

Hrng. Br. at 12-14.

I. FACTUAL BACKGROUND

Defendants in this matter are former employees of Synthes, all of whom resigned on August 16, 2004. After their resignations, Defendants began to work for an entity known as 4Spine, Inc. (“4Spine”), a distributor of products manufactured by Globus Medical, Inc., a direct competitor of Synthes.¹ Synthes filed suit against Defendants on September 1, 2004, alleging that Defendants’ new employment was in violation of the restrictive covenants they had entered into while still in the employ of Synthes. See Pl.’s Compl. (Doc. No. 1). On September 24, 2004, the parties settled the instant matter via a Final Order that was agreed upon by the parties and approved by this Court. See Doc. No. 19.

A. Dismissal of Pending State and Federal Court Actions

Almost contemporaneously with Plaintiff’s filing of the instant case, Defendants Bell and Walden filed two actions in state court seeking a declaratory judgment that the restrictive covenants they had entered into with Plaintiff were invalid. Defendant Bell filed suit on September 1, 2004 in the Superior Court of Cobb County, Georgia (Bell v. Synthes Spine Co., L.P., No. 04-1-6942-28), while Defendant Walden filed suit on August 31, 2004 in the Court of Common Pleas, Ninth Judicial Circuit, County of Charleston, South Carolina (Walden v. Synthes Spine Co., L.P., C.A. No. 2004-CP-3693). For its part, 4Spine filed two actions in federal court, also seeking to have its new employees’ contracts with Synthes declared invalid. The first of these two actions was filed on September 7, 2004 in the Northern District of Georgia (4Spine,

¹ Globus Medical, Inc. is the defendant in a related matter presently before this Court, Synthes (U.S.A.), