

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

SANDRA SWANSON and KARYN
SWANSON BOGUT,

Plaintiffs,

v.

ISSAQUAH CARE CENTER, LLC, a
Washington Corporation; and LEXINGTON
INSURANCE COMPANY, a foreign
insurance company,

Defendants.

Cause No. 06-2-09844-7 SEA

**DEFENDANT'S RESPONSE TO
PLAINTIFFS' MOTION TO
PRECLUDE ALLEGED PROTECTION
OF DEFENSE COUNSEL GUIDELINES
AND TO RESCIND BLANKET
PROTECTIVE ORDER**

I. RELIEF REQUESTED

Not content with their one bite at the apple on the Defense Guidelines issue, or with the law of this case, Plaintiffs here apply the "new judge, maybe a different result" and/or "new [distinguishable] case, different result" strategies to avoid abiding by Judge Robinson's June 19, 2006, Order¹ granting Lexington the protection it sought for its commercial property that it holds out for sale to others, notwithstanding that their time to seek reconsideration of that Order has long passed. Plaintiffs' Motion is untimely and inaccurate, and its proffered

¹. In fact, and likely the reason for Plaintiffs' untimely Motion here, Plaintiff Swanson has already violated Judge Robinson's Order of June 19, 2006, by using the subject documents in separate litigation venued in federal court (Neal Decl. at ¶ 2), and by attaching them as Exhibit 5 to Mr. Beninger's Declaration without complying with paragraph 4 to the Protective Order.

1 authority is inapposite. Plaintiffs' Motion should be denied

2 **II. STATEMENT OF FACTS**

3 Lexington will not here revisit the content of its Second Motion for Protection, filed
4 June 9, 2006, which is here incorporated for all purposes.² Lexington was ordered to produce
5 its Defense Counsel Guidelines (Court's Order of May 31, 2006) by June 15, 2006, and
6 Lexington complied with the Order by providing the Defense Guidelines on June 15, 2006.
7 Neal Decl. ¶ 3. Lexington then sought Plaintiffs' agreement to keep the Guidelines
8 confidential to this litigation because Lexington's agent, AIG Domestic Claims, Inc., actually
9 sells the Guidelines to other insurance claims handling entities. *Id.* If the Guidelines were to
10 become available to potential customers free of charge, Lexington's claims handling agent
11 would suffer adverse financial impact because its customer base would dry up. Plaintiffs
12 would not agree, so Lexington sought the Court's assistance *via* Lexington's Second Motion for
13 Protective Order Re: Defense Counsel Guidelines. In support of that Motion, an agent of AIG
14 Domestic Claims, Inc, Sharon Sobers, declared at para. 2 of her Declaration that, "**The**
15 **guidelines are not only used by counsel hired on behalf of insureds of Lexington, but**
16 **constitute a product which AIG Litigation Management can [the word "sell" omitted due**
17 **to typographical error] to other insurance companies (among others) for a fee. AIG**
18 **Litigation Management has invested significant resources in the creation of these**
19 **guidelines and considers them a valuable commodity."** Again, Lexington was not trying to
20 keep Plaintiffs from using the Guidelines within this litigation. Lexington wanted to keep
21 them private outside of this litigation to preserve its agent's market share and its product's
22 value.

23 Judge Robinson agreed with Lexington and on June 19, 2006, she entered a Protective
24 Order on Lexington's Motion, which Order specifically dealt with the Defense Guidelines.

25
26 ² Lexington's briefing in support of its Motion to Shorten Time for the Second Motion for Protection filed June 9, 2006, is also incorporated here for all purposes.

1 Neal Decl. Exhibit 1. Significantly, Judge Robinson Ordered that, as regards the Defense
2 Guidelines, ". . . **no person, other than respective counsel in accordance with paragraph 4**
3 **below, shall be allowed to examine such designated material. Plaintiffs agree to maintain**
4 **its confidentiality, and not to distribute or otherwise communicate such Confidential**
5 **Information to any person outside of this lawsuit, except as permitted herein."** *Id.* pp. 1-
6 2. Therefore, Plaintiffs have been ordered by this Court to maintain the Defense Counsel
7 Guidelines' confidentiality and not to use them outside of this lawsuit, except as permitted. A
8 specific procedure for permitted use of the documents is found at paragraph 4 to the Order. *Id.*
9 p. 4.

10 While Lexington denies the Defense Counsel Guidelines are subject to "objection," the
11 Order also provides at paragraph 2 the procedure Plaintiffs are to use if they object any
12 document Lexington wants to identify as "confidential." *Id.* p. 2. Under the mandated
13 procedure, "**A party may object to the Confidential designation. Its objection and the**
14 **basis for the objection shall be made on the record at a deposition and/or in writing**
15 **within ten business days after it receives the document . . . that has been designated as**
16 **Confidential. * * * If no resolution can be reached, the Producing Party shall file a**
17 **motion with the Court to resolve the issue within ten business days *after receiving a***
18 ***written demand to do so from the objecting party.***" (Italics added)

19 To support their alleged compliance with the Order's requirements, Plaintiffs have
20 attached their counsel's June 29, 2006, letter to Lexington's counsel (Exhibit 4 to Beninger
21 Decl.), however, Plaintiffs neglected to include Lexington's counsel's response, sent the same
22 day, which response included a .pdf copy of the subject Order.³ Neal Decl. Exhibit 2.
23 Plaintiffs' counsel's June 29, 2006, letter (Beninger Decl. Exhibit 4) does not demand that
24 Lexington file a motion to resolve the issue, as required by paragraph 2 to the Protective Order
25

26 ³ Lexington's counsel's email informed Plaintiffs' counsel that he was mistaken as to the points
raised in Beninger Exhibit 4.

1 (cited in counsel's June 29, 2006, letter), and Plaintiffs' counsel did not respond to Lexington's
2 counsel June 29, 2006, response to Plaintiffs' facially defective objection. Neal Decl. ¶ 5. As
3 the Defense Counsel Guidelines were not subject to the "objection" portion of paragraph 2 to
4 the subject Order, as no demand that Lexington file a motion was provided within the time
5 provided by the Order (or since, for that matter), and as it appeared from counsel's silence that
6 Lexington's explanation (Neal Decl. Exhibit 2) of the Court's Protective Order had sufficed to
7 appease Plaintiffs' concerns, Lexington did not file a motion to resolve Plaintiff's "objection."

8 Plaintiff Swanson appears as a different party in a pending federal lawsuit.⁴ Neal Decl.
9 ¶ 1. After declining to agree to keep the Defense Counsel Guidelines confidential in that
10 action, as well, Plaintiff Swanson there sought discovery of the Defense Counsel Guidelines,
11 Lexington objected (and did not produce them), and Plaintiff Swanson has not moved to
12 compel their production. Neal Decl. ¶ 6. Therefore, the Defense Counsel Guidelines have not
13 been produced to Plaintiff Swanson for use in that suit, however, as noted above, Plaintiff
14 Swanson recently used the Defense Counsel Guidelines she obtained here in a deposition in the
15 federal case, thereby violating the Court's Order here. Plaintiffs have also violated the Order
16 by improperly attaching the Defense Counsel Guidelines to the Declaration of their counsel,
17 David Beninger, in support of this Motion without abiding by the procedure ordered by this
18 Court (Exhibit 5 to Beninger Decl.).

19 **III. RESPONSE**

20 Plaintiffs⁵ make two arguments in support of their Motion to Preclude Alleged

21 ⁴ In Cause No. 2:05-CV-01614-MJP, Lexington Insurance Company v. Sandra Swanson,
22 (W.D. Wash.), here-Plaintiff Swanson is present *via* her execution/levy on here-defendant
Issaquah Care Center's intangible choses in action.

