utah law regarding elements of a defamation claim and its motion does not meet the elements.

**LEGAL GROUNDS**

But "the First Amendment demands a subtle although significant variation in the treatment of inferences drawn from undisputed facts" for Plaintiffs' defamation, false light, and IIED claims. *See Jacob v. Bezzant*, 2009 UT 37, ¶18,212 P.3d 535 (quotation simplified). *See also id.* ¶ 21 ("A false light claim is closely allied with an action for defamation, and the same

considerations apply to each.") (quotation simplified); *Davidson v. Baird*, 2019 UT App 8, ¶ 57, 438 P.3d 928 ("Where an [IIED] claim is based on the same facts as a claim for defamation, appropriate concern for the First Amendment rights of the parties must be considered.") (quotation simplified).

"To accommodate the respect we accord its protections of speech, the First Amendment's presence merits altering our customary rules of review by denying a nonmoving party the benefit of a favorable interpretation of factual inferences." *Bezzant*, 2009 UT 37, ¶18 (quotation simplified). *See Cox v. Hatch*, 761 P.2d 556, 561 (Utah 1988) (stating that the First Amendment favors "disposing of [defamation] cases on motion and at an early stage when it appears that a reasonable jury could not find for the plaintiffs").

Accordingly, whether a challenged statement is susceptible to a defamatory interpretation is a question of law that we consider de novo without "indulging inferences in favor of the nonmoving party." *O'Connor v. Burningham*, 2007 UT 58, ¶ 27, 165 P.3d 1214.

**Defamation/False Light**

"Defamation is the act of harming the reputation of another by making a false statement to a third person." *Jensen v. Sawyers*, 2005 UT 81, ¶ 35, 130 P.3d 325. *See West v. Thompson Newspapers*, 872 P.2d 999, 1008 (Utah 1994) ("At its core, an action for defamation is intended to protect an individual's interest in maintaining a good reputation."). A false statement harms an individual's reputation if it "impeaches [the] individual's honesty, integrity, virtue, or reputation and thereby exposes the

individual to public hatred, contempt, or ridicule." *West*, 872 P.2d at 1008. But the First Amendment, which "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quotation simplified), significantly limits the tort, *see Jensen*, 2005 UT 81, ¶ 50 ("Defamation claims always reside in the shadow of the First Amendment."). Over time, the tension between the First Amendment and laws designed to protect individual reputation has resulted in the development of "a considerable assortment of defenses, privileges, heightened burdens of proof, and particularized standards of review." *Id.*

To prevail on a claim of defamation, a plaintiff must show that "(1) the defendant

published the statements [in print or orally] concerning [the plaintiff]; (2) the statements were false;[17] (3) the statements were not subject to privilege; (4) the statements were published with the requisite degree of fault; and (5) the

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[17] Falsity is usually presumed, and truth is an affirmative defense that the defendant bears the burden of proving to defeat the claim on this basis. *Davidson v. Baird*, 2019 UT App 8, ¶ 25 n.3, 438 P.3d 928. "But where the plaintiff is a public figure or the statement involves a matter of public concern, it is the plaintiff who must shoulder the burden in his case-in-chief of proving the falsity of the challenged statement." *Id.* (quotation simplified). Here, Plaintiffs contend that they were private figures and not public officials or public figures. In any event, we assume that the challenged statements are pending litigation and we don't know if it is true or false and do not base our decision on this prong.

statements resulted in damages." *DeBry v. Godbe*, 1999 UT 111, ¶ 8, 992 P.2d 979. *See West*, 872 P.2d at 1007–08. But before the matter may proceed to the trier of fact, the court must initially determine whether, as a matter of law, the challenged statement "is capable of conveying a defamatory message." *Cox v. Hatch*, 761 P.2d 556, 561 (Utah 1988). In making this determination, a court cannot limit its analysis to isolated words or sentences. Instead, it "must weigh competing definitions and make sense of context" without "indulging inferences in favor of the nonmoving party," *O'Connor v. Burningham*, 2007 UT 58, ¶ 27, 165 P.3d 1214, and decide whether the statement tends "to injure [the plaintiff's] reputation in the eyes of its audience," *West*, 872 P.2d at 1008.

**Discussion**

HMS mis-cites Utah law regarding the elements of a defamation claim by asserting that the elements are limited to the following: "(1) the defendant published the statements (in print or orally) and the statements are (2) false, (3) not privileged, (4) negligently published (for non-public figures), and (5) resulted in damages." Motion at 10 (footnotes and citations omitted). The elements of a defamation claim were well-established by the Utah Supreme Court in *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994): "To state a claim for defamation, [a plaintiff] must show that defendants published the statements concerning him, that the statements were false, defamatory, and not subject to any privilege, that the statements were published with the requisite degree of fault, and that their publication resulted in damage."

(Emphasis added); Model Utah Jury Instructions, Second Ed., CV1602 (element #4 of a defamation claim is proof that "the statements were defamatory.").

HMS failed to cite or anywhere address the key element: "defamatory." For this reason alone, HMS's motion should be denied. *See* Utah R. Civ. P. 56(a) ("A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense— on which summary judgment is sought." (emphasis added)); *Orvis v. Johnson*, 2008 UT 2, ¶ 10, 177 P.3d 600 ("A summary judgment movant must show both that there is no material issue of fact *and* that the movant is entitled to judgment as a matter of law." (emphasis in original)).

Defamation requires proof that the

recipient actually understood and believed the statement to be defamatory. "[I]n determining whether a particular statement fits within the rather broad definition of what may be considered defamatory, the guiding principle is the statement's tendency to injure a reputation in the eyes of its audience." West, 872 P.2d at 1008

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(citing Cox, 761 P.2d at 561; W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 111, at 773 (1984); Restatement (Second) of Torts § 614 (1972); Rodney A. Smolla, Law of Defamation § 4.08 (1994). Restatement Torts § 614 requires the jury to determine if a defamatory statement "was so understood by its recipient." Indeed, even where a purported statement is made to the general public, such as in a newspaper or online, a plaintiff must establish that it damaged his/her

reputation "in the eyes of at least a substantial and respectable minority of its audience." West, 872 P.2d at 1009.

Here, HMS offered no evidence that the persons who received the emails had understood—or even read—the emails. And, even if the recipients read the emails and understood them, whether the understanding that they came away with was defamatory in any way to HMS. Finally, even if the recipients had understood a defamatory meaning, there is no evidence or argument from HMS that such a meaning was an actionable defamatory meaning as a matter of law. "A publication is not defamatory simply because it is nettlesome or embarrassing to a plaintiff, or even because it makes a false statement about the plaintiff." West, 872 P.2d at 1009 (citing Cox, 761 P.2d at 561). Many of the

purported statements at issue simply lack a defamatory meaning that is actionable—regardless whether statements are true or not. Without both the actual understanding of the recipients and any argument by HMS that the statements held such a defamatory meaning as a matter of law, HMS's motion fails. Utah R. Civ. P. 56(a).

## THE STATEMENTS ARE NOT DEFAMATORY AS A MATTER OF LAW

The purported defamatory statements, when examined in context, are not defamatory as a matter of law. "Whether a statement is capable of sustaining a defamatory meaning is a question of law ...." West, 872 P.2d at 1008. "Because the existence of defamatory content is a matter of law, a reviewing court can, and must, conduct a

context-driven assessment of the alleged defamatory statement and reach an independent conclusion about the statement's susceptibility to a defamatory interpretation." *O'Connor v. Burningham*, 2007 UT 58, ¶ 26, 165 P.3d 1214. "A court simply cannot determine whether a statement is capable of sustaining a defamatory meaning by viewing individual words in isolation; rather, it must carefully examine the context in which the statement was made, giving the words their most common and accepted meaning." *West*, 872 P.2d at 1009; see also *Prince v. Peterson*, 538 P.2d 1325, 1327- 28 & n.4 (Utah 1975) (noting that "simply making some general statement about another being a crook, or even using profanity against [another] in a general way, may not be actionable . . . depend[ing] on the circumstances"). Finally, "[i]n this evaluation of

context, [the court] should examine (1) the words themselves and their implications; (2) the entire article or message; (3) the events or disputes that gave rise to the article; and (4) the likely effect on the reasonable reader." *Hogan v. Winder*, 762 F.3d 1096, 1106 (10th Cir. 2014) (citing *Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick*, The Law of Torts § 526 (2d ed. 2014)). "Trying to focus on the defamatory words alone would be like trying to appreciate a pointillist painting by Seurat with a magnifying glass—the telling pattern would be lost in a maze of dots." Id.

The context of the statements at issue in present matter is unique and largely ignored by HMS. Upon the Court's close examination of the context, as is required, it is apparent that all of the statements are part of a much larger whole of emails that conveys a meandering river of

information, claims, statements, articles, opinions, and assertions. The emails reflect a broad spectrum of emotion and content.

The numerous emails were sent by AEG to principally two individuals: Eric Darr and MaryLou DeWald. The reaction to the emails by Darr and DeWald is flippant and dismissive: they passed the emails on to HMS with comments ranging from disinterest ("FYI" and "Once again more correspondence today") to humor ("Didn't want to ruin your weekend with an Arpana [sic] intrusion so I waited until Monday morning. Attachments this time!" and "It's Monday! For your files") to boredom ("Any still another one...."). Few of the emails are short. All of them contain numerous facts. Many of the emails contain literary tropes that are vague or difficult or impossible to comprehend. HMS has cherry-

picked from this vast mass of words a few select statements while glossing over the broad meaning expressed by the emails: that AEG is unhappy with HMS, believes that it has been harmed by HMS's conduct, is in a present legal dispute with HMS, and would like the recipients to help relieve AEG's losses by addressing AEG's grievance with HMS and by allowing AEG to place students at their schools. All of the cherry-picked statements get swallowed up into this broad context and, as a whole, do not express a defamatory meaning. Rather, the statements simply reflect the pain, anguish, anxiety, anger, stress, etc., expressed by AEG. The recipients appear to take little notice other than to forward the emails on to HMS. Hence, without any defamatory meaning, real or perceived, the statements cannot form the basis of any

defamation claim against Defendants.

**a. The Recipients of Defendants' Emails Would Interpret the Emails as Defendants' Subjective Opinion.**

Defendants have identified in Exhibit D attached hereto all of the statements that are quite simply AEG's subjective opinion. "A plaintiff is definitionally unable to meet this requirement with regard to statements of pure opinion, because such statements 'are incapable of being verified' and therefore 'cannot serve as the basis for defamation liability.'" *Davidson v. Baird*, 2019 UT App 8, ¶ 31, 438 P.3d 928 (quoting West, 872 P.2d at 1015). Hence, because such statements are purely opinion, they are not defamatory as a matter of law.

**b. All Statements Are Hyperbolic, Loose,**

**and Figurative.**

The clear tenor, content, and meaning of nearly all statements at issue are not defamatory because it is clear from the context that they are the product of rhetorical hyperbole and are "loose" and figurative. Utah recognizes that "rhetorical hyperbole, including "juvenile name-calling," *Krinsky v. Doe*, 159 Cal. App. 4th 1154, 72 Cal. Rptr. 3d 231, 249 (Cal. Ct. App. 2008), is not defamatory because it cannot "reasonably [be] interpreted as stating actual facts," *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988); see also *Krinsky*, 72 Cal. Rptr. 3d at 248-49 (concluding that posts in a heated internet discussion that referred to one officer of a corporation as a "'mega scum bag,'" called other officers "cockroaches," "'boobs, losers and crooks,'" and described another as

having "'fat thighs, a fake medical degree, . . . and . . . poor feminine hygiene'" were vulgar but not defamatory because "nothing in [the] post suggested that the author was imparting knowledge of actual facts to the reader")." *Westmont Residential LLC v. Buttars*, 2014 UT App 291, ¶¶ 24- 25, 340 P.3d 183. "In other words, "[e]xaggerated language used to express opinion, such as 'blackmailer,' 'traitor' or 'crook,' does not become actionable merely because it could be taken out of context as accusing someone of a crime." Id. (citing *Hodgins v. Times Herald Co.*, 169 Mich. App. 245, 425 N.W.2d 522, 527 (Mich. Ct. App. 1988) (citing [*Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970)])).

Viewed in the overall context, the statements convey a meaning that is not

reasonably interpreted as stating actual facts but simply opinions or positions taken in the pending litigation and the grievance process at the universities. See *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1120 n. 59 (10th Cir. 2017) (a comment is "non-actionable because it is 'loose, figurative, or hyperbolic language' that cannot 'reasonably be interpreted as stating actual facts.'").

**c. None of the Statements Exposes HMS to "Public Hatred, Contempt, or Ridicule."**

Because none of the statements at issue were published beyond a very discrete and carefully selected audience, the statements are not defamatory as a matter of law. "Under Utah law, a statement is defamatory if it impeaches an individual's honesty, integrity, virtue, or

reputation and thereby exposes the individual to public hatred, contempt, or ridicule." *West*, 872 P.2d at 1008. The statements cannot possibly expose HMS to "public hatred, contempt, or ridicule" without first being "public." This requirement is different and separate from the "publication" requirement (that a statement be communicated to a third person) in that even if a statement is communicated to a third person, if it does not subject the plaintiff to "public hatred, contempt, or ridicule," it is not an actionable defamatory statement and as a matter of law is not defamatory. *Id.* The "requirement that the expression expose the plaintiff 'to public hatred, contempt or ridicule' is an additional requirement rather than an alternative definition of 'libel.'" Id. at 1008 n. 14. Moreover, "at its core, an action for defamation is intended to protect an individual's

interest in maintaining a good reputation." Id. A reputation, however, "is based on a collective judgment of a large group of people." *Cox v. Hatch*, 761 P.2d 556, 562 (Utah 1988) (citing *Frinzi v. Hanson*, [30 Wis. 2d 271, 278, 140 N.W.2d 259, 262 (1966)]).

Here, the statements at issue were expressly limited. The Court entered an order holding this case private and confidential from its filing by HMS. It is undisputed that none of the statements could possibly expose HMS to "public hatred, contempt, or ridicule." Moreover, the statements were not made to "a large group of people" and could not possibly harm HMS's "good reputation." Hence, the statements are not defamatory as a matter of law and summary judgment in favor of HMS is not warranted.

## IV. DEFENDANTS' STATEMENTS ARE PRIVILEGED.

Defendants made the statements at issue under a number of privileges: the common interest privilege, the judicial proceedings privilege.

### a. All Statements Are Protected Under the Conditional Common Interest Privilege and/or the Judicial Proceedings Privilege.

"A conditional privilege arises to protect a legitimate interest of the publisher, the recipient, or a third person." *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 27, 221 P.3d 205 (citing *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 58 (Utah 1991)). "The privilege also extends to statements made to advance a legitimate common interest between the publisher and the recipient of the publication." *Id.*

"The judicial proceeding privilege has three elements. First, the alleged defamatory statement must have been made during or in the course of a judicial proceeding. Second, the statement must have some reference to the proceeding's subject matter. Third, the party claiming the privilege must have been acting in the capacity of a judge, juror, witness, litigant, or counsel in the proceeding at the time of the alleged defamation." *O'Connor*, 2007 UT at ¶ 31.

Here, AEG wrote to a very limited number of people for legitimate purposes. AEG wrote to university officials both as long-term partners and in their capacity as university officials with authority to adjudicate and remedy the harm and injury AEG claims HMS caused it. AEG was instrumental in bringing Ottawa University (DeWald) and Lindenwood University to HMS

through her contact, Hernandez, and bringing both students and referring agents to Harrisburg University (Darr) while she worked with HMS. The work AEG did for and with these universities is extensive. As a contractor or subcontractor with these universities, AEG was entitled to make application to the universities' grievance processes, which it did. AEG continued to pursue these processes in its communications with each of these universities. As a result, the communications at issue are privileged communications and are cannot be defamation.

This case is akin *to Lind v. Lynch*, 665 P.2d 1276, 1279 (Utah 1983), in which the stockholders shared a common business interest and the defendant published letter only to those within the common interest. Here, AEG, HMS, and the universities were bound together by

contract and the common interest in placing students at the universities. The statements made to the university officials were to access the universities' grievance process. Hence all statements at issue were protected, privileged communications.

Taken as a whole, the context of the emails to the universities, is protected grievance reporting as permitted on the website. The communications are privileged. For the reasons stated above, we conclude that Dr. Rota's statements were not susceptible to defamatory interpretation as a matter of law. HMS' claims fails and it should pay Appellants. Thus, R.1559-92; R.2134 resolve in Appellant's favor.

**IV. Electronic Communications Harassment**

On August 12, 2019, Appellants (AEG/Rota) won her trial against Hernandez acquired under the First and Second Agreements with HMS in a niche market 'specialized CPT market' of which she is a founder. She wrote requesting access to place 300 students/university per year which is $3.6 million/year at Ottawa University. In 2018, she placed 257 CPT applications.

**LEGAL GROUNDS**

"A person commits electronic communications harassment if, "with intent to intimidate, abuse, threaten, harass, frighten, or disrupt the electronic communications of another, the person," among other things, "causes disruption, jamming, or overload of an electronic communication system through excessive message traffic or other means utilizing an

electronic communication device" or, "after the recipient has requested or informed the person not to contact the recipient, . . . the person repeatedly or continuously . . . causes an electronic communication device of the recipient to ring or to receive other notification of attempted contact by means of electronic communication." Utah Code Ann. § 76-9-201(2)(a), (d) (LexisNexis 2017).

The statute also provides an exemption, stating that it "does not create a civil cause of action based on electronic communications made for legitimate business purposes," *id.* § 76-9-201(5)(b), but does not define the key phrase, "legitimate business purposes." We note that the United States District Court for the District of Utah recently concluded that the electronic communications harassment statute—a criminal

statute—does not authorize a private cause of action. *See Nunes v. Rushton*, 299 F. Supp. 3d 1216, 1237–38 (D. Utah 2018). AEG is asking for interim relief to place her students and to be compensated after 5 years of nonpayment from HMS. This falls squarely as a legitimate business purpose. For this reason, HMS' claim fails. Dr. Rota is further a founder that gives her qualified privilege discussed below.

**Discussion and Analysis**

This cause of action already has a ruling so it is moot see Hon. Judge Allen Memorandum Decision June 28, 2018.

**V. Intentional Interference**

On August 12, 2019, Appellants (AEG/Rota) won her trial against Hernandez

acquired under the First and Second Agreements with HMS in a niche market 'specialized CPT market' of which she is a founder. She wrote requesting access to place 300 students/university per year which is $3.6 million/year at Ottawa University. In 2018, she placed 257 CPT applications.

**LEGAL GROUNDS**

**California Law:** California has ruled that one-year post employment covenants are unenforceable time and again. *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*, a California appellate court invalidated a post-employee non-solicitation provision on the grounds that it restrained trade in violation of Section 16600. 28 Cal. App. 5th 923 (2018). *Edwards v. Anderson.* In Edwards, the California Supreme Court held any restraint on a person's ability to engage in

their profession is impermissible, even a reasonable or narrow one. 44 Cal. 4th 937 (2008). *Barker v. Insight Global, LLC*, a federal district court in the Northern District of California similarly held a provision restricting a regional director from soliciting employees or contractors during his employment and one year thereafter was unenforceable. 2019 WL 176260 (N.D. Cal. Jan. 11, 2019). The court held it was "convinced by the reasoning in AMN that California law is properly interpreted post- Edwards to invalidate employee non-solicitation provisions." California Law does not allow any trade restrictions. "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing

with Section 17500) of Part 3 of Division 7 of the Business and Professions Code. California law has long prohibited any contract "by which anyone is restrained from engaging in a lawful profession, trade or business of any kind." Cal. Bus. Prof. Code Unfair Competition in violation of §16720 and unfair business practices §17200.

