

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN RE: SMALL SMILES LITIGATION

CONFIDENTIALITY ORDER

Index No. 2011-6084
Index No. 2011-2128
Index No. 2011-6223
Hon. John C. Cherundolo

In order to expedite the exchange of discovery material in the above-captioned action (the "Action"), to facilitate the prompt resolution of disputes over confidentiality, to protect discovery material entitled to be kept confidential, and to insure that confidentiality is afforded only to material so entitled, it is, pursuant to the Court's authority under Section 3103(a) of the Civil Practice Law and Rules ("CPLR") and with the consent of the parties, hereby

ORDERED:

1. Non-disclosure of Confidential Discovery Material. Except with the prior written consent of the party or other person originally designating Discovery Material as Confidential, no Confidential Discovery Material, as defined in paragraph 2(b) of this Order, may be disclosed to any person or used in any manner except as provided herein.

2. Definitions of "Discovery Material" & "Confidential Discovery Material."

a. "Discovery Material" means any material produced, filed, or served by, or otherwise obtained from, any party or person during discovery or otherwise in this Action and any information included in any such material. Discovery Material may include, but

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is not limited to, deposition testimony and transcripts, answers to interrogatories, documents and tangible things produced by a party or person.

b. “Confidential Discovery Material” means any Discovery Material that is prominently stamped or labeled “CONFIDENTIAL” in a manner that does not interfere with the legibility of the document.

3. Designation of Confidential Discovery Material. A party or other person producing, filing or otherwise disseminating Discovery Material may designate for Confidential treatment such Discovery Material that the party or person believes in good faith is entitled to confidential protection under the CPLR and associated New York precedent.

4. Use and Disclosure of Confidential Discovery Material.

a. Limitations on Disclosure and Use: Except as provided in this Order, Confidential Discovery Material may be disclosed only:

(1) to counsel, including in-house counsel, who are actively engaged in the conduct of this Action on behalf of named parties;

(2) to the partners, associates, legal assistants, secretaries and other clerical staff of any person described in subparagraph (1), but only to the extent reasonably necessary to render professional services;

(3) to the Court, Court clerk for filing and court officials involved in this Action (including court reporters or persons operating video equipment at depositions);

(4) to any person designated by the Court in the interest of justice, upon such terms as the Court may deem proper;

(5) to witnesses at deposition, but only to the extent reasonably necessary to examine such witnesses at deposition;

(6) to witnesses in preparation for deposition or trial, but only to the extent reasonably necessary to prepare such witnesses for deposition or trial;

(7) to any party, including their officers, directors, agents, or employees, or other representatives or to the party's former officers, directors or senior employees in order to assist with the defense or prosecution of this Action;

(8) to outside consultants, accountants or experts retained for the purpose of assisting counsel in this Action;

(9) to third-party contractors engaged in one or more aspects of copying, organizing, filing, coding, converting, storing, or retrieving data or designing programs for handling data connected with these actions, including the performance of such duties in relation to a computerized litigation support system, but only to the extent reasonably necessary to render such services;

(10) to a court of competent jurisdiction in a proceeding by a party to enforce a discovery request made in connection with this Action;

(11) to a court of competent jurisdiction in a proceeding brought by counsel in this Action to recover fees owed to such counsel by his or her client in connection with this Action;

(12) to any attorney handling claims similar to those asserted in this Action against any (i) named party in this Action, (ii) Small Smiles clinic, (iii) past, current or future Small Smiles' owner and/or (iv) past, current or future party related in any way to management of any Small Smiles clinics;

(13) to any law enforcement, disciplinary, or administrative agency or body that has the lawful authority to subpoena or compel the production of Confidential Discovery Material;

(14) in response to a subpoena issued by a party other than those listed in subparagraph (13) above, provided the responding party complies with paragraph 10 of this Order;

(15) to any representative of an insurance company that is providing the defense to one or more of the Parties or that may have a duty to indemnify such Parties for claims made in this litigation; and

(16) by or with the written consent of the person producing such material.

b. Undertaking: Before disclosure of any Confidential Discovery Material is made to any person described in subparagraphs (6), (8) or (12) of paragraph 4(a), such person shall be provided a copy of this Order, read the Order and sign the Acknowledgement and Consent attached as Exhibit A, indicating that he/she has read this Order

and will abide by its terms. Counsel providing the Confidential Discovery Material shall retain the Acknowledgment and Consent until the conclusion of this Action, including all appeals. The parties agree not to use these statements for any purpose other than monitoring and enforcing compliance with this Order.