23 ⁵ In footnote 1 to Plaintiffs' Motion, Plaintiffs state they "bring this action as assignee of
24 Haelen and its employees and insurers," and that they stand in the shoes of unnamed "Haelen
25 entities" by virtue of this "assignment." The footnote is extraneous to the pending issue.
26 Plaintiffs have recently become aware they do not have a valid assignment even from Haelen,
never mind from Haelen's insurers, so, in anticipation of Lexington's raising that issue at the
upcoming hearing on Plaintiffs' Motion to Enter Default Amount against Defendants ICC (and
perhaps hoping that "saying it is so will make it so"), Plaintiffs have lately taken to including

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1 Protection of Defense Counsel Guidelines and to Rescind Blanket Protective Order. First, they
2 claim that Lexington has waived any protection afforded the Defense Counsel Guidelines
3 because Lexington did not file a motion regarding Plaintiffs' "objection" to the protection
4 afforded the Defense Counsel Guidelines under the Court's June 19, 2006, Order. Implicit in
5 their first argument is the unsupported assumption that the Defense Counsel Guidelines are
6 even subject to the "objection" provision found in paragraph 2 to the June 19, 2006, Order, in
7 the first place. Second, in a tacit admission that a valid Protective Order is currently in place,
8 Plaintiffs here belatedly move the Court to "rescind" Judge Robinson's broad Order of
9 Protection by claiming it is not valid as to a limited category of documents under the holding
10 in a recent case. Plaintiffs' global argument in favor of vacating the entire Protective Order,
11 even as to prospective documents that have nothing to do with the Defense Counsel
12 Guidelines, is premised on its much narrower argument that the newly cited authority of Woo
13 v. Fireman's Fund means the Defense Counsel Guidelines are not worthy of protection.
14 Plaintiffs' arguments are not well-founded.

15 **A. The Defense Counsel Guidelines Were Not Subject to Objection**

16 The Court's Order of June 29, 2006, was premised and entered expressly upon
17 Lexington's Second Motion for Protective Order Re: Defense Counsel Guidelines, which
18 Motion at pp. 1-2 recited the bates number range (LEX 1774 through LEX 1924) of the
19 documents at issue. The Court's Order at p. 1 (Neal Decl. Exhibit 1) specifically identifies the
20 documents at issue ("**... insofar as Plaintiffs have requested certain documents ("Defense
21 Counsel Guidelines") from Lexington ... which are considered by Lexington to be
22 private, trade secret proprietary information entitled to protection ...no person, other
23 than respective counsel in accordance with paragraph 4 below, shall be allowed to**

24
25 this footnote into their briefing. Lexington anticipates moving the Court to decide the validity
26 of the alleged "assignment" in the near future, but for now simply denies that Plaintiffs are
legitimately before the Court for any purpose.

1 **examine such designated material.").** As such, because Judge Robinson had already decided
2 the Defense Counsel Guidelines should be protected, the Defense Counsel Guidelines were not
3 subject to subsequent "objection" by Plaintiffs on the ground that the "Confidential"
4 designation should not apply.⁶ Paragraph 2's requirements applicable to the "objection"
5 process do not apply to the at-issue Defense Counsel Guidelines that were at the very heart of
6 the dispute, but rather to the parties' prospective efforts to maintain confidentiality regarding
7 different documents. That is the point made in Neal Decl. Ex. 2, to which Plaintiffs did not
8 respond.

9 **B. No Waiver Occurred, Except by Plaintiffs**

10 Plaintiffs next claim Lexington "waived" the protections afforded the Defense Counsel
11 Guidelines when it did not file a motion. (Motion, p. 2). In fact, it is Plaintiffs who have
12 waived the right to complain. In their Motion at p. 3, ll. 24-26, Plaintiffs purport to provide the
13 Court with the procedure Lexington was to follow, citing paragraph 2 to the Order: **"Upon**
14 **objection, the burden then shifts to the producing party to file a motion with the Court to**
15 **resolve the claims of confidentiality within ten business days."**

16 If what Plaintiffs say is true, then, assuming the Defense Counsel Guidelines were
17 subject to objection in the first place (denied), waiver could possibly have occurred. What
18 Plaintiffs say is not true, however. As noted above, paragraph 2 to the Order actually reads:

19 **"A party may object to the Confidential designation. Its**
20 **objection and the basis for the objection shall be made on the**
21 **record at a deposition and/or in writing within ten business**
22 **days after it receives the document . . . that has been**
23 **designated as Confidential. * * * If no resolution can be**
24 **reached, the Producing Party shall file a motion with the**
Court to resolve the issue within ten business days after
receiving a written demand to do so from the objecting party."

25 ⁶ Plaintiffs did not file a Motion to Reconsider Judge Robinson's Order of June 19, 2006, and
26 should not now, nine months after the fact, be heard to complain simply because a new judge
is in place.

(Underlining/Italics added)

Per Plaintiffs' Motion's misrepresentations to the Court, Lexington's obligation to file a motion is triggered following mere receipt of Plaintiffs' objection, however, the Order requires Plaintiffs to first provide a written demand to Lexington to file a motion. This, Plaintiffs did not do. Plaintiffs contend their counsel's letter of June 29, 2006 (Exhibit 4 to Beninger Declaration), constitutes the trigger to Lexington's obligation, however, that letter states only that Plaintiffs object to the designation; no demand is made upon Lexington to file a motion to resolve the objection, as is required by paragraph 2. Plaintiffs' evidence is facially insufficient to trigger Lexington's filing of a motion under paragraph 2 to the Protective Order, Lexington was not obligated to file a motion to maintain its documents' protected status, and the absence of a motion under these facts does not constitute waiver by Lexington.⁷

C. Plaintiffs' New Case is Inapposite to These Facts

The Court should acknowledge Judge Robinson's prior work on this issue by upholding the June 19, 2006, Order, which is now the law of this case. Plaintiffs should not be permitted to reopen briefing on Lexington's Second Motion for Protective Order Re: Defense Counsel Guidelines more than nine months after the Order's entry, and after the parties have relied on the Order to their detriment.

Plaintiffs have supplied the case of Woo v. Fireman's Fund Insurance Company, ____ P.3d ____, 2007 WL 641827 (March 5, 2007), a new Division One case handed down earlier this month which they argue would not allow any protections for the Defense Counsel

⁷ The Court may recall the context in place at the time of the Court's entry of the Protective Order on June 19, 2006. As of that day, Lexington had already produced the Defense Counsel Guidelines to Plaintiffs. Because they were produced prior to entry of the Protective Order limiting the documents' use to this case, only, the documents were not stamped "Confidential." Upon receipt of Exhibit 4 to the Beninger Declaration, Lexington's counsel responded to Plaintiffs' expressed objection (Exhibit 2 to Neal Decl.) by inviting Plaintiffs to stamp the documents "Confidential" prior to use, or to return the original provided set to Lexington's counsel for stamping of "Confidential" and return to Plaintiffs. Plaintiffs' counsel never responded to the overture, and Lexington considered the matter closed.

1 Guidelines. That case is distinguishable and does not apply to these facts, except to support
2 Lexington's position, and Judge Robinson's prior ruling. In Woo, the question was whether the
3 at-issue documents survived the fact-specific inquiry regarding whether they qualified as
4 "trade secrets." Fireman's Fund tried to protect their internal claims handling and training
5 manuals on the basis they were "trade secrets," but Fireman's Fund did not argue or prove that
6 the materials had "economic value in the insurance trade." Per the Woo court, "**A trade secret**
7 **must derive independent economic value from not being known to or generally**
8 **ascertainable by others who can obtain economic value from their disclosure or use.**" (¶
9 19) Fireman's Fund used the subject documents internally and did not show how they could be
10 economically harmed by disclosure. Unlike Lexington in its Second Motion for Protective
11 Order Re: Defense Guidelines, Fireman's Fund did not contend and prove that it, or its agent,
12 actively marketed and sold the subject materials to others for profit, thereby supplying the
13 requisite showing that the materials have "economic value in the insurance trade."

