

NO.: NNH-CV-14-6050848-S

ZHAOYIN WANG,	:	SUPERIOR COURT
Plaintiff,	:	
	:	
v.	:	J.D. OF NEW HAVEN
	:	AT NEW HAVEN
BETA PHARMA, INC., DON ZHANG AND	:	
ZHEJIANG BETA PHARMA CO., LTD.,	:	
Defendants.	:	MARCH 29, 2016

MOTION FOR PROTECTIVE ORDER

Pursuant to Practice Book § 13-5, Defendants Beta Pharma, Inc. (“Beta Pharma”) and Don Zhang (“Zhang”) hereby move for the entry of a Protective Order to govern litigation of the Motion to Disqualify Opposing Counsel (the “Motion to Disqualify”) that they file herewith. A copy of the proposed Order (the “Proposed Order”) is attached hereto as Exhibit A.

As explained in the Memorandum of Law filed in support of the Motion to Disqualify, Beta Pharma’s former attorney, Lance Liu, Esq. (“Liu”), represented Beta Pharma on the subject matter of this action and thereby had access to Beta Pharma’s relevant confidential and privileged information. Subsequently, Liu formed multiple associations with Katz, including a consulting relationship with Katz in this case, pursuant to which Liu corresponded with Plaintiff regarding filing this lawsuit, and a joint representation with Katz of several persons suing Defendants in other actions (before this Court and in federal court). These associations created opportunities for the disclosure of Defendants’ confidential and privileged information to Katz. Under

Connecticut law, that opportunity for disclosure taints this litigation and requires disqualification of Katz. See Goldenberg v. Corporate Air, Inc., 189 Conn. 504, 512 (1983), overruled in part on other grounds Burger & Burger, Inc. v. Murren, 202 Conn. 660 (1987). Consequently, Defendants are seeking to disqualify Katz from representing Plaintiff.

In support of their Motion to Disqualify, Defendants intend to submit for the Court's consideration, as exhibits supporting that Motion, certain documents showing that Liu counseled Defendants on the subject matter of this case, but which contain Defendants' confidential, work product, and privileged information. The Proposed Order will prevent any waiver of their privileges with respect to such information, and prevent Defendants' privileged information from being used against them in the litigation of this case's merits. The Order that Defendants seek here is substantively identical to an Order entered by the District Court for the District of Connecticut (Haight, J.) in the same circumstances – that is, in a case where Beta Pharma moved to disqualify Katz because he teamed up with Liu against Beta Pharma.

I. Relevant Facts

Liu represented Beta Pharma from approximately July 2011 until November or December 2012. During that period, he had unfettered access to Beta Pharma's confidential information and represented Beta Pharma on a broad array of issues, including corporate issues, tax issues, and contract issues.

In the present matter, Plaintiff alleges that, in March 2010, he entered into an agreement (the "2010 Agreement") that had two components. First, he would become Beta Pharma's Chief Scientific Officer in exchange for a salary and stock in Beta

Pharma and Zhejiang Beta Pharma Co., Ltd. (“ZJBP”), a Chinese company. Complaint, First Count, ¶ 10. Second, Plaintiff contends that the contract contemplated the establishment of Beta Pharma Canada (“BPC”), a Canadian corporation in which Plaintiff would own 51% of the stock and Zhang would own 49%. Id. at ¶ 11. According to Plaintiff, Beta Pharma and Zhang breached the 2010 Agreement by, among other things, failing to pay Plaintiff his salary and stock, and by discontinuing funding of BPC. Id. at ¶ 12; Complaint, Second Count, ¶ 15.

Emails and documents establish that Liu worked on, and even re-drafted, the alleged 2010 Agreement. He also counseled Beta Pharma on tax issues associated with BPC and the 2010 Agreement, and worked on dissolving the 2010 Agreement. In short, Liu’s representation of Beta Pharma concerned the same matter as this action.

Liu has now teamed up with Katz in this case against Defendants, his former clients. In April 2014, Liu executed a consulting agreement pursuant to which Liu would act as a liaison between Katz and various plaintiffs with purported claims against Beta Pharma (copy attached as Exhibit B).

Emails confirm that Liu did, in fact, consult with Katz in this capacity (copies attached as Exhibit C). Less than three weeks after signing that consulting agreement, on May 14, 2014, Plaintiff sent Liu an email titled “My case against Don(betaPharma),” delineating the facts of the present lawsuit. Id. The May 14 email included the 2010 Agreement as an attachment. Id. Katz concedes that, after Plaintiff emailed the facts of

this lawsuit to Liu, “it is likely that Liu told [Katz] the contents of Wang’s email to Liu...re ‘My case against Don(betaPharma).’”¹

Ten days later, on May 24, 2014, Plaintiff sent an email to Zhang stating, “I am under pressure to sign an attorney service agreement and it would be irreversible once I sign the service contract with the attorney. I certainly hope we can resolve everything by some other means instead of going through legal procedures.” See Exhibit C. Liu served as the liaison between Plaintiff and Katz, and the information found its way into the Complaint in this case. Again, Liu is or was consulting with Katz, adversely to Defendants, on the same matters as Liu’s prior representation of Beta Pharma.

This is not the first (or even second) time that Liu has switched sides and assisted others in suing Defendants, his former clients. Liu also became involved in several other parties’ lawsuits against Beta Pharma. With Katz, Liu is or was jointly representing the plaintiffs in two other actions against Beta Pharma and Zhang: Xie v. Beta Pharma, Inc., et al., No. NNH-CV-13-6035116 (Conn. Super. Ct.) (the “Xie Action”) and Shao, et al. v. Beta Pharma, Inc., et al., No 3:14-CV-01177 (D. Conn.) (the “Shao Action”). See Liu Motion to Quash (copy attached as Exhibit D), at pp. 8–9, in which Liu concedes that he and Katz are engaged in a joint representation of the plaintiffs in the Xie and Shao Actions.

As here, those cases concern the same matters on which Liu worked when representing Beta Pharma. Consequently, Beta Pharma filed a motion in each of those actions seeking to disqualify Katz from representing the plaintiffs. In the Shao Action,

¹ Katz made that concession when opposing Defendants’ Motion to Disqualify that they previously filed while this case was pending before the District Court for the District of Connecticut. [D.E. 76-3 in Case No. 3:14CV1790 (VLB), ¶ 16].

as here, Defendants sought to submit documents containing their privileged and confidential information in order to establish that Liu had worked on the underlying transactions. There, too, they needed to protect those documents from being used against them, and sought to submit the documents to the Court, and serve them on Katz, without waiving their privileges with respect to those documents.

Therefore, Defendants sought a Protective Order governing litigation of the motion to disqualify in the Shao Action, and on January 16, 2015, Judge Haight entered a Protective Order for Motion to Disqualify Counsel (the “Shao Protective Order”), which permitted the disclosure of privileged documents in connection with that Motion without waiving any privileges. A copy of that Order is attached hereto as Exhibit E. On the same date, Judge Haight issued an Opinion on Proposed Protective Orders, in which he recited Defendants’ explanation for seeking such an order – i.e., guarding against any waiver of privilege – and effectively adopted that concern as the basis for the Court’s Order. A copy of that Opinion is attached hereto as Exhibit F.

In March 2015, while the present action was in federal court, Defendants uncovered documents and emails establishing that Liu had worked on the subject matter of the present action. They promptly filed a motion with the federal court, seeking the same Protective Order that they seek here, the necessary changes being made between federal and state law. However, the federal court never ruled on that motion, and the case was remanded to this Court.

Defendants’ present application only asks that this Court enter the same Protective Order as the one entered by Judge Haight in the Shao action. This will simultaneously allow for full disclosure on, and analysis of, Liu’s prior representation,

while protecting Defendants' confidential and privileged information. Conversely, the Protective Order will not prejudice Plaintiff in any way.²

II. Legal Argument

A. The Court Has Authority to Issue the Proposed Order

This Court has the authority to issue an order that contains all of the provisions of the Proposed Order, which are discussed in Part B below. “[T]he court has the inherent authority to moderate the discovery process by imposing protective orders under the appropriate circumstances.” Niazi v. OJPIZZA Orange, LLC, 2014 WL 7714359, at *2 (Conn. Super. Ct. Dec. 29, 2014); see also Wendt v. Spyke, Inc., 2008 WL 732165, at *2 (Conn. Super. Ct. Mar. 4, 2008) (“[T]he court has an inherent authority to supervise discovery.”). This authority includes the authority to issue protective orders that govern the permissible dissemination of confidential documents. See, e.g., RAB Assocs., LLC v. Bertsch Cabinet Mfg., Inc., 2014 WL 4637443, at *1-2 (Conn. Super Ct. Aug. 6, 2014) (court approved protective order which determined which persons could be shown confidential-marked documents). It also includes the authority to issue protective orders that determine whether production of a document waives the attorney-client privilege or other privileges with respect to that document. See, e.g., Steadfast Ins. Co. v. Purdue Frederick Co., 2005 WL 2433042, at *1 (Conn. Super. Ct. Sept. 7, 2005) (court approved protective order under which production of privileged documents did not waive the privilege). The court may order that privileged or otherwise protected documents be filed only under seal. Rosado v. Bridgeport Roman Catholic Diocesan Corp., 276 Conn. 168, 174 & 174 n. 9 (2005).