**Utah law** has similar provisions. "In *Tahitian Noni International v. Dean*, the US District Court for the District of Utah found the geographical scope of a non-compete between a multilevel marketing company and its employee unreasonable where the provision barred the employee from working for any other network marketing companies in the world for a period of three years. The court looked at the geographic and subject scope in connection with the time limitations and found that the three-year

restriction was particularly unreasonable because of the nature of the marketing industry in which individuals derive income from other salespeople they recruit. Over three years, the former employee would lose all contacts because he was restricted from the entire industry globally and his former salespeople would be forced to sign contracts with other individuals. (No. 2:09-CV-51, 2009 WL 197525, at * 3,*4 (D. Utah Jan. 26, 2009).)" unenforceable.

§ 34-51-201 post-employment restrictive covenants. (1) Except as provided in Subsection (2) and in addition to any requirements imposed under common law, for a post-employment restrictive covenant entered into on or after May 10, 2016, an employer and an employee may not enter into a post-employment restrictive covenant for a period of more than one year from the day

on which the employee is no longer employed by the employer. A post-employment restrictive covenant that violates this subsection is void. Note that Appellant was an independent contractor which means that paragraph 2 is not applicable to Appellant at all.

**Discussion**

As of August 12, 2019, AEG is a founder who was permitted under her employment to pursue the universities she developed. In a niche market, it is not interference motive, but earning a living from the work she delivered to HMS from which she was not compensated whatsoever. CPT students are specialized in international recruitment. Appellant knew the model prior to meeting HMS Appellees brief pg. 543 of 593.

At 73% of HMS' performance as a new

entrant, she has actionable antitrust injury and it is not a trade relationship that AEG can easily replace. The agreement on the basis of which HMS sued in paragraph 2.3 shows that they know that these covenants aren't enforceable. Worse, as seen in TRO motion footnote 2 and 3, the agreement prior has provisions for universities not developed under the alleged Third Agreement.

Appellant was never paid thus, the contract is void as per Utah statute in addition to the non-compete.

## VI. BAD FAITH ADR MOTION FROM HMS

On August 12, 2019, Appellants (AEG/Rota) won her trial against Hernandez acquired under the First and Second Agreements with HMS in a niche market 'specialized CPT

market' of which she is a founder. She wrote requesting access to place 300 students/university per year which is $3.6 million/year at Ottawa University. In 2018, she placed 257 CPT applications.

**LEGAL GROUNDS**

UTAH ADR Act: §78B-6-208. Confidentiality.

(1) ADR proceedings shall be conducted in a manner that encourages informal and confidential exchange among the persons present to facilitate resolution of the dispute or a part of the dispute. ADR proceedings shall be closed unless the parties agree that the proceedings be open. ADR proceedings may not be recorded.

(2) No evidence concerning the fact, conduct, or result of an ADR proceeding may be subject to discovery or admissible at any subsequent trial of the same case or same issues between the same

parties.

(3) No party to the case may introduce as evidence information obtained during an ADR proceeding unless the information was discovered from a source independent of the ADR proceeding.

(4) Unless all parties and the neutral agree, no person attending an ADR proceeding, including the ADR provider or ADR organization, may disclose or be required to disclose any information obtained in the course of an ADR proceeding, including any memoranda, notes, records, or work product.

(5) Except as provided, an ADR provider or ADR organization may not disclose or discuss any information about any ADR proceeding to anyone outside the proceeding, including the judge or judges to whom the case may be assigned. An

ADR provider or an ADR organization may communicate information about an ADR proceeding with the director for the purposes of training, program management, or program evaluation and when consulting with a peer. In making those communications, the ADR provider or ADR organization shall render anonymous all identifying information.

**Discussion**

HMS requested the ADR motion via counsel which the Court noted 'sua sponte'. No good faith settlements were reached or proposed. At the ADR mediation that Appellees requested, they offered terms far removed from the money owed and demanded that Appellant accept to remain silent about the harassment and included matters from an ADR meeting "I am not a child of a lesser God" from Appellees coerced mediation

that Appellant could not oppose. Appellants tried to settle in good faith on May 22, 2019 (See Appellant's Main Interlocutory Brief April 11, 2022 page 13-14, footnotes 2 and 3). Therefore, Appellants requested a mediation in bad faith in the middle of a pandemic. They refused to meet on video for which Appellant had to spend money to request a mediation by video. Appellees put forth the ADR motion in bad faith solely to cost money and offer money far removed from the money owed in retaliation for the harassment complaint.

As HMS did not request the ADR in good faith, and acted solely to increase expenses and oppress in a pandemic, Appellant is not in violation of any so-called mediation order. HMS acted in bad faith and it refused to renew the agreement as seen on Appellant's brief on page

13-14 submitted on April 12, 2022, footnotes 2 and 3 and 565 of 558 of Appellant's brief.

**TIMELY LEAVE TO AMEND TO ADD DEFENDANTS FILED**

Appellant filed her AAA claims in California. As a result, HMS' motion to preclude evidence (R.3092; R.3389; R.3487) are MOOT as not pending before the trial Court. Appellant has declared under oath there are no Utah agreements time and again with and without counsel.

**Leave to Amend:** 2021 UT 21 footnote 29. (Tenth Circuit); Due Process to Add Defendants/First Amendment: Appellate Case: 20-1320

Document: 010110706275 Date Filed: 07/06/2022 Page: 1 (Tenth Circuit) based on AAA Award. As the matter is pending in California, Appellant

timely filed her leave to amend prior to the September 2, 2020 Order of Default. Appellant can't be defaulted out of her AAA claims as per AAA rules 58 (A), Rule 52 (A). As nothing is ruled on the merits and Utah agreements contested, the matter was set to go to a new trial as it is with facts changed noted by opposing counsel.

A court may, in the furtherance of justice, allow a party to amend any pleading on any terms as may be proper. Code Civ. Proc. §§ 473(a) and 576. "This statutory provision giving the courts the power to permit amendments in furtherance of justice has received a very liberal interpretation by the courts of this state." *Klopstock v. Superior Ct.* (1941) 17 Cal.2d 13, 19; see

also *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 939 ("the trial courts are to liberally

permit such amendments, at any stage of the proceeding, has been established policy of this state since 1901"), and *Hirsa v. Superior Ct.* (1981) 118 Cal.App.3d 486, 488-89 (emphasis inoriginal). Even on the eve or trial, for example, the court of appeal determined that it was error to deny the amendment of a cross-complaint to add an additional theory of recovery where the delay in seeking the amendment was attributable to the opposing party's failure to comply with discovery requests. *Sachs v. City of Oceanside* (1984) 151 Cal.App.3d 315, 319. The policy favoring leave to amend is so strong that it is an abuse of discretion to deny an amendment unless the adverse party can show meaningful prejudice, such as the running of the statute of limitations, trial delay, the loss of critical evidence, or added preparation costs. *Atkinson v. Elk Corp.* (2003)

109 Cal.App.4th 739, 761; *Solit v. Taokai Bank, Ltd.* (1999) 68 Cal.App.4th 1435, 1448. Absent a showing of such prejudice, delay alone is not grounds for denial of a motion to amend. See *Kittredge Sports Co. v. Superior Ct.* (1989) 213 Cal.App.3d 1045, 1048; *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 563-65.

*Shree Ganesh* also argues that we should reverse the district court's denial of Shree Ganesh's motion to amend its complaint to add conspiracy claims against several new defendants. Because the district court may want to revisit this decision on remand in connection with its determinations as to Shree Ganesh's other claims, we also remand for a reconsideration of the denial of the motion to amend. But in so doing, we make no decision regarding the merits of the

district court's decision on this issue. Rather our decision is motivated only by the fact that—in light of our other determinations—a decision on the issue at this time would be premature. As Appellant has already filed her leave to amend in California, the case should be dismissed in Utah as it has no forum or continue to resolve under First Amendment under public policy to allow women to keep their property share normally usurped by such males.

Justice, due process, conspiracy evidence, require that Utah Court should dismiss the matter.

**SUMMARY OF MOTIONS**

1. HMS' Motion for Partial Summary on Defamation [D.E. 150] filed May 3, 2019:

    - Truth

- Appellant wins as privileged communications
- Rights to Sue
- Moot
- HMS self-inflicted with harassment and solicitation
- HMS emailed Ravi Lothumalla 'prohibition' on July 10, 2017 and Mr. Lothumalla knows HMS.
- Appellant has no idea of HMS or Mr. Lothumalla. She met

Mr. Lothumalla through this dispute.

- Appellant is a new entrant to international recruitment and has no connection to Mr. Lothumalla from South India.
- Carol Meyer is the name of the woman that sleeps with anything that moves for $500. HMS mentioned in the HMS' settlement agreements as a known entity.

2. Defendants' Motion to Strike Motion for Partial Summary Judgment on

Defamation or, Alternatively, Strike Exhibits [D.E. 189] filed June 7, 2019.

- Appellant wins as privileged communications
- Rights to Sue
- Moot

3. HMS's Statement of Discovery Issues re: Defendant's Third Set of Discovery Issues [D.E.199] filed June 18, 2019;

- Leave to Amend for Appellants
- HMS Discovery incomplete, HMS in bad faith.
- Moot

4. Howell's Show Cause Motion, *infra,* filed June 26, 2019; [R. 2632]
    - Appellant won
    - Moot
    - Sanctions already litigated
    - Documents disclosed to author/drafter
5. Defendants Motion for Partial Summary Judgement on Enforceability of Compensation and Arbitration Provisions of First and Second Agreement with HMS [D.E. 224] filed June 30, 2019;
    - **Result: Granted**
        - Filed in California
        - Dépeçage

- 100% of work and events in California
- Equitable Rescission and other remedies available
- Nothing ruled on merits
- AB 51
- Counteroffers/Mistake
- Appellant entitled to review of 19-55748 and 20-55302 (wages and harassment cases filed with counsel) under AAA First and Second Agreements.
- August 12, 2019 Arbitration win

6. Defendants Motion for Summary Judgement Regarding Third agreement [ D.E. 277] filed August 26, 2019.
    - Moot
    - July 23, 2019 deposition on file
    - Counteroffers detected
7. HMS' Statement of Discovery Issues Regarding Requests for Extraordinary Discovery [D.E. 289] filed September 3, 2019;
    - Moot
8. HMS' Motion to Preclude Defendants from Offering Untimely Evidence and Calculation of Damages [D.E. 347] filed on October 21, 2019; and

- Moot
- HMS discovery incomplete, motion filed in bad faith

9. HMS' Motion for Summary Judgment re: Defendants' Counterclaim and Supporting Memorandum [D.E. 348] filed on October 21, 2019;
    - Moot
    - HMS discovery pending; agreements contested, parts belong in AAA;
    - Bad faith motion
10. HMS' Motion to Preclude Defendants from Using Rebuttal Experts at Trial or at any Hearing [D.E. 373] filed December 4, 2019; and

- Moot

11. Defendants' Statement of Discovery Issues Regarding Rebuttal Expert Discovery and Request for Telephone Conference [D.E. 377] filed December 5, 2019.
    - Moot
    - HMS filed expert witnesses, motion to exclude in bad faith.
12. HMS' Motion for Contempt of March 21, 2019 Order and Supporting Memorandum filed on December 9, 2019
    - Moot
13. HMS' Motion For Case Management/ADR Motion filed on January 2, 2020.
    - Moot

- Bad faith mediation as HMS refused to negotiate in May 22, 2019.
- HMS tried to coerce Appellant to stay silent and accept less money than owed
- HMS added confidential ADR items to record

14. HMS' Motion to Preclude Defendants from Using Untimely Evidence of Arguments of Damages at any Hearing or at Trial (Ninth and Tenth Supplemental Disclosures filed on January 6th, 2020.
    - Moot
    - Leave to Amend

- HMS Discovery incomplete so motion in bad faith.

15. HMS' Motion for Contempt of Stipulated Protective Order, March 21, 2019 Gag Order, Docket Privacy Order and Mediation Order filed on July 2, 2020.
    - Moot
    - Person not on HMS witness list or trial witnesses
16. HMS' Motion to Motion to Strike Untimely Supplemental Responses to Written Discovery, to Bar Withdrawal or Amendment Responses to Requests for Admissions, and for Sanctions filed on August 31, 2020.

- Moot, Facts changed; trial not set;
- Appellant wins as Appellees ask for a new trial
- Discovery incomplete, bad faith motion from HMS.

## CONCLUSION

HMS's Utah case should be dismissed as it does not meet 12 (B)(6). Utah agreements are contested and Appellant has rescission filed as a defense in California with a leave to amend to add indispensable parties such as Mr. Chris Howell. HMS to pay costs of the suit and actual damages to Appellant as none of its causes of action meet the elements and Appellant changed forums as per AB 51 consistent with her deposition noted in the September 2, 2020 Order that she timely attended with a $2,800 cost.

**THE FIRST JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF CACHE, STATE OF UTAH**

Howell Management Services

v.

August Education Group, LLC, and Aparna Vashisht Rota, an individual

170100325

MEMORANDUM DECISION on Amended Motion for Issuance of an Order to Show Cause Re: Contempt of Protective Order

Case No. 170100325

Judge Angela Fonnesbeck

THIS MATTER IS BEFORE THE COURT on the Amended Motion for Issuance of an Order to Show Cause Re: Contempt of Protective Order [D.E. 218] filed on June 26, 2019 ("Contempt Motion") by Plaintiff Howell Management Services, LLC ("HMS"). In

preparation of this Decision, the Court has reviewed the moving papers and examined the applicable legal authorities, and held a hearing on

November 13, 2019. Having considered the foregoing, the Court issues this Decision.

## BACKGROUND

HMS commenced this action on November 2, 2017, by filing a complaint against Defendants, August Education Group, LLC ("AEG") and its principal member and manager, Aparna Vashisht Rota ("Rota") (collectively, "Defendants"). HMS' amended complaint alleges claims for (1) declaratory relief, (2) breach of contract, (3) intentional interference with existing economic relations, (4) defamation, (5) injurious falsehood, and

(6) injunctive relief. *See* Am. Compl. [D.E. 37] filed Jul. 23, 2018.

On November 6, 2017, the Court entered an Order Classifying the Complaint and Docket as Protected ("Privacy Order"). *See* Privacy Order [D.E. 9] filed Nov. 6, 2017. The parties exchanged initial disclosures and commenced written discovery in September of 2018. Given the nature of the issues and the type and content of business documents likely to be exchanged in this case, the parties negotiated a Stipulated Protective Order that was entered by the Court on November 28, 2018 ("Protective Order"). *See* Protective Order [D.E. 73] filed Nov. 28, 2018.

Rota commenced a separate arbitration

action in California, *Aparna Vashisht Rota v. Michael Hernandez,* American Arbitration Association Case No. 01-18-0005144, (to which HMS is not a party) against Michael Hernandez ("Hernandez") (who is not a party to this action) (hereafter "California Arbitration"). HMS alleges that Rota produced or disclosed several confidential documents in the California Arbitration that Defendants received from HMS under the Protective Order in this action. HMS views Rota's alleged disclosure of protected documents in the California Arbitration as a willful violation of the Protective Order.

On June 26, 2019, HMS moved for an order to show cause, compelling Defendants to appear and explain why they should not

be held in contempt and sanctioned accordingly for violating the Protective Order. *See* Contempt Mot. [D.E. 218] filed Jun. 26, 2019. HMS requests that Defendants be held in contempt for their willful violation the Protective Order and that the Court strike Defendants' Answer and Counterclaim, enter default judgment, and award HMS attorney fees as an appropriate sanction. *See id.* Defendants filed a response in opposition to the motion. *See* Defs.' Opp'n [D.E. 232] filed Jul. 10, 2019. HMS replied in support thereof. *See* Pl.'s Reply [D.E. 238] filed Jul. 17, 2019.

The Court held a telephone conference on September 23, 2019, at which time the Court decided to set a hearing on the

Contempt Motion and other matters. Defendants subsequently submitted supplemental briefing. *See* Defs.' Suppl. [D.E. 359] filed Nov. 10, 2019. The Court held an evidentiary hearing on November 13, 2019. Defendants' attorneys informed the Court that it was their understanding that an order to show cause had been issued by the Court and that they were prepared to address the substantive issues related to the Contempt Motion. In accordance with a prior Court order, Rota appeared by telephone. The parties presented oral arguments on the Contempt Motion and several other motions.

On January 2, 2020, HMS requested for the Court to consider ADR proceedings. *See* Mot. for Case Management Conference

[D.E. 404]. On January 23, 2020, the Court held a telephonic conference with counsel for the parties to discuss the usefulness of ADR proceedings and issued an order requiring the parties to complete mediation. *See* Order on Telephonic Conference [D.E. 417]. On April 25, 2020, the parties reported to the Court that mediation failed to produce an agreement and requested a decision by the Court. *See* Joint Report of Results of Alternative Dispute Resolution [D.E. 432]. The Court took the matters under advisement.[118]

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a. [18] [1] On April 29, 2020, the parties filed a joint request for the Court to extend the deadline for filing dispositive motions, *see* Joint Mot. for Extension of Time [D.E. 434), which the Court granted, *see* Order re Joint Motion for Extension of Time [D.E. 437).
[2] These facts are drawn from the briefing on the Contempt Motion, and represent an amalgamation of the facts from the aforementioned.

## FINDINGS OF FACTS

Based on a review of the parties' arguments, declarations, and proffered evidence, the Court makes the following findings of facts:[2]

a. HMS is an exclusive education services provider for various for-profit and non- profit colleges and universities in the United States of America. Particularly, HMS, through its relationships with and information concerning a variety of colleges and universities in the United States, as well as others, such as its contractors and vendors, assists with the placement of students at such colleges and universities.

b. AEG is, or was (purportedly) at all times relevant to this action, a consulting

agency that claimed or claims to possess the

ability and qualifications to act as an authorized representative of HMS by assisting the recruitment of students and professionals desirous of studying in the United States.

c. On November 2, 2017, HMS filed its Motion to Classify the Verified Complaint against Defendants and the Docket as Protected ("Privacy Motion"). The Court entered its Privacy Order on November 6, 2017, granting HMS' Privacy Motion. The Privacy Order states, in part:

> The allegations of the Complaint and the exhibits to it (consisting primarily of a series of contracts), identify confidential and competitive negotiated agent compensation data, client/educational partners, pricing and pricing spreads, business strategies and methods, business models, and agent contracting structures....

> The Court finds based on representations in HMS' Motion that the Complaint and exhibits thereto contain highly confidential information and information the disclosure of which would expose confidential business records and trade secrets, provide an unfair advantage to competitors and jeopardize property. Privacy Order [D.E. 9], at 2, 3.

d. On February 1, 2018, Defendants filed a Motion to Stay Pending Arbitration and Motion for Partial Dismissal ("Arbitration Motion"). The case was stayed pending the Court's determination on whether the disputes were subject to arbitration or adjudication.

e. On June 29, 2018, the Court entered a Memorandum Decision and Order denying the Arbitration Motion. Thereafter, the Complaint was amended, an Answer and Counterclaim were filed, and a Reply to Counterclaim was filed.

f. In September of 2018, the parties exchanged initial disclosures and commenced written discovery around that same time. Given the nature of the issues and the type and content of business documents likely to be exchanged in this case, the parties negotiated a Stipulated Protective Order, which is memorialized by the Court's November 28, 2018, Protective Order. The Protective Order states, among other things:

> This case concerns claims for money and other relief, and among other things, the discovery now pending and anticipated to be taken in this case requests exchange of certain alleged confidential business information, trade secrets and other information that one or both of the parties may claim as generally protected from public disclosure in litigation involving business disputes....
>
> - Any document provided by any Party which that Party in good faith contends contains

information that is confidential and entitled to protection may be so designated as provided herein. Such designated documents shall be received by counsel of record for the Party upon the terms and conditions of this Stipulated Protective Order (the **"Protective Order").**

• As hereinafter used, the term "PROTECTED INFORMATION" shall mean confidential or proprietary technical, scientific, financial, business, trade secrets, and other sensitive information designated as such by the producing party, and includes all such designated information whether disclosed or produced by a Party or a third-party in response to discovery in this litigation, in mediation, as obtained from third parties, and/or as introduced in proceedings before this Court. The term PROTECTED INFORMATION shall also include information regarding students, persons and entities subject to the privacy and nondisclosure provisions of the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and 34 CPR Part 99 ("FERPA")....

With respect to all documents produced or furnished by a party, which are designated as

"CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" by the producing party, such information shall be kept as confidential and shall not be given, shown, made available, discussed or otherwise communicated in any manner ("disclosed") either directly or indirectly to any person not authorized to receive the information under the terms of this Stipulated Protective Order.

The parties agree to designate information as CONFIDENTIAL or ATTORNEYS' EYES ONLY on a good faith basis and not for purposes of harassing the receiving Party or for purposes of unnecessarily restricting the receiving Party's access to information. Documents that do not contain confidential information as provided for above should not be designated CONFIDENTIAL or ATTORNEYS' EYES ONLY....

9. If, through inadvertence, a producing Party provides any information pursuant to this litigation without marking the information as CONFIDENTIAL or

ATTORNEYS' EYESONLY information, the producing Party may subsequently inform the receiving Party of the CONFIDENTIAL or ATTORNEYS'

> EYES ONLY nature of the disclosed information, and the receiving Party shall use reasonable efforts to treat the disclosed information as CONFIDENTIAL or ATTORNEYS' EYES ONLY information upon receipt of written notice from the producing Party, to the extent the receiving Party has not already disclosed this information.
> Protective Order [D.E. 73], at 1-4, 6.

. The Protective Order restricts the universe of people who can receive "PROTECTED INFORMATION", either designated as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY." *Id.* at 'i['i[ 5-8. As to documents marked "CONFIDENTIAL," the Protective Order provides:

> 1. Counsel for the inspecting Party may provide copies of documents designated as "CONFIDENTIAL" only to the following: (a) the categories of individuals listed above in paragraph 7(a) -(e) and

subject to all conditions thereof;[193] (b) Parties (including the officers, directors, employees, agents and representatives of a party that is a business entity) to whom it is necessary that the material be disclosed for purposes of this litigation; and (c) Authors or drafters of the documents or information. *Id.* at 'if 8. Paragraph 10 of the Protective Order requires a receiving party to "inform the producing party of the pertinent circumstances" justifying disclosure to non-parties documents designated as "CONFIDENTIAL," stating: 10. The restrictions set forth in this Protective Order will not apply to information which is known to the

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[19] Paragraph 7(a)-(e) list categories of individuals who are authorized to receive documents designated "ATTORNEYS' EYES ONLY," such as: counsel for the parties, the Court and Court personnel, experts, third-party vendors retained to assist in storing and dealing with documents, witnesses during the course of discovery so long as it is stated on the face of each document being disclosed that the witness to whom a party is seeking to disclose the documents is either an author, recipient or otherwise involved in the creation of the document.

receiving Party or which one of the receiving Parties already has in its possession, or which becomes known to the public after the date of its transmission to the receiving Party, provided that such information does not become publicly known by any act or omission of the receiving Party, its employees, or agents which would be in violation of this order. If such public information is designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY, the receiving Party must inform the producing Party of the pertinent circumstances before the restrictions of this Order will be inapplicable. *Id.* at ,r 10.

Paragraph 11 of the Protective Order provides the following procedure for contesting, removing, or modifying a designation assigned by the producing party:

A.) Acceptance by a Party of any information, document, or thing designated as- CONFIDENTIAL or ATTORNEYS' EYES ONLY shall not constitute a concession that the information, document or this is confidential. Either Party may later contest a claim of confidentiality and does not waive such right to argue at a later date that the designation of such document is not warranted. In the event a Party believes any document designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY does not warrant the designation assigned to it by the producing party under the terms of this Protective Order or that disclosure of information designated ATTORNEYS' EYES ONLY must be disclosed to other than a qualified recipient of such information in order to provide advice with respect to this action, the Party may, through the filing of a Statement of Discovery Issues pursuant to Utah Rule of Civil Procedure 37, seek an order of the court removing or modifying the designation assigned by the producing party. *Id.* at ,r 11.

2. HMS produced in discovery a number of documents designated both "CONFIDENTIAL" and "ATTORNEYS' EYES ONLY," including the following

relevant documents at issue (collectively, "HMS Documents"):

a. Email from Hernandez to Chris Howell dated March 28, 2017, marked as "CONFIDENTIAL," and bearing HMS bates stamp HMSPROD04295. *See* Shields Decl. [D.E. 215] filed Jun. 26, 2019, at Ex. A.

b. Authorized Representative Agreement between HMS and Hernandez dated March 13, 2016, marked as "CONFIDENTIAL," and bearing HMS bates stamps HMSPRODD00040-44. *Id.* at Ex. B.

c. HMS Authorized Representative Agreement (Addendum) dated August 15, 2016, marked as "CONFIDENTIAL," and bearing HMS bates stamp HMSPROD00035. *Id.* at Ex. C.

B.) A dispute arose concerning a separate contract between Rota and Hernandez (to which HMS is not a party) which led to Rota commencing the California Arbitration.

a. The parties to the California Arbitration conducted written discovery, including but not limited to the production of documents. In the course of California Arbitration, Rota produced the following documents in response to discovery (collectively, "California Documents"): Email in pdf format from Hernandez to Howell dated March 28, 2017, "Subject: "Apama," marked with bates stamp VASHISHT-000342. *Jd.* at Ex. D.

b. Authorized Representative Agreement between HMS and Hernandez dated March 13, 2016, marked with bates stamps VASHISHT-000396-400. *Jd.* at Ex. F.

c. HMS Authorized Representative Agreement (Addendum) dated August 15, 2016 between HMS and Hernandez, marked with bates stamp VASHISHT-000401. *Id.* at Ex. E.

C.) Rota requested production of the California Documents in the California Arbitration. However, Hernandez's counsel in the California Arbitration, Robert Williams ("Williams") objected in writing to production

of the California Documents in that action. Rota submitted a motion to compel production of the California Documents in the California Arbitration, which the Arbitrator summarily denied in a letter dated March 25, 2019. *See* Williams Suppl. Deel. [D.E. 240] filed Jul. 17, 2019, at Ex. C.

D.) Hernandez did not give the California Documents to Rota during their business relationship under the contract that is at issue in the California Arbitration nor furnish the documents to her before or during the California Arbitration.

E.) Williams personally supervised, reviewed, and submitted all documents produced in discovery in the California Arbitration on behalf of Hernandez. He did not produce any of the California Documents to

Rota.

F.) Williams provided copies of the California Documents to HMS' counsel in this case, in the form that Hernandez and Williams received them from Rota in discovery. A side-by- side examination of the California Documents and the HMS Documents shows they are identical.

The redactions shown in the California Documents are identical to the redactions placed on the HMS Documents in this action. The only difference is that the "CONFIDENTIAL" designation and HMS bates stamps on the HMS Documents have been removed from the California Documents, which contain their own VASHISHT bates stamps in the lower right-hand comer of each page and no other markings.

G.) Rota previously produced

documents in this action that she obtained from the California Arbitration. On those occasions, Rota preserved the bates stamps from the California Arbitration and added new bates stamps for this action. Moreover, the documents were not marked confidential in the California Arbitration. *See* Shields Suppl. Deel. [D.E. 239] filed Jul. 17, 2019, at Ex. A.

## ANALYSIS

"As a general rule, district courts are granted a great deal of deference in selecting discovery sanctions." *Allen v. Ciokewicz,* 2012 UT App 162, **,i** 22,280 P.3d 425 (quoting *Kilpatrickv. Bullough Abatement, Inc.,* 2008 UT 82, ,i 23, 199 P.3d 957). With regards to violations of discovery orders, Rule 37(b) of the Utah Rules of Civil Procedure provides:

> Unless the court finds that the failure was substantially justified, the court, upon motion, may impose appropriate sanctions for the failure to follow its orders, including the following:
>
> A.) deem the matter or any other designated facts to be established in accordance with the claim or defense of the party obtaining the order; prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence; stay further proceedings until the order is obeyed; dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action; order the party or the attorney to pay the reasonable costs, expenses, and attorney fees, caused by the failure; treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and
>
> instruct the jury regarding an adverse inference.

Utah R. Civ. P. 37(b). "Under [R]ule 37, if a party fails to comply with a court order, the

court may 'dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action.'" *Rawlings v. Rawlings,* 2015 UT 85, ,r 24,358 P.3d 1103 (quoting Utah R. Civ. P. 37(e)(2)(D) (2011)); *see also First Fed. Sav. & Loan Ass'n of Salt Lake City v. Schamanek,* 684 P.2d 1257, 1266 (Utah 1984) ("Striking the pleadings is permissible ... where there is an invalid refusal to obey a discovery order") (citations omitted). However, Rule 37 sanctions "require a showing of 'willfulness, bad faith, or fault' on the part of the non- complying party." *Id.* (citations omitted). "Sanctions are appropriate when '(1) the party's behavior was willful; (2) the party has acted in bad faith; (3) the court can attribute some fault to the party; or (4) the party has engaged in persistent

dilatory tactics tending to frustrate the judicial process.'" *Rawlings,* 2015 UT at ,r 16 (quoting *Kilpatrick,* 2008 UT at ,r 25).

### a. I. Violation of the Protective Order

The first issue before the Court is whether Rota's disclosures in the California Arbitration to Hernandez, his attorney, and the arbitrator constitute a violation of the Protective Order. The Protective Order states, in relevant part:

> 5. With respect to all documents produced or furnished by a Party, which are designated as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" by the producing Party, such information shall be kept confidential and shall not be given, shown, made available, discussed, or otherwise communicated in any manner ("disclosed"), either directly or indirectly, to any person not authorized to receive the information under the terms of this Stipulated Protective Order.

Protective Order [D.E. 73], at ,r 5. In short, paragraph 5 of the Protective Order clearly and unambiguously requires *all* documents designated as "CONFIDENTIAL" to be kept confidential, and it prohibits disclosure of any such document or information to any person not authorized by the Protective Order to receive such information. *Id.* Paragraphs 7 and 8 identify

various categories of persons who are authorized to receive documents designated as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY." *Id.* at **117,** 8. Paragraph 10 explains when, or in what circumstances, the restrictions of the Protective Order do not apply. *Id.* at 110.

And paragraph 11 establishes the procedure that parties should follow to contest, modify, or remove CONFIDENTIAL designations.

*Id.* at 1 11.

> Here, Defendants received the HMS Documents in this action from HMS. The HMS

Documents were clearly designated as "CONFIDENTIAL" and marked with HMS bates stamps, making the HMS Documents subject to the restrictions of the Protective Order. *See id.* at **115,** 7,

8. The Protective Order required Defendants to preserve the confidentiality of the HMS Documents, and it prohibited them from disclosing the documents to any person not authorized by the Protective Order to receive such information. *See id.* Rota produced copies of those protected documents (the California Documents) to Hernandez, his attorney, and the arbitrator in the California Arbitration. Defendants never sought approval or authorization from HMS or the

Court to use or disclose the HMS Documents in the California Arbitration, and they never informed or notified HMS or the Court about the disclosures in question. Instead, Rota removed the "CONFIDENTIAL" designations and HMS bates stamps from the HMS Documents, marked them with her own document numbers, and then disclosed the scrubbed copies of protected documents in a completely unrelated and separate lawsuit. A side by side comparison reveals that the California Documents are otherwise identical copies of the HMS Documents. Based on the forgoing undisputed facts, the Court finds that there is clear and convincing evidence that Rota disclosed confidential documents that were subject to the protections of the

Protective Order.

Defendants argue, however, that there was no breach of confidentiality or violation of the Protective Order because: (1) Hernandez was an author, signor, and/or party to the disclosed documents; (2) Hernandez already possessed and/or had knowledge of the disclosed information;
(3) there was no need to protect the documents from Hernandez; and (4) the Protective Order did not prohibit removal of the "CONFIDENTIAL" designation or HMS bates number from the documents. *See* Defs.' Opp'n [D.E. 232], at 9.

Defendants assert that Hernandez was authorized to receive the HMS or California Documents under paragraph 7 and 8. Paragraph 8 states:

> 8. Counsel for the inspecting Party may provide copies of

> documents designated as "CONFIDENTIAL" only to the following: (a) the categories of individuals listed above in paragraph 7(a)-(e) and subject to all conditions thereof; (b) Parties (including the officers, directors, employees, agents and representatives of a party that is a business entity) to whom it is necessary that the material be disclosed for purposes of this litigation; and (c) Authors or drafters of the documents or information.

Protective Order [D.E. 73], at ,r 8. According to Defendants, Rota was authorized to provide copies of the HMS Documents because Hernandez was an author or drafter of the email communication between Hernandez and Chris Howell (an HMS principal) and a signor or party to the HMS Representative Agreement and Addendum. The Court disagrees.

Defendants' argument fails to acknowledge that the universe of individuals

who are authorized to receive protected information under paragraphs 7 and 8, or any other provision, is clearly and contextually restricted to this litigation. *See id.* at ,r,r 7, 8. The California Documents were disclosed in connection with an unrelated lawsuit, to unrelated individuals, and for unrelated purposes. Defendants have not identified any reason or purpose to disclose the protected information that is even remotely related to this lawsuit. Further, Defendants' argument fails to address the fact that the protected documents were not just disclosed to Hernandez, they were also provided to the Arbitrator and Hernandez's counsel in the California Arbitration. There is no dispute that Hernandez's counsel and the Arbitrator in the California Arbitration do not fall into any of the

defined categories of persons authorized to receive such documents or information. Finally, even if the protected documents could have been disclosed to the individuals in question, there is no dispute that Defendants failed to follow the Protective Order's unambiguous and mandatory procedure for making such disclosures. As such, Defendants cannot claim that the recipients of the California Documents were authorized to receive protected information under the terms of the Protective Order.

Defendants also argue that "while the production of these documents to a third party might constitute a violation of the Protective Order to someone other than Hernandez, the documents produced to Hernandez are not confidential to him because [he] already possessed them and was an author of them."

Defs.' Opp'n [D.E. 232], at 9. Defendants rely on paragraph 10, which states:

> 10. The restrictions set forth in this Protective Order will not apply to information which is known to the receiving Party or which one of the receiving Parties already has in its possession, or which becomes known to the public after the date of its transmission to the receiving Party, provided that such information does not become publicly known by any act or omission of the receiving Party, its employees, or agents which would be in violation of this order. If such public information is designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY, the receiving Party must inform the producing Party of the pertinent circumstances before the restrictions of this Order will be inapplicable.

Protective Order [D.E. 73], at 'if 10.

Defendants' argument is that the Protective Order's restrictions do not apply to Hernandez, because he was already aware of the disclosed information in the email from two sources

separate from this litigation: (1) himself and (2) the agreements that he signed. The Court disagrees.

> Paragraph 10 only "appl[ies] to information which is known to the receiving Party or which one of the receiving Parties already has in its possession." *Id.* (emphasis added). The Protective Order clearly defines "Parties" as "parties to this action." *Id.* at 2. Thus, paragraph 10 does not authorize the disclosures to Hernandez, his counsel, or the arbitrator because they are not parties to this action. Moreover, Defendants' argument fails to acknowledge that paragraph 10 also requires "the receiving Party [to] inform the producing Party of the pertinent circumstances before the restrictions of the Order will be inapplicable." *Id.* at 10. And there is no dispute that Defendants never informed HMS of any such pertinent circumstances. As such, Defendants cannot claim that the restrictions of the Protective Order were inapplicable.
>
> Defendants further argue that the removal of the "CONFIDENTIAL" designation and disclosure of protected documents was not

a violation of the Protective Order because HMS "cannot show the need for the protection of the documents." Defs.' Opp'n [D.E. 232], at 11. However, as HMS correctly pointed out, the Protective Order provides a procedure for receiving parties to follow if they believe that certain documents or information do not merit protection.

Paragraph 11 states, in relevant part:

> ... In the event a Party believes any document designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY does not warrant the designation assigned to it by the producing party under the terms of this Protective Order or that disclosure of information designated ATTORNEYS' EYES ONLY must be disclosed to other than a qualified recipient of such information in order to provide advice with respect to this action, the Party may, through the filing of a Statement of Discovery Issues pursuant to Utah Rule of Civil Procedure 37, seek an order of the court removing or modifying the

> designation assigned by the producing party.

Protective Order [D.E. 73], at 11. If Defendants believed that the "CONFIDENTIAL" designations were "not warranted" then they should have contested the designation by filing a Rule 37 Statement of Discovery Issues and sought a Court order that removed or modified the designations. Defendants ignored the unambiguous terms of the Protective Order, instead electing to unilaterally remove that designation, without providing notice to HMS, and without Court order or authorization. In sum, Defendants violated the Protective Order by failing to put HMS on notice of the impending disclosure and by

failing to seek leave of the Court prior to the disclosure.

Ultimately, the Court finds that there is clear and convincing evidence that Rota intentionally and willfully violated the unambiguous terms of the Court's Protective Order by altering and disclosing protected documents to persons who were not authorized to receive such information.

**b. II. Willfulness, Bad Faith, Fault, and Persistent Misconduct**

The next issue before the Court is whether there is evidence of willfulness, bad faith, and/or fault on the part of the non-compliant parties. Defendants argue that they should not be held in contempt for removing the "CONFIDENTIAL" designation

and HMA bates stamps because: the Protective Order does not explicitly prohibit the removal of bates stamps, Hernandez already had unstamped copies, and "the stamps would have created more confusion since they were produced with different bates stamps unique to and consistent with that litigation." Defs.' Opp'n [D.E. 232], at 7. HMS argues, however, that "Rota should have preserved the 'CONFIDENTIAL' designation and HMS bates [stamps] on the California Produced Documents as a flag of warning to the recipients that there is an assertion of confidentiality and a protective order in place." Pl.'s Reply [D.E. 238], at 6. HMS also argues that Rota's actions "demonstrate a knowing and willful violation of the Court's

Protective Order insofar as Rota attempted to conceal HMS's assertion of confidentiality." *Id.* The Court agrees with HMS' arguments.

Defendants fail to offer any compelling reason or motive to remove the "CONFIDENTIAL" designation and HMS bates stamps from the California Documents. Defendants should have preserved the "CONFIDENTIAL" designations and HMS bates stamps from this action and added new document numbers for the California Arbitration, the same procedure that Rota used when "she previously produced documents in this action that she obtained from the California Arbitration." Defs.' Opp'n [D.E. 232], at 7. The Court is not persuaded by Defendants'

argument that it was necessary to remove the confidential protections and case identifiers to avoid confusion.

It appears that Rota sought production of the documents in question from Hernandez in the California Arbitration. When Hernandez's counsel objected in writing to production of those documents, Rota submitted a motion for the arbitrator to compel production. The arbitrator eventually denied Rota's request to compel production. It is significant that Rota did not alter or disclose the HMS Documents until after the arbitrator had denied her motion to compel production. Rota could have sought an order to compel production from a court with jurisdiction, and she could have asked HMS

or the Court for permission to produce the HMS Documents.

Instead, Rota chose to remove the "CONFIDENTIAL" designation and HMS bates stamps from confidential documents that she had otherwise been unable to acquire in the California Arbitration. Rota's unilateral decision to remove the "CONFIDENTIAL" designation and case identifiers from protected documents constitutes nothing less than a willful and bad faith attempt to circumvent the Court's Protective Order and the arbitrator's decision to deny production. The Court therefore finds that there is clear and convincing evidence of willfulness, bad faith, and fault on the part of Defendants.

The record reveals that this is not the first time Defendants have failed to comply with the Court's orders. The transcript of the March 4, 2018, hearing on HMS's motion for temporary restraining order and preliminary injunction shows that Rota had previously violated the Protective Order. The Court found at that hearing that Rota previously violated the Privacy Order and the Protective Order. *See* Hrg. Transcript [D.E. 144], filed Apr. 4, 2019, at 39:13-15 ("THE COURT: And I do think [Rota] has violated the Privacy Order and the Protective Order already."). However, instead of imposing a fine or issuing a finding of contempt, the Court warned that it would impose sanctions on Rota if there she was later found in contempt

of the Court's order on that motion. *See id.*

> The record also shows that Rota has already been sanctioned for discovery misconduct.

HMS previously filed a statement of discovery issues regarding Rota's refusal to cooperate or comply with deposition requests. After hearing oral arguments, the Court issued an order that compelled Rota to attend deposition and granted HMS's request for related attorney fees. *See* Order [D.E. 227] filed Jul. 1, 2019, at 2. The Court further ordered that if Rota failed to appear for deposition the Court would "consider, among other things, holding the Defendants in contempt, striking the Defendants' Answer to the Second Amended Verified Complaint and Counterclaim, and entering the Defendants' default." *Id.* at 2. The Court

finds that the forgoing history of misconduct, when combined with Defendants' immediate violation, demonstrates Defendants have engaged in persistent discovery misconduct. In sum, the Court finds that HMS has demonstrated, by clear and convincing evidence, that Defendants should be held in civil contempt for failure to comply with the express and unambiguous terms of the Court's Protective Order. The Court further finds that sanctions are appropriate based on clear and convincing evidence that: (1) Defendants' misconduct was

willful; (2) Defendants acted in bad faith; (3) fault is attributable to Defendants; and (4) Defendants have engaged in persistent discovery misconduct tending to frustrate the

judicial process.

## IV. Sanction

HMS requests that Defendants be held in contempt and that the Court strike Defendants' Answer and Counterclaim, enter default judgment, and award HMS attorney fees as appropriate sanctions. *See* Contempt Mot. [D.E. 218], at 3. Defendants argue that HMS's "requested relief is enormously disproportional" because "[e]ven if this Court were to conclude that there has been some technical violation of the Protective Order ... [HMS] has suffered virtually no harm due to any alleged violation." Defs.' Opp'n [D.E. 232], at 12. In other words, "no harm, no foul." Defendants maintain that a finding of contempt or

sanction is unwarranted when the Protective Order is construed in a reasonable and common sense fashion. Moreover, Defendants request that the Court award them "their attorney fees and costs in defending the present meritless motion." *Id.* at 7.

Rule 37(b) sanctions are specifically "intended to deter misconduct in connection with discovery" and only "require a showing of willfulness, bad faith, or fault on the part of the non- complying party." *First Fed.*, 684 P.2d at 1266. While the Court may consider the extent of the prejudice to the opposing party, there is no requirement that it "measure the impact on the litigation of a wrongdoer's willful misconduct before it

issues a dismissal sanction." *See Salmeron v. Enter. Recovery Sys., Inc.*, 579 F.3d 787, 797 (7th Cir. 2009). The Court acknowledges that "default judgment is one of the most severe of the potential sanctions that can be imposed." *See Rawlings,* 2015 UT at 2. The Court finds, however, that Defendants' intentional, willful and persistent disregard of the Court's orders requires a severe sanction. *See id.* at 124 (affirming district court's decision to strike a party's pleadings and defenses and enter default judgment based on "extensive findings that [the party] did not comply with its orders, provided no adequate justification or excuse, ignored previous sanctions, and acted in a willful and intentional manner").

The rules of civil procedure "do not permit parties to comply with court orders only when they see fit." *Id.* The Court expects parties to comply with its orders, and parties have a right to rely on their adversaries' compliance with the Court's orders. Defendants were bound by the clear and unambiguous terms of the Protective Order. The Parties agreed to preserve the confidentiality of protected documents like the HMS Documents, and they agreed to follow a specific procedure for challenging, modifying, and removing the Protective Order's restrictions. Defendants should have complied with the unambiguous terms of the Protective Order. Instead, Defendants unilaterally determined-without disclosure

to the Court or HMS, and in the face of an order to the contrary-that there was no harm in breaching the clear and unambiguous terms of the Court's Protective Order. As HMS correctly points out, Defendants' disregard of the Court's orders has "undermined the free exchange of documents and information in this action." Pl.'s Reply [D.E. 238], at 6. Defendants fail to offer any adequate justification or excuse for their misconduct. Defendants ignored the Court's warnings and refused to comply with clear and unambiguous Court orders. The Court refuses to countenance Defendants' open and blatant disregard for the Court's mandates. The appropriateness of a harsh sanction in this case is only further supported by

Defendants' unapologetic response and request that they be compensated for having to defend their wrongful behavior. For these reasons, and other good cause shown, the Court finds that it is appropriate to strike Defendants' Answer and Counterclaims, enter default judgment on all of HMS claims against Defendants, and award attorney fees to HMS.

**CONCLUSION**

Based on the foregoing, IT IS HEREBY ORDERED that HMS' Amended Motion for Issuance of an Order to Show Cause in re: Contempt of Protective Order and Supporting Memorandum [D.E. 218] is GRANTED.

IT IS FURTHER ORDERED that Defendants are held in civil contempt, and that the

following appropriate sanctions are imposed:

8. Defendants Answer and Counterclaim [D.E. 43] shall be STRIKED, and default shall be entered on all causes of action against Defendants in the Verified Second Amended Complaint [D.E. 37].

9. Defendants shall pay to HMS reasonable costs, expenses, and attorneys' fees caused by the failure (including reasonable attorneys' fees and costs related to bringing this motion to show cause). Defendants shall bear their own attorney fees and costs related to the motion to show cause. HMS shall submit an affidavit supporting its attorney fees and expenses within thirty (30) days of this Decision. If necessary, Defendants will then have fifteen (15) days to file a response to that affidavit.

IT IS FURTHER ORDERED that the following matters are MOOT:

10. HMS' Motion for Partial Summary Judgment on Defamation and Supporting Memorandum [D.E. 150]

filed May 3, 2019;

11. Defendants' Motion to Strike Motion for Partial Summary Judgment on Defamation or, Alternatively, Strike Exhibits [D.E. 189] filed June 7, 2019;

12. HMS's Statement of Discovery Issues re: Defendant's Third Set of Discovery Requests [D.E. 199] filed June 18, 2019;

13. Defendants' Motion for Partial Summary Judgment on Enforceability of Compensation and Arbitration Provisions of First and Second Agreement with HMS [D.E. 224] filed June 30, 2019;

14. Defendants' Motion for Summary Judgment Regarding Third Agreement [D.E. 277] filed August 26, 20194;

15. HMS' Statement of Discovery Issues Regarding Requests for Extraordinary Discovery [D.E. 289] filed September 3, 2019;

16. HMS' Motion to Preclude Defendants from Offering Untimely Evidence and Calculation of Damages [D.E. 347] filed October 21, 2019; and

[4] On April 25, 2020, Defendants withdrew this motion from further consideration by the Court while HMS reserved all rights. *See* Joint Report of Results of Alternative Dispute Resolution [D.E. 432],at 3.

17. HMS' Motion for Summary Judgment re: Defendants' Counterclaim and Supporting Memorandum [D.E. 348] filed October 21, 2019;

18. HMS' Motion to Preclude Defendants from Using Rebuttal Experts at Trial or at any Hearing [D.E. 373] filed December 4, 2019; and

19. Defendants' Statement of Discovery Issues Regarding Rebuttal Expert Discovery and Request for Telephone Conference [D.E. 377] filed December 5, 2019[5].

Unless otherwise stated or ordered by the Court, all other motions that have been submitted for decision and that are not necessary to effect judgment, are deemed

MOOT. The parties may resubmit any matter that is not resolved by this Decision and necessary to effect judgment.

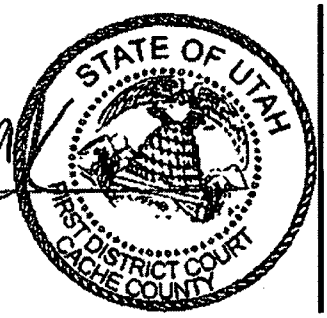
IT IS FURTHER ORDERED that the parties shall contact the Court to set a scheduling conference to discuss evidentiary hearings or investigations that are necessary to enable the Court to effect judgment. This Decision represents the order of the Court. No further order is necessary to effectuate this decision.

DATED this _*20*_day of September, 2020.

BY THE COURT:

Angela Fonnesbeck

Judge Angela Fonnesbeck



[5] On April 25, 2020, Defendants withdrew this motion from further consideration by the Court while HMS reserved all rights. *See* Joint Report of Results of Alternative Dispute Resolution [D.E. 432},at 3.

Howell Management Services

v.

August Education Group, LLC, and Aparna Vashisht Rota, an individual

170100325

MEMORANDUM DECISION

Case No. 170100325

Judge Angela Fonnesbeck

**THIS** MATTER IS BEFORE THE COURT pursuant to Defendants' Verified Motion to Amend the Court's March 21, 2019, Order and, in the Alternative, Motion for Exemption to Existing Order Request for Hearing ("Motion to Amend").[1] In preparation of this Decision, the Court has reviewed the moving papers and examined the applicable

legal authorities. The Court also heard oral arguments on the Motion to Amend. Having considered the foregoing, the Court issues this Decision.

## SUMMARY

On February 11, 2019, Plaintiff Howell Management Services, LLC ("HMS") filed a Motion for Temporary Restraining Order and Preliminary Injunction ("TRO Motion").[2] Defendants, August Education Group, LLC's (AEG) and Apama Vashisht Rota's ("Rota") (collectively,"Defendants") opposed the TRO Motion. The parties submitted briefing, affidavits, and exhibits in response and reply thereto. On March 4, 2019, the Court held a hearing on the TRO Motion. At that hearing, the Court found that Defendants had previously violated the

[1] Defs.' Mot. to Am. [D.E. 273] filed Aug. 22, 2019.
[2] *See* TRO Mot. [D.E. 91] filed Feb. 11, 2019.

Privacy Order and the Protective Order. *See* Hrg. Tr. [D.E. 144], filed Apr. 4, 2019, at 39:13-15 ("THE COURT: And I do think [Rota] has violated the Privacy Order and the Protective Order already"). The Court had considered evidence of Defendants' "prior conduct," including numerous communications, and indicated that its "biggest concern" was that Defendants were "unfairly prejudicing a trial, a potential trial, with witnesses." *Id.* at 34:4-6. The Court issued a purposefully broad and general "gag order that neither party communicate with any potential witness about anything to do with this case or the parties." *Id.* at 40:1-7. The Court explained that it would enter "a written order that w[ould] be very clear as to what can and cannot be spoken about." *Id.* Instead of imposing a fine or issuing a finding of contempt, the Court warned that it would impose sanctions on Defendants if they were later

found in contempt of the Court's order on the TRO Motion. *See id.* at 39:13-20.

On March 21, 2019, the Court signed and entered the following Order ("March 21, 2019, Order"):

> 1. The Parties and any person(s) acting in active concert or participation with the Parties who have notice of this Order, are generally barred and restrained form sending any electronic or other communications - directly or indirectly - until further order of the Court, to all or any of the opposing party's:
>
> a. University partners - including but not limited to Harrisburg University of Science and Technology, Ottawa University, and Lindenwood University;
>
> b. Accreditation bodies;
>
> c. Agents;
>
> d. Vendors;
>
> e. Employees; and,
>
> f. Independent contractors.
>
> 2. Said electronic or other communication shall not discuss, disclose, intimate, or otherwise refer to the matters in dispute in this litigation.
>
> 3. Additionally, said communications may not contain accusations of or attachment referring to harassment, discrimination, or other alleged

> misconduct against the Parties, the Parties' officers, employees, agents, and university partners, from retaining, using, disclosing, or otherwise misappropriating, directly or indirectly, the Parties' confidential and proprietary information. Order [D.E. 137] filed Mar. 22, 2019, at 1-2.

On August 22, 2019, Defendants moved to amend the March 21 Order to allow Defendants to contact Ottawa University, Harrisburg University, the College of Saint Rose, and Lindenwood University, so long as such communications do not involve or include discussion of any matters pertaining to the current litigation. *See* Mot. to Am. [D.E. 273]. HMS opposed the Motion to Amend. Defendants replied in support thereof. The parties also presented oral arguments on the Motion to Amend at the hearing held on November 13, 2019. On January 2, 2020, HMS requested for the Court to consider ADR proceedings. *See* Mot. for Case Management Conference [D.E. 404]. On January 23, 2020, the Court held a telephonic

conference with counsel for the parties to discuss the usefulness of ADR proceedings and issued an order requiring the parties to complete mediation. *See* Order on Telephonic Conference [D.E. 417]. On April 25, 2020, the parties reported to the Court that medication failed to produce an agreement and requested a decision by the Court. *See* Joint Report of Results of Alternative Dispute Resolution [D.E. 432]. The Court took the matters under advisement.[3]

## ANALYSIS

Defendants argue the following: the March 21, 2019, Order is too broad, contains vague and ambiguous terms, violates protections of free speech, and is in effect a non-compete order; the Court did not hold an evidentiary hearing or follow proper procedure to convert the TRO or impose a preliminary injunction; and the order is in effect a non-compete order, that unfairly and unnecessarily restricts Defendants' ability to earn a living by

restricting her contact with affected

---

[3] On April 29, 2020, the parties filed a joint request for the Court to extend the deadline for filing dispositive motions, *see* Joint Mot. for Extension of Time [D.E. 434], which the Court granted, *see* Order re Joint Mot. for Extension of Time [D.E. 437].

universities for business purposes and a number of non-parties involved in the same professional field. Defendants request that the Court either: clarify that the March 21, 2019, Order does not preclude Defendants from contacting the affected universities for business purposes separate and apart from any relationship with HMS; revoke the order; or alter the order to allow Defendants to communicate with the universities about general matters, obtaining a direct student placement contracts, and other business ventures, while maintaining the prohibition against communicating with the universities concerning

the pending litigation and/or any harassment attachments and complaints. The Court has examined the March 21, 2019, Order and reviewed the Motion to Amend, including all related briefing, exhibits, and affidavits that were filed in opposition or support thereof. The Court has also considered the transcript of the March 4, 2019, hearing on the TRO Motion. After carefully considering the parties' arguments and applicable legal authorities, the Court issues the following finding.

As an initial matter, the Court finds that Defendants request for relief under Rule 60(b) is untimely. Defendants motion was filed 154 days after the March 21, 2019, Order was entered, well outside the 90 day deadline to seek relief under Rule 60(b)(l)-(5). Defendants fail to offer any reason or justification for the delay that would

allow the Court to excuse the timing of the motion or find that it was filed within a reasonable amount of time. The Court also finds that the March 21, 2019, Order is not invalid or procedurally improper. The hearing transcript reveals that the March 21, 2019, Order is not a TRO. Defendants' attorney suggested at the hearing, that if the Court was inclined to grant Plaintiffs request, then the Court issue a gag order that applied to both parties instead of a TRO. *See* Hrg. Transcript [D.E. 144] at 30:5-10 ("COURT: So you're asking me not necessarily to issue a TRO, but to issue, for lack of a better term, a gag order that applies to both parties? MR. REICH: Yes."). After a discussion on the merits of counsel's suggestion, the Court *sua sponte* converted the TRO into a "gag order."

More importantly, however, the Court

rejects Defendants attempts to relitigate issues and arguments that were previously raised and considered by the Court when it entered the March 21, 2019, Order. Defendants had the opportunity to address the issues raised in the Motion to Amend. The record clearly shows that the Court had considered Defendants' arguments alleging that the scope of the March 21, 2019, Order is overbroad and adversely impacts Defendants' livelihood, business, wellbeing, and ability to compete or engage in free speech. *See* Defs.' Opp'n to TRO [D.E.] at 13-15, 17-18. The record clearly reveals that Rota is either unable or unwilling to censure her communications with individuals and entities identified in the March 21, 2019, Order.

The Order was drafted and intended to preclude Defendants from contacting universities and colleges regarding matters in dispute in this

litigation, to ensure that any communication did not contain accusations of or attachment referring to harassment, discrimination, or other alleged misconduct against the parties, and to preclude any communication from containing any confidential and proprietary information. Previously, Judge Allen expressed a concern regarding Rota's deliberate and/or careless disregard for court orders regarding private, confidential, and potentially defamatory communications. Likewise, the Court is still concerned regarding Rota's consistent disregard for the Court's orders. The Court expects parties to comply with court orders, and HMS has a right to rely on Defendants' compliance. Defendants repeated disregard requires a broad gag order. The broad scope of the March 21, 2019, Order is as necessary today, as it was when the Court first

issued it. For these reasons, and other good cause shown, the Court finds that it would be inappropriate to amend the March 21, 2019, Order.

## ORDER

Based on the foregoing, IT IS HEREBY ORDERED that Defendants' Verified Motion to **Amend March 21, 2019, Order and, in the Alternative, Motion for Exemption to Existing Order** Request for Hearing [D.E. 273] is DENIED.

IT IS FURTHER ORDERED that the following matters are MOOT. First, Plaintiff's *Motion for Contempt of March 21, 2019, Order and Supporting Memorandum* [D.E. 384] filed **December, 2019 is rendered MOOT by the Court's Memorandum Decision on Amended Motion for Issuance for an Order to Show Cause Re: Contempt of Protective Order issued on September 2, 2020. Next, HMS' Motion to Preclude Defendants from Using Untimely Disclosed Evidence or Arguments of Damages at any Hearing or at Trial (Ninth and Tenth Supplemental Disclosures** [D.E. 409] filed January 6, 2020, is MOOT. Unless otherwise stated or

ordered by the Court, all **other motions that have been submitted for decision and that are not necessary to effect judgment, are deemed MOOT. This Decision represents the order of the Court.**

DATED this *20th* day of September, 2020.
BY THE COURT:

Judge Angela Fonnesbeck

STATE OF UTAH
FIRST DISTRICT COURT
CACHE COUNTY

## CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 170100325
**by the method and on the date specified.**

EMAIL: SYLVIA ACOSTA

GRACE@TAGTEAMLAW.

COM EMAIL:

ELIZABETH BUTLER

EBUTLER@JONESWALD

O.COM EMAIL: JAMES

LEWIS

JD@LEWISHANSEN.COM

EMAIL: SHANE PETERSON

STPETERSON@JONESWALDO.C

OM EMAIL: KENNETH REICH

KLR@LEWISHANSEN.COM

EMAIL: JEFFREY SHIELDS

JSHIELDS@JONESWALDO.COM EMAIL:

NATHAN THOMAS

NTHOMAS@JONESWALDO.COM

09/02/2020 /s/ HOLLY TRAFELET

Date: _____

_____

**Signature**

## CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 170100325

**by the method and on the date specified.**

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JSHIELDS@JONESWALDO.COM

EMAIL: NATHAN THOMAS
NTHOMAS@JONESWALDO.COM

09/02/2020 HOLLY TRAFELET

Date: _____

_____

**Signature**

These are original orders
UI 170100325

**THE FIRST JUDICIAL DISTRICT COURT**
**IN AND FOR CACHE COUNTY, STATE OF UTAH**

| | |
|---|---|
| HOWELL MANAGEMENT SERVICES, LLC,<br><br>Plaintiff,<br><br>vs.<br><br>AUGUST EDUCATION GROUP, LLC, and APARNA VASHISHT ROTA,<br><br>Defendants. | **MEMORANDUM DECISION on Amended Motion for Issuance of an Order to Show Cause Re: Contempt of Protective Order**<br><br>Case No. 170100325<br><br>Judge Angela Fonnesbeck |

THIS MATTER IS BEFORE THE COURT on the Amended Motion for Issuance of an Order to Show Cause Re: Contempt of Protective Order [D.E. 218] filed on June 26, 2019 ("Contempt Motion") by Plaintiff Howell Management Services, LLC ("HMS"). In preparation of this Decision, the Court has reviewed the moving papers and examined the applicable legal authorities, and held a hearing on November 13, 2019. Having considered the foregoing, the Court issues this Decision.

## BACKGROUND

HMS commenced this action on November 2, 2017, by filing a complaint against Defendants, August Education Group, LLC ("AEG") and its principal member and manager, Aparna Vashisht Rota ("Rota") (collectively, "Defendants"). HMS' amended complaint alleges claims for (1) declaratory relief, (2) breach of contract, (3) intentional interference with existing economic relations, (4) defamation, (5) injurious falsehood, and (6) injunctive relief. *See* Am. Compl. [D.E. 37] filed Jul. 23, 2018.

On November 6, 2017, the Court entered an Order Classifying the Complaint and Docket as Protected ("Privacy Order"). *See* Privacy Order [D.E. 9] filed Nov. 6, 2017. The parties exchanged initial disclosures and commenced written discovery in September of 2018. Given the nature of the issues and the type and content of business documents likely to be exchanged in this case, the parties negotiated a Stipulated Protective Order that was entered by the Court on November 28, 2018 ("Protective Order"). *See* Protective Order [D.E. 73] filed Nov. 28, 2018.

Rota commenced a separate arbitration action in California, *Aparna Vashisht Rota v. Michael Hernandez*, American Arbitration Association Case No. 01-18-0005144, (to which HMS is not a party) against Michael Hernandez ("Hernandez") (who is not a party to this action) (hereafter "California Arbitration"). HMS alleges that Rota produced or disclosed several confidential documents in the California Arbitration that Defendants received from HMS under the Protective Order in this action. HMS views Rota's alleged disclosure of protected documents in the California Arbitration as a willful violation of the Protective Order.

On June 26, 2019, HMS moved for an order to show cause, compelling Defendants to appear and explain why they should not be held in contempt and sanctioned accordingly for violating the Protective Order. *See* Contempt Mot. [D.E. 218] filed Jun. 26, 2019. HMS requests that Defendants be held in contempt for their willful violation the Protective Order and that the Court strike Defendants' Answer and Counterclaim, enter default judgment, and award HMS attorney fees as an appropriate sanction. *See id.* Defendants filed a response in opposition to the motion. *See* Defs.' Opp'n [D.E. 232] filed Jul. 10, 2019. HMS replied in support thereof. *See* Pl.'s Reply [D.E. 238] filed Jul. 17, 2019.

The Court held a telephone conference on September 23, 2019, at which time the Court decided to set a hearing on the Contempt Motion and other matters. Defendants subsequently submitted supplemental briefing. *See* Defs.' Suppl. [D.E. 359] filed Nov. 10, 2019. The Court held an evidentiary hearing on November 13, 2019. Defendants' attorneys informed the Court that it was their understanding that an order to show cause had been issued by the Court and that they were prepared to address the substantive issues related to the Contempt Motion. In accordance with a prior Court order, Rota appeared by telephone. The parties presented oral arguments on the Contempt Motion and several other motions.

On January 2, 2020, HMS requested for the Court to consider ADR proceedings. *See* Mot. for Case Management Conference [D.E. 404]. On January 23, 2020, the Court held a telephonic conference with counsel for the parties to discuss the usefulness of ADR proceedings and issued an order requiring the parties to complete mediation. *See* Order on Telephonic Conference [D.E. 417]. On April 25, 2020, the parties reported to the Court that mediation failed to produce an agreement and requested a decision by the Court. *See* Joint Report of Results of Alternative Dispute Resolution [D.E. 432]. The Court took the matters under advisement.[1]

## FINDINGS OF FACTS

Based on a review of the parties' arguments, declarations, and proffered evidence, the Court makes the following findings of facts:[2]

1. HMS is an exclusive education services provider for various for-profit and non-profit colleges and universities in the United States of America. Particularly, HMS, through its relationships with and information concerning a variety of colleges and universities in the United

[1] On April 29, 2020, the parties filed a joint request for the Court to extend the deadline for filing dispositive motions, *see* Joint Mot. for Extension of Time [D.E. 434], which the Court granted, *see* Order re Joint Motion for Extension of Time [D.E. 437].

[2] These facts are drawn from the briefing on the Contempt Motion, and represent an amalgamation of the facts from the aforementioned.

States, as well as others, such as its contractors and vendors, assists with the placement of students at such colleges and universities.

2. AEG is, or was (purportedly) at all times relevant to this action, a consulting agency that claimed or claims to possess the ability and qualifications to act as an authorized representative of HMS by assisting the recruitment of students and professionals desirous of studying in the United States.

3. On November 2, 2017, HMS filed its Motion to Classify the Verified Complaint against Defendants and the Docket as Protected ("Privacy Motion"). The Court entered its Privacy Order on November 6, 2017, granting HMS' Privacy Motion. The Privacy Order states, in part:

> The allegations of the Complaint and the exhibits to it (consisting primarily of a series of contracts), identify confidential and competitive negotiated agent compensation data, client/educational partners, pricing and pricing spreads, business strategies and methods, business models, and agent contracting structures. . . .
>
> The Court finds based on representations in HMS' Motion that the Complaint and exhibits thereto contain highly confidential information and information the disclosure of which would expose confidential business records and trade secrets, provide an unfair advantage to competitors and jeopardize property.

Privacy Order [D.E. 9], at 2, 3.

4. On February 1, 2018, Defendants filed a Motion to Stay Pending Arbitration and Motion for Partial Dismissal ("Arbitration Motion"). The case was stayed pending the Court's determination on whether the disputes were subject to arbitration or adjudication.

5. On June 29, 2018, the Court entered a Memorandum Decision and Order denying the Arbitration Motion. Thereafter, the Complaint was amended, an Answer and Counterclaim were filed, and a Reply to Counterclaim was filed.

6. In September of 2018, the parties exchanged initial disclosures and commenced written discovery around that same time. Given the nature of the issues and the type and content of business documents likely to be exchanged in this case, the parties negotiated a Stipulated Protective Order, which is memorialized by the Court's November 28, 2018, Protective Order. The Protective Order states, among other things:

> This case concerns claims for money and other relief, and among other things, the discovery now pending and anticipated to be taken in this case requests exchange of certain alleged confidential business information, trade secrets and other information that one or both of the parties may claim as generally protected from public disclosure in litigation involving business disputes. . . .
>
> 1. Any document provided by any Party which that Party in good faith contends contains information that is confidential and entitled to protection may be so designated as provided herein. Such designated documents shall be received by counsel of record for the Party upon the terms and conditions of this Stipulated Protective Order (the "**Protective Order**").
>
> 2. As hereinafter used, the term "PROTECTED INFORMATION" shall mean confidential or proprietary technical, scientific, financial, business, trade secrets, and other sensitive information designated as such by the producing party, and includes all such designated information whether disclosed or produced by a Party or a third-party in response to discovery in this litigation, in mediation, as obtained from third parties, and/or as introduced in proceedings before this Court. The term PROTECTED INFORMATION shall also include information regarding students, persons and entities subject to the privacy and nondisclosure provisions of the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and 34 CFR Part 99 ("FERPA"). . . .
>
> 5. With respect to all documents produced or furnished by a party, which are designated as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" by the producing party, such information shall be kept as confidential and shall not be given, shown, made available, discussed or otherwise communicated in any manner ("disclosed") either directly or indirectly to any person not authorized to receive the information under the terms of this Stipulated Protective Order.
>
> 6. The parties agree to designate information as CONFIDENTIAL or ATTORNEYS' EYES ONLY on a good faith basis and not for purposes of harassing the receiving Party or for purposes of unnecessarily restricting the receiving Party's access to information. Documents that do not contain confidential information as provided for above should not be designated CONFIDENTIAL or ATTORNEYS' EYES ONLY. . . .
>
> 9. If, through inadvertence, a producing Party provides any information pursuant to this litigation without marking the information as CONFIDENTIAL or

> ATTORNEYS' EYES ONLY information, the producing Party may subsequently inform the receiving Party of the CONFIDENTIAL or ATTORNEYS' EYES ONLY nature of the disclosed information, and the receiving Party shall use reasonable efforts to treat the disclosed information as CONFIDENTIAL or ATTORNEYS' EYES ONLY information upon receipt of written notice from the producing Party, to the extent the receiving Party has not already disclosed this information.

Protective Order [D.E. 73], at 1-4, 6.

7. The Protective Order restricts the universe of people who can receive "PROTECTED INFORMATION", either designated as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY." *Id.* at ¶¶ 5–8. As to documents marked "CONFIDENTIAL," the Protective Order provides:

> 8. Counsel for the inspecting Party may provide copies of documents designated as "CONFIDENTIAL" only to the following: (a) the categories of individuals listed above in paragraph 7(a) -(e) and subject to all conditions thereof;[3] (b) Parties (including the officers, directors, employees, agents and representatives of a party that is a business entity) to whom it is necessary that the material be disclosed for purposes of this litigation; and (c) Authors or drafters of the documents or information.

*Id.* at ¶ 8.

8. Paragraph 10 of the Protective Order requires a receiving party to "inform the producing party of the pertinent circumstances" justifying disclosure to non-parties documents designated as "CONFIDENTIAL," stating:

> 10. The restrictions set forth in this Protective Order will not apply to information which is known to the receiving Party or which one of the receiving Parties already has in its possession, or which becomes known to the public after the date of its transmission to the receiving Party, provided that such information does not become publicly known by any act or omission of the receiving Party, its employees, or agents which would be in violation of this order. If such public information is designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY,

[3] Paragraph 7(a)-(e) list categories of individuals who are authorized to receive documents designated "ATTORNEYS' EYES ONLY," such as: counsel for the parties, the Court and Court personnel, experts, third-party vendors retained to assist in storing and dealing with documents, witnesses during the course of discovery so long as it is stated on the face of each document being disclosed that the witness to whom a party is seeking to disclose the documents is either an author, recipient or otherwise involved in the creation of the document.

the receiving Party must inform the producing Party of the pertinent circumstances before the restrictions of this Order will be inapplicable.

*Id.* at ¶ 10.

9. Paragraph 11 of the Protective Order provides the following procedure for contesting, removing, or modifying a designation assigned by the producing party:

> 11. Acceptance by a Party of any information, document, or thing designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY shall not constitute a concession that the information, document or this is confidential. Either Party may later contest a claim of confidentiality and does not waive such right to argue at a later date that the designation of such document is not warranted. In the event a Party believes any document designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY does not warrant the designation assigned to it by the producing party under the terms of this Protective Order or that disclosure of information designated ATTORNEYS' EYES ONLY must be disclosed to other than a qualified recipient of such information in order to provide advice with respect to this action, the Party may, through the filing of a Statement of Discovery Issues pursuant to Utah Rule of Civil Procedure 37, seek an order of the court removing or modifying the designation assigned by the producing party.

*Id.* at ¶ 11.

10. HMS produced in discovery a number of documents designated both "CONFIDENTIAL" and "ATTORNEYS' EYES ONLY," including the following relevant documents at issue (collectively, "HMS Documents"):

a. Email from Hernandez to Chris Howell dated March 28, 2017, marked as "CONFIDENTIAL," and bearing HMS bates stamp HMSPROD04295. *See* Shields Decl. [D.E. 215] filed Jun. 26, 2019, at Ex. A.

b. Authorized Representative Agreement between HMS and Hernandez dated March 13, 2016, marked as "CONFIDENTIAL," and bearing HMS bates stamps HMSPRODD00040-44. *Id.* at Ex. B.

c. HMS Authorized Representative Agreement (Addendum) dated August 15, 2016, marked as "CONFIDENTIAL," and bearing HMS bates stamp HMSPROD00035. *Id.* at Ex. C.

12. A dispute arose concerning a separate contract between Rota and Hernandez (to which HMS is not a party) which led to Rota commencing the California Arbitration.

13. The parties to the California Arbitration conducted written discovery, including but not limited to the production of documents. In the course of California Arbitration, Rota produced the following documents in response to discovery (collectively, "California Documents"):

a. Email in pdf format from Hernandez to Howell dated March 28, 2017, "Subject: "Aparna," marked with bates stamp VASHISHT-000342. *Id.* at Ex. D.

b. Authorized Representative Agreement between HMS and Hernandez dated March 13, 2016, marked with bates stamps VASHISHT-000396-400. *Id.* at Ex. F.

c. HMS Authorized Representative Agreement (Addendum) dated August 15, 2016 between HMS and Hernandez, marked with bates stamp VASHISHT-000401. *Id.* at Ex. E.

14. Rota requested production of the California Documents in the California Arbitration. However, Hernandez's counsel in the California Arbitration, Robert Williams ("Williams") objected in writing to production of the California Documents in that action. Rota submitted a motion to compel production of the California Documents in the California Arbitration, which the Arbitrator summarily denied in a letter dated March 25, 2019. *See* Williams Suppl. Decl. [D.E. 240] filed Jul. 17, 2019, at Ex. C.

15. Hernandez did not give the California Documents to Rota during their business relationship under the contract that is at issue in the California Arbitration nor furnish the documents to her before or during the California Arbitration.

16. Williams personally supervised, reviewed, and submitted all documents produced in discovery in the California Arbitration on behalf of Hernandez. He did not produce any of the California Documents to Rota.

17. Williams provided copies of the California Documents to HMS' counsel in this case, in the form that Hernandez and Williams received them from Rota in discovery. A side-by-side examination of the California Documents and the HMS Documents shows they are identical.

The redactions shown in the California Documents are identical to the redactions placed on the HMS Documents in this action. The only difference is that the "CONFIDENTIAL" designation and HMS bates stamps on the HMS Documents have been removed from the California Documents, which contain their own VASHISHT bates stamps in the lower right-hand corner of each page and no other markings.

18. Rota previously produced documents in this action that she obtained from the California Arbitration. On those occasions, Rota preserved the bates stamps from the California Arbitration and added new bates stamps for this action. Moreover, the documents were not marked confidential in the California Arbitration. *See* Shields Suppl. Decl. [D.E. 239] filed Jul. 17, 2019, at Ex. A.

**ANALYSIS**

"As a general rule, district courts are granted a great deal of deference in selecting discovery sanctions." *Allen v. Ciokewicz*, 2012 UT App 162, ¶ 22, 280 P.3d 425 (quoting *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶ 23, 199 P.3d 957). With regards to violations of discovery orders, Rule 37(b) of the Utah Rules of Civil Procedure provides:

> Unless the court finds that the failure was substantially justified, the court, upon motion, may impose appropriate sanctions for the failure to follow its orders, including the following:
>
> (1) deem the matter or any other designated facts to be established in accordance with the claim or defense of the party obtaining the order;
>
> (2) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence;
>
> (3) stay further proceedings until the order is obeyed;
>
> (4) dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;
>
> (5) order the party or the attorney to pay the reasonable costs, expenses, and attorney fees, caused by the failure;
>
> (6) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(7) instruct the jury regarding an adverse inference.

Utah R. Civ. P. 37(b). "Under [R]ule 37, if a party fails to comply with a court order, the court may 'dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action.'" *Rawlings v. Rawlings*, 2015 UT 85, ¶ 24, 358 P.3d 1103 (quoting Utah R. Civ. P. 37(e)(2)(D) (2011)); *see also First Fed. Sav. & Loan Ass'n of Salt Lake City v. Schamanek*, 684 P.2d 1257, 1266 (Utah 1984) ("Striking the pleadings is permissible . . . where there is an invalid refusal to obey a discovery order") (citations omitted). However, Rule 37 sanctions "require a showing of 'willfulness, bad faith, or fault' on the part of the non-complying party." *Id.* (citations omitted). "Sanctions are appropriate when '(1) the party's behavior was willful; (2) the party has acted in bad faith; (3) the court can attribute some fault to the party; or (4) the party has engaged in persistent dilatory tactics tending to frustrate the judicial process.'" *Rawlings*, 2015 UT at ¶ 16 (quoting *Kilpatrick*, 2008 UT at ¶ 25).

**I. Violation of the Protective Order**

The first issue before the Court is whether Rota's disclosures in the California Arbitration to Hernandez, his attorney, and the arbitrator constitute a violation of the Protective Order. The Protective Order states, in relevant part:

> 5. With respect to all documents produced or furnished by a Party, which are designated as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" by the producing Party, such information shall be kept confidential and shall not be given, shown, made available, discussed, or otherwise communicated in any manner ("disclosed"), either directly or indirectly, to any person not authorized to receive the information under the terms of this Stipulated Protective Order.

Protective Order [D.E. 73], at ¶ 5. In short, paragraph 5 of the Protective Order clearly and unambiguously requires *all* documents designated as "CONFIDENTIAL" to be kept confidential, and it prohibits disclosure of any such document or information to any person not authorized by the Protective Order to receive such information. *Id.* Paragraphs 7 and 8 identify

various categories of persons who are authorized to receive documents designated as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY." *Id.* at ¶¶ 7, 8. Paragraph 10 explains when, or in what circumstances, the restrictions of the Protective Order do not apply. *Id.* at ¶ 10. And paragraph 11 establishes the procedure that parties should follow to contest, modify, or remove CONFIDENTIAL designations. *Id.* at ¶ 11.

Here, Defendants received the HMS Documents in this action from HMS. The HMS Documents were clearly designated as "CONFIDENTIAL" and marked with HMS bates stamps, making the HMS Documents subject to the restrictions of the Protective Order. *See id.* at ¶¶ 5, 7, 8. The Protective Order required Defendants to preserve the confidentiality of the HMS Documents, and it prohibited them from disclosing the documents to any person not authorized by the Protective Order to receive such information. *See id.* Rota produced copies of those protected documents (the California Documents) to Hernandez, his attorney, and the arbitrator in the California Arbitration. Defendants never sought approval or authorization from HMS or the Court to use or disclose the HMS Documents in the California Arbitration, and they never informed or notified HMS or the Court about the disclosures in question. Instead, Rota removed the "CONFIDENTIAL" designations and HMS bates stamps from the HMS Documents, marked them with her own document numbers, and then disclosed the scrubbed copies of protected documents in a completely unrelated and separate lawsuit. A side by side comparison reveals that the California Documents are otherwise identical copies of the HMS Documents. Based on the forgoing undisputed facts, the Court finds that there is clear and convincing evidence that Rota disclosed confidential documents that were subject to the protections of the Protective Order.

Defendants argue, however, that there was no breach of confidentiality or violation of the Protective Order because: (1) Hernandez was an author, signor, and/or party to the disclosed documents; (2) Hernandez already possessed and/or had knowledge of the disclosed information; (3) there was no need to protect the documents from Hernandez; and (4) the Protective Order did not prohibit removal of the "CONFIDENTIAL" designation or HMS bates number from the documents. *See* Defs.' Opp'n [D.E. 232], at 9.

Defendants assert that Hernandez was authorized to receive the HMS or California Documents under paragraph 7 and 8. Paragraph 8 states:

> 8. Counsel for the inspecting Party may provide copies of documents designated as "CONFIDENTIAL" only to the following: (a) the categories of individuals listed above in paragraph 7(a)-(e) and subject to all conditions thereof; (b) Parties (including the officers, directors, employees, agents and representatives of a party that is a business entity) to whom it is necessary that the material be disclosed for purposes of this litigation; and (c) Authors or drafters of the documents or information.

Protective Order [D.E. 73], at ¶ 8. According to Defendants, Rota was authorized to provide copies of the HMS Documents because Hernandez was an author or drafter of the email communication between Hernandez and Chris Howell (an HMS principal) and a signor or party to the HMS Representative Agreement and Addendum. The Court disagrees.

Defendants' argument fails to acknowledge that the universe of individuals who are authorized to receive protected information under paragraphs 7 and 8, or any other provision, is clearly and contextually restricted to this litigation. *See id.* at ¶¶ 7, 8. The California Documents were disclosed in connection with an unrelated lawsuit, to unrelated individuals, and for unrelated purposes. Defendants have not identified any reason or purpose to disclose the protected information that is even remotely related to this lawsuit. Further, Defendants' argument fails to address the fact that the protected documents were not just disclosed to Hernandez, they

were also provided to the Arbitrator and Hernandez's counsel in the California Arbitration. There is no dispute that Hernandez's counsel and the Arbitrator in the California Arbitration do not fall into any of the defined categories of persons authorized to receive such documents or information. Finally, even if the protected documents could have been disclosed to the individuals in question, there is no dispute that Defendants failed to follow the Protective Order's unambiguous and mandatory procedure for making such disclosures. As such, Defendants cannot claim that the recipients of the California Documents were authorized to receive protected information under the terms of the Protective Order.

Defendants also argue that "while the production of these documents to a third party might constitute a violation of the Protective Order to someone other than Hernandez, the documents produced to Hernandez are not confidential to him because [he] already possessed them and was an author of them." Defs.' Opp'n [D.E. 232], at 9. Defendants rely on paragraph 10, which states:

> 10. The restrictions set forth in this Protective Order will not apply to information which is known to the receiving Party or which one of the receiving Parties already has in its possession, or which becomes known to the public after the date of its transmission to the receiving Party, provided that such information does not become publicly known by any act or omission of the receiving Party, its employees, or agents which would be in violation of this order. If such public information is designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY, the receiving Party must inform the producing Party of the pertinent circumstances before the restrictions of this Order will be inapplicable.

Protective Order [D.E. 73], at ¶ 10. Defendants' argument is that the Protective Order's restrictions do not apply to Hernandez, because he was already aware of the disclosed information in the email from two sources separate from this litigation: (1) himself and (2) the agreements that he signed. The Court disagrees.

Paragraph 10 only "appl[ies] to information which is known to the receiving Party or which one of the receiving Parties already has in its possession." *Id.* (emphasis added). The Protective Order clearly defines "Parties" as "parties to this action." *Id.* at ¶ 2. Thus, paragraph 10 does not authorize the disclosures to Hernandez, his counsel, or the arbitrator because they are not parties to this action. Moreover, Defendants' argument fails to acknowledge that paragraph 10 also requires "the receiving Party [to] inform the producing Party of the pertinent circumstances before the restrictions of the Order will be inapplicable." *Id.* at ¶ 10. And there is no dispute that Defendants never informed HMS of any such pertinent circumstances. As such, Defendants cannot claim that the restrictions of the Protective Order were inapplicable.

Defendants further argue that the removal of the "CONFIDENTIAL" designation and disclosure of protected documents was not a violation of the Protective Order because HMS "cannot show the need for the protection of the documents." Defs.' Opp'n [D.E. 232], at 11. However, as HMS correctly pointed out, the Protective Order provides a procedure for receiving parties to follow if they believe that certain documents or information do not merit protection. Paragraph 11 states, in relevant part:

> . . . In the event a Party believes any document designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY does not warrant the designation assigned to it by the producing party under the terms of this Protective Order or that disclosure of information designated ATTORNEYS' EYES ONLY must be disclosed to other than a qualified recipient of such information in order to provide advice with respect to this action, the Party may, through the filing of a Statement of Discovery Issues pursuant to Utah Rule of Civil Procedure 37, seek an order of the court removing or modifying the designation assigned by the producing party.

Protective Order [D.E. 73], at ¶ 11. If Defendants believed that the "CONFIDENTIAL" designations were "not warranted" then they should have contested the designation by filing a Rule 37 Statement of Discovery Issues and sought a Court order that removed or modified the designations. Defendants ignored the unambiguous terms of the Protective Order, instead

electing to unilaterally remove that designation, without providing notice to HMS, and without Court order or authorization. In sum, Defendants violated the Protective Order by failing to put HMS on notice of the impending disclosure and by failing to seek leave of the Court prior to the disclosure.

Ultimately, the Court finds that there is clear and convincing evidence that Rota intentionally and willfully violated the unambiguous terms of the Court's Protective Order by altering and disclosing protected documents to persons who were not authorized to receive such information.

**II. Willfulness, Bad Faith, Fault, and Persistent Misconduct**

The next issue before the Court is whether there is evidence of willfulness, bad faith, and/or fault on the part of the non-compliant parties. Defendants argue that they should not be held in contempt for removing the "CONFIDENTIAL" designation and HMA bates stamps because: the Protective Order does not explicitly prohibit the removal of bates stamps, Hernandez already had unstamped copies, and "the stamps would have created more confusion since they were produced with different bates stamps unique to and consistent with that litigation." Defs.' Opp'n [D.E. 232], at 7. HMS argues, however, that "Rota should have preserved the 'CONFIDENTIAL' designation and HMS bates [stamps] on the California Produced Documents as a flag of warning to the recipients that there is an assertion of confidentiality and a protective order in place." Pl.'s Reply [D.E. 238], at 6. HMS also argues that Rota's actions "demonstrate a knowing and willful violation of the Court's Protective Order insofar as Rota attempted to conceal HMS's assertion of confidentiality." *Id.* The Court agrees with HMS' arguments.

Defendants fail to offer any compelling reason or motive to remove the "CONFIDENTIAL" designation and HMS bates stamps from the California Documents. Defendants should have preserved the "CONFIDENTIAL" designations and HMS bates stamps from this action and added new document numbers for the California Arbitration, the same procedure that Rota used when "she previously produced documents in this action that she obtained from the California Arbitration." Defs.' Opp'n [D.E. 232], at 7. The Court is not persuaded by Defendants' argument that it was necessary to remove the confidential protections and case identifiers to avoid confusion.

It appears that Rota sought production of the documents in question from Hernandez in the California Arbitration. When Hernandez's counsel objected in writing to production of those documents, Rota submitted a motion for the arbitrator to compel production. The arbitrator eventually denied Rota's request to compel production. It is significant that Rota did not alter or disclose the HMS Documents until after the arbitrator had denied her motion to compel production. Rota could have sought an order to compel production from a court with jurisdiction, and she could have asked HMS or the Court for permission to produce the HMS Documents. Instead, Rota chose to remove the "CONFIDENTIAL" designation and HMS bates stamps from confidential documents that she had otherwise been unable to acquire in the California Arbitration. Rota's unilateral decision to remove the "CONFIDENTIAL" designation and case identifiers from protected documents constitutes nothing less than a willful and bad faith attempt to circumvent the Court's Protective Order and the arbitrator's decision to deny production. The Court therefore finds that there is clear and convincing evidence of willfulness, bad faith, and fault on the part of Defendants.

The record reveals that this is not the first time Defendants have failed to comply with the Court's orders. The transcript of the March 4, 2018, hearing on HMS's motion for temporary restraining order and preliminary injunction shows that Rota had previously violated the Protective Order. The Court found at that hearing that Rota previously violated the Privacy Order and the Protective Order. *See* Hrg. Transcript [D.E. 144], filed Apr. 4, 2019, at 39:13-15 ("THE COURT: And I do think [Rota] has violated the Privacy Order and the Protective Order already."). However, instead of imposing a fine or issuing a finding of contempt, the Court warned that it would impose sanctions on Rota if there she was later found in contempt of the Court's order on that motion. *See id.*

The record also shows that Rota has already been sanctioned for discovery misconduct. HMS previously filed a statement of discovery issues regarding Rota's refusal to cooperate or comply with deposition requests. After hearing oral arguments, the Court issued an order that compelled Rota to attend deposition and granted HMS's request for related attorney fees. *See* Order [D.E. 227] filed Jul. 1, 2019, at 2. The Court further ordered that if Rota failed to appear for deposition the Court would "consider, among other things, holding the Defendants in contempt, striking the Defendants' Answer to the Second Amended Verified Complaint and Counterclaim, and entering the Defendants' default." *Id.* at 2. The Court finds that the forgoing history of misconduct, when combined with Defendants' immediate violation, demonstrates Defendants have engaged in persistent discovery misconduct.

In sum, the Court finds that HMS has demonstrated, by clear and convincing evidence, that Defendants should be held in civil contempt for failure to comply with the express and unambiguous terms of the Court's Protective Order. The Court further finds that sanctions are appropriate based on clear and convincing evidence that: (1) Defendants' misconduct was

willful; (2) Defendants acted in bad faith; (3) fault is attributable to Defendants; and (4) Defendants have engaged in persistent discovery misconduct tending to frustrate the judicial process.

## IV. Sanction

HMS requests that Defendants be held in contempt and that the Court strike Defendants' Answer and Counterclaim, enter default judgment, and award HMS attorney fees as appropriate sanctions. *See* Contempt Mot. [D.E. 218], at 3. Defendants argue that HMS's "requested relief is enormously disproportional" because "[e]ven if this Court were to conclude that there has been some technical violation of the Protective Order . . . [HMS] has suffered virtually no harm due to any alleged violation." Defs.' Opp'n [D.E. 232], at 12. In other words, "no harm, no foul." Defendants maintain that a finding of contempt or sanction is unwarranted when the Protective Order is construed in a reasonable and common sense fashion. Moreover, Defendants request that the Court award them "their attorney fees and costs in defending the present meritless motion." *Id.* at 7.

Rule 37(b) sanctions are specifically "intended to deter misconduct in connection with discovery" and only "require a showing of willfulness, bad faith, or fault on the part of the non-complying party." *First Fed.*, 684 P.2d at 1266. While the Court may consider the extent of the prejudice to the opposing party, there is no requirement that it "measure the impact on the litigation of a wrongdoer's willful misconduct before it issues a dismissal sanction." *See Salmeron v. Enter. Recovery Sys., Inc.*, 579 F.3d 787, 797 (7th Cir. 2009). The Court acknowledges that "default judgment is one of the most severe of the potential sanctions that can be imposed." *See Rawlings*, 2015 UT at ¶ 2. The Court finds, however, that Defendants' intentional, willful and persistent disregard of the Court's orders requires a severe sanction. *See*

*id.* at ¶ 24 (affirming district court's decision to strike a party's pleadings and defenses and enter default judgment based on "extensive findings that [the party] did not comply with its orders, provided no adequate justification or excuse, ignored previous sanctions, and acted in a willful and intentional manner").

The rules of civil procedure "do not permit parties to comply with court orders only when they see fit." *Id.* The Court expects parties to comply with its orders, and parties have a right to rely on their adversaries' compliance with the Court's orders. Defendants were bound by the clear and unambiguous terms of the Protective Order. The Parties agreed to preserve the confidentiality of protected documents like the HMS Documents, and they agreed to follow a specific procedure for challenging, modifying, and removing the Protective Order's restrictions. Defendants should have complied with the unambiguous terms of the Protective Order. Instead, Defendants unilaterally determined—without disclosure to the Court or HMS, and in the face of an order to the contrary—that there was no harm in breaching the clear and unambiguous terms of the Court's Protective Order. As HMS correctly points out, Defendants' disregard of the Court's orders has "undermined the free exchange of documents and information in this action." Pl.'s Reply [D.E. 238], at 6. Defendants fail to offer any adequate justification or excuse for their misconduct. Defendants ignored the Court's warnings and refused to comply with clear and unambiguous Court orders. The Court refuses to countenance Defendants' open and blatant disregard for the Court's mandates. The appropriateness of a harsh sanction in this case is only further supported by Defendants' unapologetic response and request that they be compensated for having to defend their wrongful behavior. For these reasons, and other good cause shown, the Court finds that it is appropriate to strike Defendants' Answer and Counterclaims, enter default judgment on all of HMS claims against Defendants, and award attorney fees to HMS.

## CONCLUSION

Based on the foregoing, IT IS HEREBY ORDERED that HMS' Amended Motion for Issuance of an Order to Show Cause in re: Contempt of Protective Order and Supporting Memorandum [D.E. 218] is GRANTED.

IT IS FURTHER ORDERED that Defendants are held in civil contempt, and that the following appropriate sanctions are imposed:

- Defendants Answer and Counterclaim [D.E. 43] shall be STRIKED, and default shall be entered on all causes of action against Defendants in the Verified Second Amended Complaint [D.E. 37].
- Defendants shall pay to HMS reasonable costs, expenses, and attorneys' fees caused by the failure (including reasonable attorneys' fees and costs related to bringing this motion to show cause). Defendants shall bear their own attorney fees and costs related to the motion to show cause. HMS shall submit an affidavit supporting its attorney fees and expenses within thirty (30) days of this Decision. If necessary, Defendants will then have fifteen (15) days to file a response to that affidavit.

IT IS FURTHER ORDERED that the following matters are MOOT:

- HMS' Motion for Partial Summary Judgment on Defamation and Supporting Memorandum [D.E. 150] filed May 3, 2019;
- Defendants' Motion to Strike Motion for Partial Summary Judgment on Defamation or, Alternatively, Strike Exhibits [D.E. 189] filed June 7, 2019;
- HMS's Statement of Discovery Issues re: Defendant's Third Set of Discovery Requests [D.E. 199] filed June 18, 2019;
- Defendants' Motion for Partial Summary Judgment on Enforceability of Compensation and Arbitration Provisions of First and Second Agreement with HMS [D.E. 224] filed June 30, 2019;
- Defendants' Motion for Summary Judgment Regarding Third Agreement [D.E. 277] filed August 26, 2019[4];
- HMS' Statement of Discovery Issues Regarding Requests for Extraordinary Discovery [D.E. 289] filed September 3, 2019;
- HMS' Motion to Preclude Defendants from Offering Untimely Evidence and Calculation of Damages [D.E. 347] filed October 21, 2019; and

[4] On April 25, 2020, Defendants withdrew this motion from further consideration by the Court while HMS reserved all rights. *See* Joint Report of Results of Alternative Dispute Resolution [D.E. 432],at 3.

- HMS' Motion for Summary Judgment re: Defendants' Counterclaim and Supporting Memorandum [D.E. 348] filed October 21, 2019;
- HMS' Motion to Preclude Defendants from Using Rebuttal Experts at Trial or at any Hearing [D.E. 373] filed December 4, 2019; and
- Defendants' Statement of Discovery Issues Regarding Rebuttal Expert Discovery and Request for Telephone Conference [D.E. 377] filed December 5, 2019[5].

Unless otherwise stated or ordered by the Court, all other motions that have been submitted for decision and that are not necessary to effect judgment, are deemed MOOT. The parties may resubmit any matter that is not resolved by this Decision and necessary to effect judgment.

IT IS FURTHER ORDERED that the parties shall contact the Court to set a scheduling conference to discuss evidentiary hearings or investigations that are necessary to enable the Court to effect judgment. This Decision represents the order of the Court. No further order is necessary to effectuate this decision.

DATED this 2 day of September, 2020.

BY THE COURT:

Angela Fonnesbeck

Judge Angela Fonnesbeck

STATE OF UTAH
FIRST DISTRICT COURT
CACHE COUNTY

[5] On April 25, 2020, Defendants withdrew this motion from further consideration by the Court while HMS reserved all rights. *See* Joint Report of Results of Alternative Dispute Resolution [D.E. 432],at 3.

## CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 170100325 by the method and on the date specified.

EMAIL: SYLVIA ACOSTA GRACE@TAGTEAMLAW.COM

EMAIL: ELIZABETH BUTLER EBUTLER@JONESWALDO.COM

EMAIL: JAMES LEWIS JD@LEWISHANSEN.COM

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EMAIL: KENNETH REICH KLR@LEWISHANSEN.COM

EMAIL: JEFFREY SHIELDS JSHIELDS@JONESWALDO.COM

EMAIL: NATHAN THOMAS NTHOMAS@JONESWALDO.COM

09/02/2020 /s/ HOLLY TRAFELET

Date: _____ _____

Signature

**THE FIRST JUDICIAL DISTRICT COURT**
**IN AND FOR CACHE COUNTY, STATE OF UTAH**

| | |
|---|---|
| HOWELL MANAGEMENT SERVICES, LLC,<br><br>Plaintiff,<br><br>vs.<br><br>AUGUST EDUCATION GROUP, LLC, and APARNA VASHISHT ROTA,<br><br>Defendants. | **MEMORANDUM DECISION**<br><br>Case No. 170100325<br><br>Judge Angela Fonnesbeck |

THIS MATTER IS BEFORE THE COURT pursuant to Defendants' Verified Motion to Amend the Court's March 21, 2019, Order and, in the Alternative, Motion for Exemption to Existing Order Request for Hearing ("Motion to Amend").[1] In preparation of this Decision, the Court has reviewed the moving papers and examined the applicable legal authorities. The Court also heard oral arguments on the Motion to Amend. Having considered the foregoing, the Court issues this Decision.

## SUMMARY

On February 11, 2019, Plaintiff Howell Management Services, LLC ("HMS") filed a Motion for Temporary Restraining Order and Preliminary Injunction ("TRO Motion").[2] Defendants, August Education Group, LLC's (AEG) and Aparna Vashisht Rota's ("Rota") (collectively, "Defendants") opposed the TRO Motion. The parties submitted briefing, affidavits, and exhibits in response and reply thereto. On March 4, 2019, the Court held a hearing on the TRO Motion. At that hearing, the Court found that Defendants had previously violated the

[1] Defs.' Mot. to Am. [D.E. 273] filed Aug. 22, 2019.
[2] *See* TRO Mot. [D.E. 91] filed Feb. 11, 2019.

Privacy Order and the Protective Order. *See* Hrg. Tr. [D.E. 144], filed Apr. 4, 2019, at 39:13-15 ("THE COURT: And I do think [Rota] has violated the Privacy Order and the Protective Order already"). The Court had considered evidence of Defendants' "prior conduct," including numerous communications, and indicated that its "biggest concern" was that Defendants were "unfairly prejudicing a trial, a potential trial, with witnesses." *Id.* at 34:4-6. The Court issued a purposefully broad and general "gag order that neither party communicate with any potential witness about anything to do with this case or the parties." *Id.* at 40:1-7. The Court explained that it would enter "a written order that w[ould] be very clear as to what can and cannot be spoken about." *Id.* Instead of imposing a fine or issuing a finding of contempt, the Court warned that it would impose sanctions on Defendants if they were later found in contempt of the Court's order on the TRO Motion. *See id.* at 39:13-20.

