UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD LOWERY,

*Plaintiff*,

v.

LILLIAN MILLS, et al.,

*Defendants*.

Case No. 1:23-cv-129-DAE

DECLARATION OF ENDEL KOLDE
SUPPORT OF PLAINTIFF'S RESPONSE TO MOTION FOR A PROTECTIVE ORDER

I, Endel Kolde, declare the following:

1. I am an adult and competent to make this declaration. I am lead counsel for Richard Lowery in this case.

2. During the time period from January 3-11, 2024, opposing counsel Matt Dow and Joel Glover conferred with me by email on the possibility of entering this district's model stipulated protective for use in discovery in this case.

3. Joel Glover and I also conferred by phone on January 9, 2024.

4. While the parties appeared to agree generally that a protective order was warranted, from Plaintiff's perspective there were three main areas of disagreement.

5. First, Plaintiff wanted to use the AEO version of the order and confirm that "retained counsel" as used in that model order did not include the UT legal counsel's office, because Lowery views in-house counsel as an extension of the administrators who he believes took unlawful action against him. He believes they want to use the discovery process to gather information about his dissident activities for use outside of this litigation, since he still remains employed at UT, for now. Lowery is thus concerned that the disclosure of his private communications will be used as opposition research on him and could be used to discipline him or others in the future.

6. Second, Plaintiff was concerned about the risk of over-designation of records by UT as "confidential," including records that would be ordinarily subject to disclosure under the Texas Public Information Act. That concern was also due to the model order using terminology that is suited to a commercial litigation or trade secret case, which are obviously different from this case. Defendants were unwilling to agree to this or vary from the model order language in any way.

7. Third, Plaintiff was concerned that neither the stock designation criteria for classified records nor the AEO records would properly account for the private communications that Lowery was concerned about protecting from re-disclosure.

Moreover, without accounting for the records that Plaintiff was concerned about, the records he wanted to protect would be subject to have their designations challenged because they were not "product formula information, design information, non-public financial information, pricing information, customer identification data" or the like. Those criteria have no application to this case.

8. I sent a redline proposal to defense counsel by email on January 10. A true and correct copy of that redline is attached as Exhibit A.

9. On January 11, defense counsel rejected our proposal with the following comments: "We don't agree that UT legal counsel are excluded from the types of folks who can view AEO materials; The revision as to what is confidential still runs into the same problem for us of trying to marry two different bodies of law (TX PIA law and federal discovery law), so we still aren't able to agree to this, particularly given our track record of how we've provided information to date with no confidentiality designation whatsoever; and We can't agree to a pre-determination of what constitutes AEO materials before we see the documents that plaintiff is describing. And if what has been described is what will be deemed AEO, then we don't see a need for that category."

10. Defense counsel concluded his email by stating: "We will file the model version of the PO as opposed and point out that we need guidance from the Court on our differences."

11. Plaintiff's counsel is also concerned that Defendants may be seeking to use a protective order to protect UT administrators, and Hartzell specifically, from otherwise non-confidential UT records becoming part of the public record.

12. For example, at the Sheridan Titman deposition on January 12, the undersigned counsel took steps to investigate an credible allegation that Jay Hartzell had used state resources to benefit his son in admission into a graduate program at UT. Prof. Titman agreed that, if that happened, it would have been inappropriate for Jay Hartzell to do that.

13. One of Lowery's public writings, an opinion piece in the Washington Times, that was quoted in the original complaint, discussed the hypocrisy of university administrators discriminating against others' kids, while not discriminating against their own kids. Dkt. 1, ¶ 12. This article is publicly available at http://bit.ly/3kKNBDl. A true and correct copy of a print-out of that article was previously filed with this Court as Dkt. 8-7.

14. On January 15, I promulgated Lowery's fifth set of requests for production to UT seeking to further investigate these credible allegations and uncover documents we reasonably believe to exist and be under UT's custody and control. A true and correct copy of those requests is attached as Exhibit B.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this date, January 18, 2024.

Endel Kolde