² Before filing this Motion, Defendants' counsel ascertained that Plaintiff opposes the issuance of the Proposed Order.

Most importantly for the present Motion, this Court has the authority to issue a protective order that shields from public view documents produced or filed in litigation of a motion to disqualify. Franco v. Toyota Motor Sales, USA, Inc., 1995 WL 780944 (Conn. Super. Ct. Dec. 11, 1995). In Franco, the plaintiff (Franco) brought an action against Toyota entities (Toyota) alleging that the seat belt restraint system on some cars was defective and dangerous. Franco's attorney, Leopold, had previously defended Toyota in actions involving allegedly defective seat restraint systems. Toyota filed a motion to disqualify Leopold and his law firm because Leopold had switched sides. The motion to disqualify raised the question of whether Leopold's work for Toyota on the previous seat-restraint actions was sufficiently related to the current action to justify disqualification. Id. at *1-3.

To show that the matters were sufficiently related, Toyota submitted Leopold's billing records from his work on the prior matters. To facilitate Toyota's submission of such confidential and necessarily privileged records, Toyota filed a motion for a protective order together with a proposed order, while Franco objected to that motion and filed its own proposed order. Id. at *4.

In the court's decision on the motion to disqualify, it held that good cause had been provided for the issuance of a protective order "to preserve the confidentiality of certain documents." Id. The court granted Toyota's motion for a protective order, adopted the proposed order that accompanied it, and stated that the order sought "to protect the confidentiality of documents disclosed (and under seal) in connection with the motion to disqualify." Id. The protective order, the court said, would "guard and

assure the return of the documents produced, as well as copies and summaries of those documents.” Id.

In opposition to the motion to disqualify, Franco filed – apparently under seal – copies of two deposition transcripts and complaints in Toyota cases on which Leopold worked. The court held that the memorandum and supporting documents were subject to the protective order “removing the materials from public scrutiny.” Id. at *1. Toyota filed a reply brief along with the Leopold billing records, apparently also under seal, and the court held that the reply brief and billing records were also subject to such an order. Id. at *2.

In the court’s ruling on the motion to disqualify, it relied on the documents that had been removed from public view. Addressing the similarity between the matters Leopold had worked on for Toyota and the current case, the court observed that the “[b]illing records reflect that [Leopold] billed Toyota for time spent on cases concerning seats and seat belts,” and that “Leopold had ample opportunity to be exposed to Toyota’s strategies . . . His billing records indicate that he was involved in work for Toyota concerning issues . . . [that]are, if not identical, essentially the same.” Id. at *4. On that basis, the court disqualified Leopold and his firm. Id.

The court in Franco established its authority to issue the protective order that Defendants seek here. The protective order permitted Toyota to submit the Leopold billing records to the court in support of the motion to disqualify while shielding them from public view. The Franco court further established that it could base its ruling on the documents that had been shielded from public view (in fact, in that case, the shielded billing records were the sole evidence that the court relied on). The court

found that the billing records required disqualification because, once it was established that Leopold had worked on similar matters that created opportunities to be exposed to Toyota's strategies, a breach of confidence was presumed under Bergeron v. Mackler, 225 Conn. 391 (1993) and Goldenberg.

Here, Defendants seek essentially the same order for the same reason. They wish to submit privileged, work product, and confidential information about Liu's work for Beta Pharma that will assist the Court in ruling on the Motion to Disqualify, without waiving the confidential, work product, or privileged status of that information.

As in Franco, courts in other jurisdictions have also imposed special procedures to permit parties seeking disqualification to submit attorney-client privileged information in support of such a motion while shielding such information from public view. For example, a Louisiana appellate court held that a trial court could (and must) consider the privileged communications submitted by the plaintiff in support of his motion to disqualify by means other than taking evidence in open court, such as (1) sealed affidavits, (2) in camera inspection of documents, (3) conducting portions of a hearing outside the presence of the other side, and (4) sealing the record or portions thereof. Keith v. Keith, 140 So.2d 1202, 1211-12 (La. App. Ct. 2014). It reversed the trial court for failing to recognize "alternatives and methods by which courts have taken evidence while preserving confidences which may fall under the attorney-client privilege." Id. at 1211. In the context of a motion to disqualify, the rules governing the submission of such evidence "should not penalize the plaintiff for asserting his right to the attorney-client privilege." Id.; see also Decora Inc. v. DW Wallcovering, Inc., 899 F.Supp. 132, 137-38 (S.D.N.Y. 1995) (allowing a plaintiff seeking disqualification to submit privileged

documents to the court in camera so the plaintiff could use the material to show that an attorney with the defendant's law firm had worked on a substantially related matter, stating that "[t]he former client should not have to disclose such confidences to an adversary as the price of obtaining disqualification."); Radware, Ltd. v. A10 Networks, Inc., 2014 WL 116428, *3 (N.D. Cal Jan. 10, 2014) (permitting a plaintiff bringing a disqualification motion to submit documents in camera, and holding that the moving party should not be subjected to "the agonizing and unfair choice between disclosing its attorney-client communications to third parties . . . and litigating against a firm that [it] believes will use confidential information obtained in its previous representation of [it] against [it]").³

The Court's authority to issue the Proposed Order, and the good cause for issuing the Order, is buttressed by the fact that Liu's misconduct in switching sides in these actions created the **need** to disclose the information for the Court's consideration. When a party's privileged material will assist the party in litigating its former counsel's misconduct, the court should limit disclosure of the material as much as possible. O'Brien v. Stolt-Nielsen Transp. Gp. Ltd., 2004 WL 870839, at *1 (Conn. Super. Ct. Apr. 2, 2004). In O'Brien, an attorney sued his former client, which accused the attorney of improperly resigning from his position as general counsel. Id. at *1. The defendant former client moved to seal two affidavits and a brief, which it contended contained statements protected by the attorney-client privilege and other confidential client

³ Defendants do not even ask for as much as the movants asked for in Keith, Decora, and Radware. Whereas in those cases the movants sought orders that would permit them to submit documents to the court without disclosing them to the opposing party's counsel, the Proposed Order that Defendants now seek would require them to serve copies of all such documents on Plaintiff's counsel.

information arising from the plaintiff's prior work as its general counsel. Id. The court sealed the documents, and also stated that "there is authority for the proposition that use of the material should be in such a fashion as to limit its disclosure as much as possible." Id. The court cited General Dynamics Corp. v. Superior Court, 7 Cal.4th 1164, 1191 (1994), in which the California Supreme Court held that, in actions between an attorney and a former client, courts may use an "equitable arsenal" of measures to permit the submission of the necessary proof while protecting confidential and privileged material, including "the use of sealing and protective orders [and] orders restricting the use of testimony in successive proceedings."

As noted above, the Court's authority includes ordering that production of a document does not waive privileges with respect to that document. Steadfast Ins. Co., 2005 WL 2433042, at *1. Courts have the authority to issue protective orders establishing that specific disclosures do not waive privileges even outside the context of inadvertent disclosures. Ellis v. Toshiba Am. Info. Sys., Inc., 218 Cal. App. 4th 853, 878 (2013) (protective order provided that the production of any electronic information did not waive any of the producing party's claims of privacy, confidentiality, and privilege); Nolte v. Cigna Corp., 2010 WL 3199740, at *2 (C.D. Ill. Aug. 5, 2010) (the defendants' production of certain documents would not, under any circumstances, be deemed a waiver of privilege and the defendants could continue to claim the privilege in that and any other litigation); Petrossian v. Grossman, 219 A.D.2d 587, 588 (N.Y. App. Ct. 1995) (a plaintiff seeking to disqualify the defendants' law firm could have submitted privileged information about the prior representation without waiving her privileges by submitting it

for an in camera inspection or by submitting it pursuant to an appropriate protective order).

Also, the courts' authority to issue orders like the Proposed Order, and the good cause for doing so, are well-established in the analogous context of habeas corpus actions asserting the ineffective assistance of counsel. Such cases are similar to the present situation, because the misconduct or mistakes of a party's former counsel have forced it to confront a potential dilemma between risking the use of its privileged information against it in the underlying action and foregoing its claim based on the misconduct or mistakes. Courts have permitted habeas petitioners to disclose privileged information in order to establish the ineffectiveness of former counsel while prohibiting the use of that material in any subsequent retrial.

For example, the Ninth Circuit upheld a protective order that permitted any documents produced in discovery in the petitioner's ineffective-assistance petition to be used only in litigation of the habeas petition itself, and specifically barred their use in the petitioner's resentencing hearing. Lambright v. Ryan, 698 F.3d 808, 818-20 (9th Cir. 2012). In fact, the circuit court held that the trial court abused its discretion by failing to issue that order before the commencement of discovery and by modifying it to permit the respondent to turn over some of the privileged materials to the agency that would prosecute the petitioner's resentencing. Id. The Ninth Circuit requires that such protective orders be issued in habeas petitions because a petitioner should not be forced to decide between pursuing his claim of ineffective assistance of counsel and retaining his privileges with respect to the subject information. Bittaker v. Woodford, 331 F.3d 715, 723 (9th Cir. 2003).

State courts have likewise limited the use of privileged information disclosed in ineffective assistance claims to the habeas proceedings themselves. Waldrup v. Head, 272 Ga. 572, 580 (2000) (holding that the trial court should issue a protective order limiting disclosure of the petitioner's privileged files to persons needed to assist the respondent in rebutting the petitioner's claim of ineffectiveness, and that the files disclosed at the ineffectiveness hearing could not be used in the petitioner's subsequent criminal trial); Commonwealth of Penn. v. Chmiel, 558 Pa. 478, 511 (1999) (client confidences that were properly disclosed at an ineffectiveness hearing could not be used in the client's trial on criminal charges); People v. Dennis, 177 Cal. App. 3d 863, 876 (1986) (disclosures of privileged information that the defendant made in support of his motion for a new trial on grounds of ineffectiveness of counsel could not be used in his new trial).

Based on the foregoing, this Court has ample authority to issue all of the provisions of the Proposed Order.

B. The Requested Protective Order Will Assist the Court in Deciding the Motion to Disqualify

As Defendants explain in detail in their Memorandum of Law on the Motion to Disqualify, because Liu worked for Beta Pharma on the same (or substantially the same) matter as the present action and then teamed up with Katz, Katz must be disqualified. See, e.g., Goldenberg, 189 Conn. at 504. Currently, there is evidence before the Court showing that Liu worked on the same matter as this case while representing Beta Pharma, and then switched sides. Nevertheless, to further establish that Liu worked for Beta Pharma on the same or substantially the same matter, Defendants seek to submit to the Court (and serve on Plaintiff's counsel) additional

documents evidencing such work. However, because those documents concern Liu's representation of Beta Pharma on this matter, they contain Defendants' confidential, work product, and privileged information. In the absence of a Protective Order, by disclosing such information in connection with the Motion to Disqualify, Defendants would thereby risk waiving their privileges with respect to the information in this and other litigation, and they would risk Plaintiff using such privileged information against them when litigating the merits of the case. That would defeat the very purpose of the Motion to Disqualify, which is to protect Defendants from being injured by the use of their confidential and privileged information against them.

This concern arose in the Shao Action under exactly the same circumstances. In order to deal with this concern, Judge Haight issued the Shao Protective Order, which governed litigation of the disqualification motion in that action, and contained provisions that prevented the waiver of Defendants' privileges. The Protective Order that Defendants seek in the present Motion is substantively identical to the Shao Protective Order. The Proposed Order, like the Shao Protective Order, contains a number of important provisions, including the following:

(1) The Proposed Order permits a party that discloses documents in order to litigate the Motion to Disqualify to designate as "Attorneys' Eyes Only Material" documents that contain attorney-client privileged information, information protected by work product immunity, and information protected by attorney-client confidentiality under Rule of Professional Conduct 1.6 arising out of, or in connection with, a legal representation. See Shao Protective Order ¶ 2, Proposed Order ¶ 2. Thus, the

Proposed Order permits Defendants to apply “Attorneys’ Eyes Only” protection to the documents at issue in the Motion to Disqualify.

(2) The Proposed Order limits the use of “Confidential” or “Attorneys’ Eyes Only” material disclosed in connection with the Motion to Disqualify, by providing that such material shall not be used by the parties for any purpose other than litigating the Motion to Disqualify. See Shao Protective Order ¶ 3, Proposed Order ¶ 3. Thus, it enables Defendants to submit these documents to the Court, and serve them on Plaintiff’s counsel, without risking that such documents will be used against them in other aspects of this litigation or in other litigation.

(3) The Proposed Order provides that any disclosure of information or materials that are protected by the attorney-client privilege or the work product doctrine in connection with the Motion to Disqualify shall not, for any purposes, be deemed a waiver of the attorney-client privilege or the work product doctrine in this or any other proceedings. See Shao Protective Order ¶ 13, Proposed Order ¶ 13. This eliminates the danger that disclosure of the documents at issue will waive Defendants’ privileges with respect to them. Thus, it avoids placing Defendants in the position of either litigating and waiving privileges, or potentially permitting Katz’s conflicted representation to continue.

(4) The Proposed Order requires a party that submits “Confidential” or “Attorneys’ Eyes Only” material to the Court in connection with the Motion to Disqualify to follow the procedures in Rule 5(e)(4)(d) of the Local Rules of this Court for submitting such documents to chambers under seal. See Shao Protective Order ¶ 10, Proposed Order ¶ 10.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following counsel of record by email this 29th day of March, 2016.

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