On March 21, 2019, the Court signed and entered the following Order ("March 21, 2019, Order"):

> 1. The Parties and any person(s) acting in active concert or participation with the Parties who have notice of this Order, are generally barred and restrained form sending any electronic or other communications – directly or indirectly – until further order of the Court, to all or any of the opposing party's:
>
> a. University partners – including but not limited to Harrisburg University of Science and Technology, Ottawa University, and Lindenwood University;
>
> b. Accreditation bodies;
>
> c. Agents;
>
> d. Vendors;
>
> e. Employees; and,
>
> f. Independent contractors.
>
> 2. Said electronic or other communication shall not discuss, disclose, intimate, or otherwise refer to the matters in dispute in this litigation.
>
> 3. Additionally, said communications may not contain accusations of or attachment referring to harassment, discrimination, or other alleged misconduct against the Parties, the Parties' officers, employees, agents, and university

partners, from retaining, using, disclosing, or otherwise misappropriating, directly or indirectly, the Parties' confidential and proprietary information.

Order [D.E. 137] filed Mar. 22, 2019, at 1-2.

On August 22, 2019, Defendants moved to amend the March 21 Order to allow Defendants to contact Ottawa University, Harrisburg University, the College of Saint Rose, and Lindenwood University, so long as such communications do not involve or include discussion of any matters pertaining to the current litigation. *See* Mot. to Am. [D.E. 273]. HMS opposed the Motion to Amend. Defendants replied in support thereof. The parties also presented oral arguments on the Motion to Amend at the hearing held on November 13, 2019. On January 2, 2020, HMS requested for the Court to consider ADR proceedings. *See* Mot. for Case Management Conference [D.E. 404]. On January 23, 2020, the Court held a telephonic conference with counsel for the parties to discuss the usefulness of ADR proceedings and issued an order requiring the parties to complete mediation. *See* Order on Telephonic Conference [D.E. 417]. On April 25, 2020, the parties reported to the Court that medication failed to produce an agreement and requested a decision by the Court. *See* Joint Report of Results of Alternative Dispute Resolution [D.E. 432]. The Court took the matters under advisement.[3]

## ANALYSIS

Defendants argue the following: the March 21, 2019, Order is too broad, contains vague and ambiguous terms, violates protections of free speech, and is in effect a non-compete order; the Court did not hold an evidentiary hearing or follow proper procedure to convert the TRO or impose a preliminary injunction; and the order is in effect a non-compete order, that unfairly and unnecessarily restricts Defendants' ability to earn a living by restricting her contact with affected

[3] On April 29, 2020, the parties filed a joint request for the Court to extend the deadline for filing dispositive motions, *see* Joint Mot. for Extension of Time [D.E. 434], which the Court granted, *see* Order re Joint Mot. for Extension of Time [D.E. 437].

universities for business purposes and a number of non-parties involved in the same professional field. Defendants request that the Court either: clarify that the March 21, 2019, Order does not preclude Defendants from contacting the affected universities for business purposes separate and apart from any relationship with HMS; revoke the order; or alter the order to allow Defendants to communicate with the universities about general matters, obtaining a direct student placement contracts, and other business ventures, while maintaining the prohibition against communicating with the universities concerning the pending litigation and/or any harassment attachments and complaints. The Court has examined the March 21, 2019, Order and reviewed the Motion to Amend, including all related briefing, exhibits, and affidavits that were filed in opposition or support thereof. The Court has also considered the transcript of the March 4, 2019, hearing on the TRO Motion. After carefully considering the parties' arguments and applicable legal authorities, the Court issues the following finding.

As an initial matter, the Court finds that Defendants request for relief under Rule 60(b) is untimely. Defendants motion was filed 154 days after the March 21, 2019, Order was entered, well outside the 90 day deadline to seek relief under Rule 60(b)(1)-(5). Defendants fail to offer any reason or justification for the delay that would allow the Court to excuse the timing of the motion or find that it was filed within a reasonable amount of time. The Court also finds that the March 21, 2019, Order is not invalid or procedurally improper. The hearing transcript reveals that the March 21, 2019, Order is not a TRO. Defendants' attorney suggested at the hearing, that if the Court was inclined to grant Plaintiff's request, then the Court issue a gag order that applied to both parties instead of a TRO. *See* Hrg. Transcript [D.E. 144] at 30:5-10 ("COURT: So you're asking me not necessarily to issue a TRO, but to issue, for lack of a better term, a gag order that

applies to both parties? MR. REICH: Yes."). After a discussion on the merits of counsel's suggestion, the Court *sua sponte* converted the TRO into a "gag order."

More importantly, however, the Court rejects Defendants attempts to relitigate issues and arguments that were previously raised and considered by the Court when it entered the March 21, 2019, Order. Defendants had the opportunity to address the issues raised in the Motion to Amend. The record clearly shows that the Court had considered Defendants' arguments alleging that the scope of the March 21, 2019, Order is overbroad and adversely impacts Defendants' livelihood, business, wellbeing, and ability to compete or engage in free speech. *See* Defs.' Opp'n to TRO [D.E. ] at 13-15, 17-18. The record clearly reveals that Rota is either unable or unwilling to censure her communications with individuals and entities identified in the March 21, 2019, Order.

The Order was drafted and intended to preclude Defendants from contacting universities and colleges regarding matters in dispute in this litigation, to ensure that any communication did not contain accusations of or attachment referring to harassment, discrimination, or other alleged misconduct against the parties, and to preclude any communication from containing any confidential and proprietary information. Previously, Judge Allen expressed a concern regarding Rota's deliberate and/or careless disregard for court orders regarding private, confidential, and potentially defamatory communications. Likewise, the Court is still concerned regarding Rota's consistent disregard for the Court's orders. The Court expects parties to comply with court orders, and HMS has a right to rely on Defendants' compliance. Defendants repeated disregard requires a broad gag order. The broad scope of the March 21, 2019, Order is as necessary today, as it was when the Court first issued it. For these reasons, and other good cause shown, the Court finds that it would be inappropriate to amend the March 21, 2019, Order.

**ORDER**

Based on the foregoing, IT IS HEREBY ORDERED that Defendants' Verified Motion to Amend March 21, 2019, Order and, in the Alternative, Motion for Exemption to Existing Order Request for Hearing [D.E. 273] is DENIED.

IT IS FURTHER ORDERED that the following matters are MOOT. First, Plaintiff's *Motion for Contempt of March 21, 2019, Order and Supporting Memorandum* [D.E. 384] filed December, 2019 is rendered MOOT by the Court's Memorandum Decision on Amended Motion for Issuance for an Order to Show Cause Re: Contempt of Protective Order issued on September 2, 2020. Next, HMS' Motion to Preclude Defendants from Using Untimely Disclosed Evidence or Arguments of Damages at any Hearing or at Trial (Ninth and Tenth Supplemental Disclosures [D.E. 409] filed January 6, 2020, is MOOT. Unless otherwise stated or ordered by the Court, all other motions that have been submitted for decision and that are not necessary to effect judgment, are deemed MOOT. This Decision represents the order of the Court.

DATED this 8 day of September, 2020.

BY THE COURT:

Judge Angela Fonnesbeck

STATE OF UTAH
FIRST DISTRICT COURT
CACHE COUNTY

## CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 170100325 by the method and on the date specified.

EMAIL: SYLVIA ACOSTA GRACE@TAGTEAMLAW.COM

EMAIL: ELIZABETH BUTLER EBUTLER@JONESWALDO.COM

EMAIL: JAMES LEWIS JD@LEWISHANSEN.COM

EMAIL: SHANE PETERSON STPETERSON@JONESWALDO.COM

EMAIL: KENNETH REICH KLR@LEWISHANSEN.COM

EMAIL: JEFFREY SHIELDS JSHIELDS@JONESWALDO.COM

EMAIL: NATHAN THOMAS NTHOMAS@JONESWALDO.COM

09/02/2020 /s/ HOLLY TRAFELET

Date: _____ _____

Signature

The Order of the Court is stated below:
Dated: November 28, 2018 10:48:07 AM
/s/ Kevin K. Allen
District Court Judge

**IN THE FIRST JUDICIAL DISTRICT COURT**

**IN AND FOR CACHE COUNTY, STATE OF UTAH**

| | |
|---|---|
| HOWELL MANAGEMENT SERVICES, LLC, a Utah limited liability company,<br><br>Plaintiff,<br><br>vs.<br><br>AUGUST EDUCATION GROUP, LLC a California limited liability company; and APARNA VASHISHT ROTA, and individual,<br><br>Defendants.. | **STIPULATED PROTECTIVE ORDER**<br><br>Case No. 170100325<br><br>Judge Kevin Allen |
| | |

Plaintiff Howell Mangement Services, LLC ("**Plaintiff**" or "**HMS**") commenced this action against Defendants August Education Group, LLC ("**August**") and Aparna Vashisht Rota ("**Rota**," and together with August, the "Defendants") on November 2, 2017. Defendants have filed their Answer to the Second Amended Verified Complaint and asserted a Counterclaim. Plaintiff filed its Answer to the Counterclaim. The parties have exchanged their Initial Disclosures pursuant to Utah Rule of Civil Procedure 26(a) and have each served written discovery on one another under Utah Rules of Civil Procedure 26, 33, 34 and 36.

This case concerns claims for money and other relief, and among other things, the discovery now pending and anticipated to be taken in this case requests exchange of certain alleged confidential business information, trade secrets, and other information that one or both of

the parties may claim is generally protected from public disclosure in litigation involving business disputes under Utah Rule of Civil Procedure 37(a)(7)(G) and other applicable law.

Plaintiff, through counsel, Jeffrey W. Shields, Nathan D. Thomas, and Elizabeth Butler, of Jones Waldo Holbrook & McDonough, P.C., and Defendants, through counsel, Keith A. Call and Andrew L. Roth of Snow Christensen & Martineau, PC, hereby enter into this Stipulated Protective Order to facilitate exchange of and use of documents and information in this litigation and to resolve certain objections made to one another's discovery requests. The parties acknowledge that many of the documents to be exchanged, are claimed to be confidential and subject to protection from public disclosure. Accordingly, the parties to this action (sometimes referred to herein as the "**Parties**" or separately as a "**Party**"), by and through the above-named counsel, stipulate and agree, pursuant to their signatures below, and request the Court to enter an order, on the following terms. Based upon such stipulation, and good cause appearing therefore, it is now by the Court,

ORDERED AS FOLLOWS:

1. Any document provided by any Party which that Party in good faith contends contains information that is confidential and entitled to protection may be so designated as provided herein. Such designated documents shall be received by counsel of record for the Party upon the terms and conditions of this Stipulated Protective Order (this "**Protective Order**").

2. As hereinafter used, the term "PROTECTED INFORMATION" shall mean confidential or proprietary technical, scientific, financial, business, trade secrets, and other sensitive information designated as such by the producing party, and includes all such designated information whether disclosed or produced by a Party or a third-party in response to

discovery in this litigation, in mediation, as obtained from third parties, and/or as introduced in proceedings before this Court. The term PROTECTED INFORMATION shall also include information regarding students, persons and entities subject to the privacy and nondisclosure provisions of the federal Family Educational Rights and Privacy Act , 20 U.S.C. § 1232g, and 34 CFR Part 99 ("FERPA").

3. The term CONFIDENTIAL INFORMATION shall mean all PROTECTED INFORMATION that is not designated as "CONFIDENTIAL - ATTORNEYS EYES ONLY" information.

4. The term CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, shall mean PROTECTED INFORMATION that is so designated by the producing party. The designation CONFIDENTIAL - ATTORNEYS EYES ONLY may be used only for the following types of past, current, or future PROTECTED INFORMATION: (1) sensitive business information, including highly sensitive financial or marketing information and the identity of suppliers, distributors, and potential or actual customers; (2) competitive business information, including non-public financial information and or marketing analyses or comparisons of competitor's services and strategic planning, or (3) any other PROTECTED INFORMATION the disclosure of which to non-qualified people subject to this Protective Order the producing party reasonably and in good faith believes would likely cause harm.

5. With respect to all documents produced or furnished by a Party, which are designated as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" by the producing Party, such information shall be kept confidential and shall not be given, shown, made available, discussed, or otherwise communicated in any manner ("disclosed"), either directly or indirectly,

to any person not authorized to receive the information under the terms of this Stipulated Protective Order.

6. The parties agree to designate information as CONFIDENTIAL or ATTORNEYS' EYES ONLY on a good faith basis and not for purposes of harassing the receiving Party or for purposes of unnecessarily restricting the receiving Party's access to information. Documents that do not contain confidential information as provided for above should not be designated CONFIDENTIAL or ATTORNEYS' EYES ONLY.

7. Counsel for the receiving Party may provide copies of documents designated as "ATTORNEYS' EYES ONLY" only to the following:

(a) Counsel of record for the parties, including associate attorneys and paralegals and clerical employees from the law firms having made an appearance in this matter who are assisting such counsel;

(b) The Court, courtroom personnel, law clerks for the Court, mediators and any attorneys or staff assisting a mediator;

(c) An independent advisor, consultant, or expert, and their support staff, retained by the receiving Party's counsel to furnish technical or expert services and/or give testimony or assist with mediation and this litigation provided that such vendors are advised in writing in advance of the terms of this Stipulated Protective Order and that they agree in writing to be bound its terms;

(d) Third-party vendors specifically retained to assist counsel in storing documents and/or electronically stored information provided that such vendors

are advised in writing in advance of the terms of this Stipulated Protective Order and that they agree in writing to be bound by its terms; and

(e) Any witness during the course of discovery, so long as it is stated on the face of each document designated "ATTORNEYS' EYES ONLY" being disclosed that the witness to whom a party is seeking to disclose the document was either an author, recipient, or otherwise involved in the creat of the document. Where it is not stated on the face of the document being disclosed that the witness to whom a party is seeking to disclose the document was either an author, recipient, or otherwise involved in the creation of the document, the party seeking disclosure may nonetheless disclose the "ATTORNEYS' EYES ONLY" document to the witness provided that: (i) the party seeking disclosure has a reasonable basis for believing that the witness in fact received or reviewed the document, (ii) the party seeking disclosure provides advance notice to the party that produced the document, and (iii) the party that produced the document does not inform the party seeking disclosure that the person to whom the party intends to disclose the document did not in fact receive or review the document. Nothing in this Order shall prevent the disclosure at a deposition of a document designated "ATTORNEYS' EYES ONLY" to the officers, directors, and managerial level employees of the producing party, or to any employee of such party who has access to such information in the ordinary course of such employee's employment.

8. Counsel for the inspecting Party may provide copies of documents designated as "CONFIDENTIAL" only to the following:

(a) The categories of individuals listed above in Paragraph 7.(a)-(e) subject to all conditions thereof;

(b) Parties (including the officers, directors, employees, agents and representatives of a Party that is a business entity) to whom it is necessary that the material be disclosed for purposes of this litigation; and

(c) Authors or drafters of the documents or information.

9. If, through inadvertence, a producing Party provides any information pursuant to this litigation without marking the information as CONFIDENTIAL or ATTORNEYS' EYES ONLY information, the producing Party may subsequently inform the receiving Party of the CONFIDENTIAL or ATTORNEYS' EYES ONLY nature of the disclosed information, and the receiving Party shall use reasonable efforts to treat the disclosed information as CONFIDENTIAL or ATTORNEYS' EYES ONLY information upon receipt of written notice from the producing Party, to the extent the receiving Party has not already disclosed this information.

10. The restrictions set forth in this Protective Order will not apply to information which is known to the receiving Party or which one of the receiving Parties already has in its possession, or which becomes known to the public after the date of its transmission to the receiving Party, provided that such information does not become publicly known by any act or omission of the receiving Party, its employees, or agents which would be in violation of this order. If such public information is designated as CONFIDENTIAL or ATTORNEYS' EYES

ONLY, the receiving Party must inform the producing Party of the pertinent circumstances before the restrictions of this Order will be inapplicable.

11. Acceptance by a Party of any information, document, or thing designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY shall not constitute a concession that the information, document or thing is confidential. Either Party may later contest a claim of confidentiality and does waive such right to argue at a later date that the designation of such document is not warranted. In the event a Party believes any document designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY does not warrant the designation assigned to it by the producing party under the terms of this Protective Order or that disclosure of information designated ATTORNEYS' EYES ONLY must be disclosed to other than a qualified recipient of such information in order to provide advice with respect to this action, the Party may, through the filing of a Statement of Discovery Issues pursuant to Utah Rule of Civil Procedure 37, seek an order of the court removing or modifying the designation assigned by the producing party.

12. Neither party shall disclose or be required to disclose student information subject to the privacy and non-dislcosure provisions of FERPA absent compliance with the provisions of 34 CFR § 99.31 and other parts of FERPA regulating disclosure of such information.

13. This Protective Order shall be without prejudice to the right of any Party to oppose production of any information on grounds other than confidentiality.

14. This Protective Order shall not prevent any Party from applying to a court of law for relief therefrom, or from applying to a court for further or additional protective orders, or from agreeing among themselves to modify or vacate this Protective Order.

15. Nothing in this Protective Order shall bar or otherwise restrict outside counsel from rendering advice to his or her client with respect to this action and, in the course thereof, from relying in a general way upon his examination of materials designated ATTORNEYS' EYES ONLY, provided, however, that in rendering such advice and in otherwise communicating with his or her clients, such counsel shall not disclose the specific contents of any materials designated ATTORNEYS' EYES ONLY.

16. At the conclusion of this litigation or upon a settlement, a receiving party shall use its reasonable best efforts to destroy or return all CONFIDENTIAL and ATTORNEYS' EYES ONLY information furnished pursuant to this Protective Order to the producing party's attorneys of record, and all copies thereof, shall be returned to the producing attorneys of record. If the receiving party chooses to destoy the information, it shall, upon request, certify that it has used its reasonable efforts to destroy the documents. The provisions of this Protective Order insofar as they restrict the disclosure, communication of, and use of, confidential and attorneys' eyes only information produced hereunder shall continue to be binding after the conclusion of this action. Notwithstanding the foregoing, a receiving party shall not be required to return or destroy information that is retained pursuant to automatic backup and archiving processes; provided however, that the receiving party shall continue to maintain the confidentiality of any such CONFIDENTIAL or ATTORNEYS' EYES ONLY information contained in such archival materials in accordance with the terms of this Order.

17. If discovery is sought of a person not a Party to this action ("**non-Party**") requiring disclosure of such third Party's CONFIDENTIAL or ATTORNEYS' EYES ONLY information, the CONFIDENTIAL or ATTORNEYS' EYES ONLY information disclosed by

such non-Party will be accorded the same protection as the parties' CONFIDENTIAL or ATTORNEYS' EYES ONLY information, and will be subject to the same procedures as those governing disclosure of the parties' CONFIDENTIAL or ATTORNEYS' EYES ONLY information pursuant to this Protective Order.

18. The terms of this Protective Order are in addition to, not in lieu of, this Court's *Order Classifying the Verified Complaint Against August Education Group LLC and Aparna Vashsisht Rota and the Docket as Protected,* entered on the docket dated November 6, 2017.

The foregoing is hereby stipulated by and between counsel who jointly request the Court to enter the same as its Order.

DATED this 21st day of November, 2018.