14 In addition, Fireman's Fund lost because it failed to exercise continued protection over
15 the documents at, and following, trial, a factor not at issue here. Plaintiffs' belatedly-provided
16 case should not be considered in the first place, however, it is factually distinguishable from
17 the facts of the present case and should be disregarded by the Court, except to the extent the
18 decision supports Lexington's position, and the upholding of Judge Robinson's Order.

19 **D. The Protective Order Should Remain**

20 Plaintiffs' Motion makes two arguments. First, the Defense Counsel Guidelines should
21 lose their protection because of Lexington's alleged waiver, as discussed above. Plaintiffs'
22 second argument is that the "blanket" Protective Order should be "rescinded" on the alleged
23 ground that the Defense Counsel Guidelines (only) do not measure up under Woo. As the
24 Court can see from Judge Robinson's handwritten notation on page 4 of the June 19, 2006,
25 Order (para. 6 "**Any party wishing to file a document under seal or seal a document filed**
26 **by another party must comply with LR 26(c) and LR 15.**"), Judge Robinson carefully

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1 considered the Order before she entered it and it was her intention that the Order apply to any
2 prospective documents filed/used in this case, not just to the subject Defense Counsel
3 Guidelines. The Court's will should not be undone by the inaccurate statements and inapposite
4 authority provided by Plaintiffs.

5 **VI. CONCLUSION**

6 The Defense Counsel Guidelines were the subject of the June 19, 2006, Order and,
7 therefore, were not subject to the "objection" process (only) outlined in paragraph 4. Ideally,
8 Plaintiffs would have agreed to not use the Defense Counsel Guidelines outside of this case,
9 but they would not. If Plaintiffs were unhappy with the subsequent Order, they should have
10 filed a timely Motion to Reconsider, but they did not do so. Instead, they sent Lexington's
11 counsel a letter stating their objection to that which was Ordered by Judge Robinson only ten
12 days earlier, but Plaintiffs failed, fatally, as it turns out, to demand in that letter that Lexington
13 file a motion to resolve their objection. Plaintiffs failed to comply with paragraph 4 to the
14 Protective Order and so waived any objection they allegedly had to the protection of
15 documents which were at the core of the Motion being ruled upon.

16 Even if Plaintiffs somehow retained the right to move for reconsideration of the Court's
17 Order nine months later, their reliance on the holding in Woo v. Fireman's Fund is misplaced
18 as that case does not support their position under the different facts at issue here, only
19 Lexington's. In any event, the limited holding in Woo should not be used to undo a broader
20 Protective Order that potentially extends to prospective documents to be used/exchanged in
21 this case, not just the Defense Counsel Guidelines.

22 Finally, Lexington requests this Court order Plaintiffs' Exhibit 5 containing the Defense
23 Counsel Guidelines sealed. Plaintiffs' improperly filed the documents in the public record in
24 violation of the prior Protective Order. Even if this Court were to reconsider the issue and
25 deny the Protective Order, the documents must be sealed, and any future pleadings using the
26 documents must be sealed, to preserve their confidential nature pending Lexington's appeal on

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1 the issue.

2 Plaintiffs' Motion should be denied.

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4 RESPECTFULLY SUBMITTED this 26th day of March, 2007.

5 COZEN O'CONNOR

6
7 By: _____
8 Thomas M. Jones, WSBA No. 13141
9 Christopher L. Neal, WSBA No. 25685
10 Of Attorneys for Defendant Lexington
11 Insurance Company
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