In the event that any person described in subparagraphs (6), (8) or (12) of paragraph 4(a) refuses to sign Exhibit A, counsel seeking to disclose the Confidential Discovery Material may seek written permission from the party or person designating the discovery material as Confidential to disclose such material, or seek leave of the Court if such permission is refused.

5. Confidential Information in Depositions.

a. A deponent may during the deposition be shown, and examined about, Confidential Discovery Material so long as the deponent is advised that the Confidential Discovery Material is subject to a Protective Order that precludes its disclosure to third parties and further advised that violations of the Protective Order could subject the deponent to being sanctioned by the Court.

b. Parties and deponents may designate pages and lines of the transcript as Confidential to the extent they contain material or information entitled to protection (as defined in paragraph 3 above). Such Confidential information shall be highlighted by line and any page containing Confidential information shall be prominently stamped or labeled "CONFIDENTIAL" in a manner that does not interfere with the legibility of the transcript. The "CONFIDENTIAL" designation shall only apply to the highlighted portions of a page. Any party and/or deponent who wishes to designate any portion of the transcript as Confidential shall, within ten (10) days after receiving a deposition transcript, provide all counsel of record with (i) a letter containing the list of such designations by page, line and/or exhibit pages and (ii) the

pages stamped or labeled "CONFIDENTIAL" with the highlighted designations. Until the expiration of the ten (10) day period during which designations may be made, the entire deposition will be treated as subject to protection as Confidential under this Order. If no designations are made within the ten (10) day period, the transcript shall not be entitled to any protection under this Order.

6. Disputes Over Confidential Discovery Material Designation.

a. Conference Required: Any party seeking to challenge another party's designation of Confidential Discovery Material shall contact the party or person that designated the Discovery Material and make a good faith effort to resolve any dispute concerning the designation by agreement or stipulation. A motion or application for a protective order shall identify the parties' efforts to comply with this subsection and shall state that the parties were unable to resolve the dispute concerning whether a protective order covering the designated Discovery Material is warranted under New York law.

b. Motion for Protection: If the parties are unable to resolve fully any disagreement over the designated Discovery Material, the designating party who wishes to maintain the status of the material as Confidential shall within ten (10) days of written notice by either party that an impasse has been reached in the discussions described in paragraph (a) above, make, in the manner prescribed by the CPLR and the Uniform Trial Rules of New York State, and any Individual Rules of this Court, a motion or other appropriate application to the Court to protect the confidentiality of the documents or information so designated. If such a motion or application is made, all Discovery Material so designated shall maintain Confidential status pending a determination by the Court as to their appropriate status.

c. Burden. The burden shall be on the party claiming the Confidential designation to establish the grounds for a protective order under New York law. Nothing in this Stipulation and Order shall shift the burden of proving confidentiality and satisfying the burden required for a protective order under the CPLR. If the designating party fails to file a motion within ten (10) days of receipt of the written notice described above, the Confidential Discovery Material at issue shall lose its Confidential designation and shall not be entitled to any protection under this Order.

d. De-designation. If Discovery Material designated as “CONFIDENTIAL” loses such designation by agreement or otherwise, the party that produced the Discovery Material shall reproduce the Discovery Material without the “CONFIDENTIAL” designation within seven (7) days of the de-designation.

7. Inadvertent Failure to Designate. Except as provided in this paragraph, the inadvertent failure to designate particular Discovery Material as “CONFIDENTIAL” at the time of production shall not operate to waive a party’s or person’s right to designate such Discovery Material as Confidential at a later date. No party shall be deemed to have violated this Order if, prior to receipt of notification of any later designation by counsel of record, such Discovery Material has been disclosed or used in a manner inconsistent with the later designation. Once such a designation has been made, however, the relevant documents or materials shall be treated as Confidential in accordance with this Order; unless such Discovery Material has been previously disclosed in a manner inconsistent with the later designation. If an inadvertently omitted Confidential designation is first claimed during the course of a deposition, hearing, or other court proceeding, the subject Discovery Material may be used throughout the

deposition, hearing, or proceeding as though no designation had been made, but shall be treated as though such designation had been made immediately thereafter.

8. Confidential Does Not Mean Seal. This Stipulation and Order is for the convenience of the parties only and does not constitute a finding that any document labeled “CONFIDENTIAL” meets the requirement for sealing set forth in 22 NYCRR 216.1.

9. Confidential Discovery Material at Trial. This Order does not cover the treatment of Confidential Discovery Material at trial. The parties will meet and confer ninety (90) days before the trial date and, if unable to reach agreement, the parties shall submit alternative proposals to the Court within sixty (60) days before the trial date as to how to treat Confidential Discovery Material at trial.

10. Further Requests for Production. If, at any time, any Confidential Discovery Material in the possession, custody or control of any person other than the person who originally produced such Confidential Discovery Material is subpoenaed or requested by any person or entity, the person to whom the subpoena or request is directed shall immediately provide written notice to the person who originally produced such Confidential Discovery Material.

11. Miscellaneous. This Stipulation shall be construed, interpreted and governed by New York State law. This Stipulation may be executed in counterparts. Nothing in this Stipulation expands the scope of confidentiality permitted by New York law.

12. Termination. The provisions of this Order shall continue to be binding after final termination of this Action. Within one hundred and twenty (120) days after final conclusion of all aspects of this Action including any appeals, any party or person who received Confidential Discovery Material must, at the option of the receiving party, (i) return such

Confidential Discovery Material to the person or persons who produced them or (ii) certify in writing to counsel to the producing party that he or she has destroyed (other than counsel's copies of exhibits filed under seal with the Court and counsel's file copies of papers prepared in connection with this Action, e.g., pleadings, court papers and other papers served in the Action) the Confidential Discovery Material and materials and the portions of all other material containing such Confidential information.

13. Modification Permitted. Nothing herein shall prejudice the right of the parties to move to amend or modify this Order for any reason on a showing of good cause.

14. Additional Parties. The terms of this Order shall be binding upon all current and future parties to this Action and their counsel. Within ten (10) days of the entry of an appearance by a new party to this Action, including any new plaintiff, defendant or third-party defendant who elects to appear or to intervene in this Action, plaintiffs' counsel shall serve a copy of this Order on such party's counsel.

15. Non-Parties. This Order shall apply with equal force to any Discovery Material produced by any non-party to this Action. Non-parties may avail themselves of the protections of this Order, and may designate materials produced by them as Confidential Material upon execution of a counterpart of this Order.

16. Effective Date. This Order shall be effective immediately.

SO ORDERED on November 28, 2011:

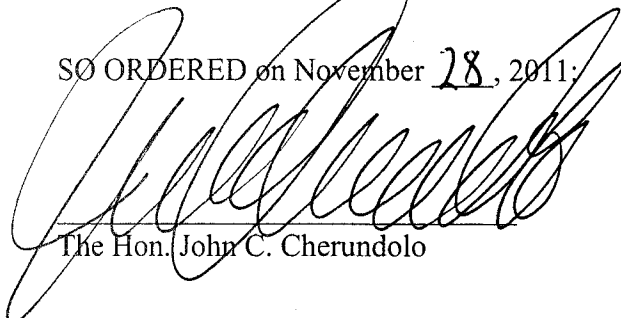

The Hon. John C. Cherundolo

EXHIBIT A

ACKNOWLEDGEMENT AND CONSENT

I hereby certify that: (i) I have read the Stipulated Protective Order (the "Order") that has been entered by the Court in this action (the "Action"), and I understand its terms; (ii) I understand that Discovery Material designated as Confidential under the Order is being provided to me pursuant to the terms of the Order; (iii) I agree to be fully bound by the provisions of the Order, including its provisions restricting disclosure of material designated as Confidential under the Order and limiting the use of such Discovery Material to the conduct of the Action; (iv) I hereby submit to the jurisdiction of this Court for purposes of enforcement of the Order; and (v) I understand that violation of the Order is punishable by contempt of Court and also may be remedied by money damages and/or injunctive relief.

Dated: _____

Signature: _____