SNOW CHRISTENSEN & MARTINEAU

By: */s/ Keith A. Call* (by permission via email)

Keith A. Call

Andrew L. Roth

Attorneys for Defendants

JONES WALDO HOLBROOK & MCDONOUGH

By: *Jeffrey W. Shields*

Jeffrey Weston Shields

Nathan D. Thomas

Elizabeth Butler

Attorneys for Plaintiff

****ENTERED BY THE COURT ON THE DATE AND AS INDICATED BY THE COURT'S SEAL AT THE TOP OF THE FIRST PAGE****

4841-2305-7792, v. 1

**EXHIBIT D**

**THE FIRST JUDICIAL DISTRICT COURT**
**IN AND FOR THE COUNTY OF CACHE, STATE OF UTAH**

| | |
|---|---|
| HOWELL MANAGEMENT SERVICES, LLC, a Utah limited liability company,<br><br>Plaintiff,<br><br>vs.<br><br>AUGUST EDUCTION GROUP, LLC, a California limited liability company; and APARNA VASHISHT-ROTA, an individual,<br><br>Defendants. | ORDER<br><br>Case No. 170100325<br><br>Judge Kevin K. Allen |

THIS MATTER IS BEFORE THE COURT pursuant to the hearing held before the Court on Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction on March 4, 2019. The Court provided that neither Party could communicate with any potential witness regarding this case or the Parties, and that it would issue a more detailed order.

As such, it is HEREBY ORDERED, ADJUDCED, AND DECREED that:

1. The Parties, and any person(s) acting in active concert or participation with the Parties who have notice of this Order, are generally barred and restrained from sending any electronic or other communications—directly or indirectly—until further order of the Court, to all or any of the opposing party's:

a. university partners—including but not limited to Harrisburg University of Science and Technology, Ottawa University, and Lindenwood University;

b. accreditation bodies;

c. agents;

d. vendors;

e. employees; and

f. independent contractors.

2. Said electronic or other communication shall not discuss, disclose, intimate, or otherwise refer to the matters in dispute in this litigation.

3. Additionally, said communications may not contain accusations of or attachment referring to harassment, discrimination, or other alleged misconduct against the Parties, the Parties' officers, employees, agents, and university partners, and from retaining, using, disclosing, or otherwise misappropriating, directly or indirectly, the Parties' confidential and proprietary information.

DATED this 21 day of March, 2024.

BY THE COURT:

Judge Kevin K. Allen

STATE OF UTAH FIRST DISTRICT COURT CACHE COUNTY

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 170100325 by the method and on the date specified.

MANUAL EMAIL: ELIZABETH M BUTLER ebutler@joneswaldo.com
MANUAL EMAIL: JAMES D LEWIS jd@lewishansen.com
MANUAL EMAIL: KENNETH L REICH klr@lewishansen.com

03/22/2019 /s/ HILLARY FRUGE

Date: _____ _____

Deputy Court Clerk

AMERICAN ARBITRATION ASSOCIATION

Western Case Management Center
Sandra Marshall
Vice President
45 E River Park Place West
Suite 308
Fresno, CA 93720
Telephone: (877)528-0880
Fax: (855)433-3046

March 19, 2021

Aparna Vashisht Rota
12396 Dormouse Road
San Diego, CA 92129
Via Email to: aps.rota@gmail.com

Jeffrey W. Shields, Esq.
Jones, Waldo, Holbrook & McDonough, P.C.
170 South Main Street
Suite 1500
Salt Lake City, UT 84101-1644
Via Email to: jshields@joneswaldo.com

AAA claims under First + Second Agreement not waived.

Thank You!

Case Number: 01-20-0000-3618

August Education Group and Aparna Vashisht-Rota
-vs-
Chris Howell and Howell Management Services

Dear Parties:

After careful review of the parties' positions, Judge Orfield has ruled as follows:

> The matter is dismissed without prejudice to refile, but only if there is a ruling from the court compelling this matter to arbitration.

Should an order be received, please contact me directly regarding reopening this matter - do not file a new case.

Pursuant to the AAA's current policy, in the normal course of our administration, the AAA may maintain certain electronic case documents in our electronic records system. Such electronic documents may not constitute a complete case file. Other than certain types of electronic case documents that the AAA maintains indefinitely, electronic case documents will be destroyed 18 months after the date of this letter.

Sincerely,

/s/
Julie E Collins
Manager of ADR Services
Direct Dial: (559)408-5713
Email: JulieCollins@adr.org
Fax: (855)433-3046

cc:
Heather Loveridge
Timothy Horton
Elizabeth M. Butler, Esq.

**THE FIRST JUDICIAL DISTRICT COURT**
**IN AND FOR THE COUNTY OF CACHE, STATE OF UTAH**

| | |
|---|---|
| HOWELL MANAGEMENT SERVICES, LLC, a Utah limited liability company,<br><br>Plaintiff,<br><br>vs.<br><br>AUGUST EDUCTION GROUP, LLC, a California limited liability company; and APARNA VASHISHT-ROTA, an individual,<br><br>Defendants. | MEMORANDUM DECISION<br><br>Case No. 170100325<br><br>Judge Kevin K. Allen |

THIS MATTER IS BEFORE THE COURT pursuant to the Defendants' Motion to Stay Pending Arbitration and Motion for Partial Dismissal. In preparation of this Decision, the Court has reviewed the respective memoranda, held oral arguments, and examined the applicable legal authorities. Having considered the foregoing, the Court issues this Decision.

**SUMMARY**

On February 1, 2018, Defendant filed a Motion to Stay Pending Arbitration and Motion for Partial Dismissal. Defendants request the Court stay this action and compel the Parties to arbitrate their dispute in accordance with the arbitration clause contained in the agreement that governs the Parties' relationship. Additionally, Defendants request the Court dismiss Plaintiff's third cause of action for failure to state a claim. Defendants allege the contractual relationship between August Education Group, LLC ("AEG") and Plaintiff Howell Management Services, LLC ("HMS") began in 2015. While Plaintiff contends four agreements existed between the

Parties, Defendants allege the Second Agreement is the last agreement that occurred and is binding upon the Parties. Defendants allege that, while it sought to enter into the Third and Fourth Agreements with Plaintiff, AEG's principal, Defendant Aparna Vashisht-Rota ("Rota") never received sign copies of the Third and Fourth Agreements and rescinded her signature on May 5, 2017. Defendants argue that Plaintiff's claims are governed by the binding arbitration clause in the Second Agreement, and, as such, this Court should stay this action and compel arbitration. With the rescission of Rota's signature before signed copies of the agreements were received, Defendants contend the Third and Fourth Agreements are not binding contracts. In the event the Court does not compel arbitration, Defendants argue Plaintiff's third cause of action should be dismissed should be dismissed as the statute does not create a private right of action.

On February 15, 2018, Plaintiff filed a Memorandum in Opposition to Defendants' Motion to Stay Pending Arbitration and Motion for Partial Dismissal. Plaintiff alleges Defendants terminated the Second Agreement on March 27, 2017. Thereafter, Plaintiffs alleges Defendants contacted it requesting to re-establish their business relationship. After a series of negotiations, Plaintiff alleges the Third Agreement was entered into. Plaintiff alleges Rota signed the Third Agreement, as did Plaintiff, but copies were not sent to Defendants until later. Plaintiff alleges both Parties began immediate performance of the Third Agreement; specifically, that Rota furnished Plaintiff with an IRS Form 2-9 to facilitate payment of the monthly retainer and Plaintiff sent a check. Subsequently, Plaintiff alleges Defendants contacted it requesting modification to be made, and the Fourth Agreement was then signed on May 5, 2017. Plaintiff acknowledges that, the next day, Rota sent an email where she repudiated and rescinded her signature on the Fourth Agreement. Plaintiff argues that the operative agreement governing the Parties' relationship—the Fourth Agreement—lacks an arbitration clause, and the Court cannot

compel arbitration. Plaintiffs contend that, even if the Court were to accept Rota's rescission of her signature, the Third Agreement would then be binding and it also does not contain an arbitration clause. Where either of the possible binding agreements does not contain an arbitration clause, Plaintiff argues that the Court cannot compel arbitration. Furthermore, Plaintiff argues that the statute specifically provides that criminal prosecution for electronic communication harassment does not bar a civil action for damages.

On February 22, 2018, Defendants filed a Reply Memorandum Supporting Motion to Stay Pending Arbitration and Motion for Partial Dismissal. Defendants argue that the Third and Fourth Agreements were never binding on the Parties, and the Second Agreement remains controlling. Defendants contend that Rota's signature upon the Third and Fourth Agreements was merely an offer to Plaintiff and not a binding acceptance. Defendants contend that, even if the Parties did begin to perform, the Third and Fourth Agreements require a return promise not performance. Where the return promise was never made, Defendants contend the Third and Fourth Agreements cannot be binding. In the event the Court finds that arbitration cannot be compelled, Defendant contend that Plaintiff's third cause of action fails to state a claim upon which relief can be granted, and the statute does not provide a private right of action.

## ANALYSIS

### I. Motion to Compel Arbitration

Under the Utah Rules of Civil Procedure, "[e]very defense, in law or fact, to claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required . . ." Utah R. Civ. P. 12(b). However, a party may assert a particular defense, including "(1) lack of subject matter jurisdiction . . .(3) improper venue . . . [and] (6) failure to state a claim upon

which relief can be granted," within a motion. *Id.* Such a motion "shall be made before pleading if a further pleading is permitted." *Id.*

In the case at hand, Defendants contend that the Parties are governed by a binding arbitration clause contained in the Second Agreement. Thus, Defendants contend the Court lacks subject matter jurisdiction, and is an improper venue for the Parties to settle their disputes. In Utah, "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." Utah Code Ann. § 78B-11-107(1). A court "shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." *Id.* at § 78B-11-107(2). The Defendants correctly note that, "[i]t is the policy of the law in Utah to interpret contracts in favor of arbitration, in keeping with our policy of encouraging extrajudicial resolution of disputes when the parties have agreed not to litigate." *Mariposa Exp., Inc. v. United Shipping Solutions, LLC*, 2013 UT App 28, ¶ 17, 295 P.3d 1173 (quoting *Central Fla. Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 16, 40 P.3d 599). However, upon a motion to compel a party to arbitrate, "if the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate." *Id.* at § 78B-11-108(1)(b).

Here, Defendants argue that the Third and Fourth Agreements are not valid as they were never provided copies containing both Parties' signatures, and the Second Agreement remains binding an enforceable. The Utah Court of Appeals determined that "[i]t is established that a signature is not always necessary to create a binding agreement." *Commercial Union Associates v. Clayton*, 863 P.2d 29, 34 (Utah Ct. App. 1993) (quotations and citations omitted). The court

1.) HMS accepted the rescission from the alleged Fourth Agreement. It did not disclose that to the Court.
2.) The alleged 3rd and 4th agreement same with confusing compensation terms, they are copies and all signed copies are null and void.
3.) Past consideration arising out of the Second Agreement is no consideration for both the 3rd and 4th contract as the $500 sent arose out of the work prior and money already due.
4.) Due to a line for 'preapproval' added for unclassified students (those without a referral source) which is not possible revealed during the deposition on 7/23/19, there was no consideration for the new contracts.
5.) Second agreement has money due for ANY reason subject to AAA that the UT agreements can't supersede by law. So that 'supersede' in paragraph 1.5 is a mistake that should have been stricken as per Section 4.2.

further opined that, similarly, it was established that "the purpose of a signature is to demonstrate 'mutuality of assent' which could as well be shown through the conduct of the parties." *Id.* (quotations and citations omitted). Thus, a signature is not necessarily required to show that the Parties agreed to be bound by the terms of an agreement. Rather, the fact that Plaintiff sent Defendants a check demonstrates their assent and understanding they were bound by the terms contained within the Third Agreement. Additionally, Rota specifically expressed her desire and excitement at being able to be working with Plaintiff again. Moreover, had Rota not believed Defendants were and intended to be bound by the terms of the Third Agreement, she would not have begun the process renegotiating the terms for the Fourth Agreement. Furthermore, Plaintiff did sign the Third and Fourth Agreements and failed to provide Defendants with a timely copy. Lastly, the Third and Fourth Agreements provide that to be valid and in effect, only the signature of the Defendants was required. Thus, the Parties' action and conduct indicates their assent to be bound by the terms of the Third and Fourth Agreements.

Defendants additionally argue that Rota rescinded her signatures for both the Third and Fourth Agreements. However, by Rota's own words, she stated, "I am not comfortable with ***this agreement***, and don't wish to pursue it or sign it as an option. I rescind my ***signature*** on ***the agreement*** and all signed copies of it are null and void effective immediately." Defs.' Mot. to Stay, *Ex. D to Rota Decl.*, filed Feb. 1, 2018 (emphasis added). Rota was specifically addressing the latest draft and amendments—the Fourth Agreement—and did not address multiple agreements or multiple signatures. While Defendants argue it was rescinding her signature on both the Third and Fourth Agreements, the Court simply cannot find that where only the singular agreement and signature were addressed. As such, the Court finds that, at most, Rota only rescinded her signature pertaining to the Fourth Agreement.

Mistakes Mistake of Fact: A party that interprets a term one way, but has reason to know that another interprets it differently, should bring the issue to light before the contract is closed. Failure to do this often pushes courts to construe the meaning of the term against the party, which had knowledge of the possible mistake (Wex) Mistake: in general, any error or misconception which is a situation where the parties did not mean the same thing when they agreed to a term of provision. Also, when at least one contracting party held a belief that was factually or legally false. As a result, the contract may be subject to rescission. (Wex). Plaintiff understood one thing from the unclassified/non-compensable provisions while the opposition meant something different. Opposition is sophisticated and knew that Plaintiff interpreted the contract differently and knew that Plaintiff made the mistake in calculation and they did not bring this issue to light even though the negotiations show confusion in terms. Opposition added a line surreptitiously to the agreement so he knew that the agreement terms being negotiated were actually futile. Opposition did not bring this issue to light. The confusing terms and mistake is present in both alleged Utah agreements.

Offer Made: April 24, 2017. Offer Accepted: April 24, 2017. No countersigned copies as per process On May 3rd, 2017 *Chris Howell): "Additionally, if you could please send me a list of the pending agent agreements if there are any that still require my signature that would be great." May 4th, 2017: Counteroffer made (remove the retainer) from AEG to HMS. This is a rejection of the April 24th, 2017 offer. Counteroffer negates April 24th, 2017 offer. No modification requested by opposition as per the contract at 4.4 and they have a clear process for that. May 5th, 2017: Counteroffer sent with removed retainer May 6th, 2017: Counteroffer rescinded PRIOR to acceptance by opposition. May 8th, 2017: Rescission accepted by opposition.

Furthermore, regardless of whether or not the rescission occurred, the Third and Fourth Agreements expressly provide that they supersede any previous or existing agreements between the Parties. The Parties are not in dispute that they terminated the Second Agreement. However, upon signing the Third Agreement, it then superseded the Second Agreement. Likewise, upon singing the Fourth Agreement, it then superseded the Third Agreement. Where Rota rescinded her signature on the Fourth Agreement, the Court finds the Third Agreement is the controlling document. The Third Agreement does not contain a binding arbitration clause. Rather, the Third Agreement contains a paragraph stating that it "shall be governed by and construed in accordance with the laws of the State of Utah." Complt., *Ex. C*, filed Nov. 2, 2017, ¶ 4.5. Furthermore, with regards to disputes, the Parties agreed to "submit[] to the exclusive jurisdiction of the Courts of the State of Utah, and irrevocably waives any objection . . . to venue." *Id.* While Defendants argue that the Second Agreement is controlling, Defendants are the ones that terminated the Second Agreement and then sought Plaintiff out to begin negotiations on the Third and Fourth Agreements.

Therefore, based on the foregoing, the Court finds that the Third Agreement is binding and enforceable upon the Parties. The Third Agreement contains no binding arbitration clause, and the Court cannot find it appropriate to compel arbitration or stay proceedings.

**II. 12(b)(6) Motion**

The Utah Rules of Civil Procedure allow for a complaint to be dismissed where it "fails to state a claim upon which relief can be granted." Utah R. Civ. P. 12(b)(6). "A rule 12(b)(6) motion to dismiss addresses only the sufficiency of the pleadings, and therefore, 'is not an opportunity for the trial court to decide the merits of the case.'" *Williams v. Bench*, 2008 UT App 306, ¶ 20, 193 P.3d 640 (quoting *Tuttle v. Olds*, 2007 UT App 10, ¶ 14, 155 P.3d 893). Thus,

"trial courts are obliged to address the legal viability of a plaintiff's underlying claim as presented in the pleadings." *Williams*, 2008 UT App at ¶ 20.

In the case at hand, Plaintiffs have brought a cause of action for electronic communication harassment damages under Utah Code Section 76-9-201. Plaintiffs contend that this statute creates a civil cause of action for violating the statute. Plaintiffs have alleged that Defendants emails have violated this statute, which provides:

> A person is guilty of electronic communication harassment and subject to prosecution . . . if with the intent to intimidate, abuse, threaten, harass, frighten, or disrupt the electronic communications of another, . . . after the recipient has requested or informed the person not to contact the recipient, and the person repeatedly or continuously contacts the electronic communication device of the recipient.

Utah Code Ann. § 76-9-201(2)(a)(ii). Plaintiffs contend that the statute further creates a civil cause of action for violating the statutes, based upon the provision that states "criminal prosecution under this section does not affect an individual's right to bring a civil action for damages suffered as a result of the commission of any of the offenses under this section." *Id.* at § 76-9-201(4)(a).

Under this statute, there is no express language authorizing a civil claim. "In the absence of an express grant of a private cause of action, a civil claim exists on if the language of Utah Code section 76-9-201 creates an implied right to sue." *Nunes v. Rushton*, 299 F.Supp.3d 1216, 1237 (D. Utah 2018). "In Utah, '[i]n the absence of language expressly granting a private right of action[,] . . . the courts of this state are reluctant to imply a private right of action based on state law.'" *Buckner v. Kennard*, 2004 UT 78, ¶ 40, 99 P.3d 842 (quoting *Miller v. Weaver*, 2003 UT 12, ¶ 20, 66 P.3d 592 (citations omitted)) (alterations in original). "Utah courts have rarely, if ever, found a Utah statute to grant an implied private right of action." *Buckner*, 2004 UT at ¶ 43 (citations omitted).

In *Nunes*, the United States District Court for the District of Utah recently determined whether a private right of action existed under section 76-9-201. *Nunes v. Rushton*, 299 F.Supp.3d 1216 (D. Utah 2018). The court determined that there was no express language in the section 76-9-201 authorizing a civil claim. *Id.* at 1237. Citing Utah precedent, the court reasoned that Utah has a "high bar for creating an implied cause of action." *Id.* The court determined the statute provided that criminal prosecution did not foreclose a civil action suffered as result of the commission of these offenses, but that the "language does not impliedly create a new cause of action." *Id.* Rather, the court found that "[t]he plain language of the statute confirms only that a criminal prosecution does not prevent the victim from bringing an existing civil claim—e.g. , for intention infliction of emotion distress or defamation—against the perpetrator." *Id.* at 1237-38.

Analogous to *Nunes*, Plaintiff attempts to bring a civil claim based upon section 76-9-201. However, as found in *Nunes*, the plain language of the statute only provides it does not foreclose an existing civil claim for damages, not that it creates one. Where the statute does not authorize a private cause of action, this Court finds Plaintiff's third cause of action for electronic communication harassment under this statute fails as a matter of law.

Therefore, based on the foregoing, Plaintiff's third cause of action is dismissed.

## CONCLUSION

Based on the foregoing, the Defendant's Motion to Stay Pending Arbitration and Motion for Partial Dismissal is granted in part, and denied in part. This decision represents the order of the Court. No further order is necessary to effectuate this decision.

DATED this 25 day of June, 2018.

BY THE COURT:

Judge Kevin K. Allen

STATE OF UTAH
FIRST DISTRICT COURT
CACHE COUNTY

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 170100325 by the method and on the date specified.

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Date: 07/02/2018

/s/ ALEXIS BROWN

Deputy Court Clerk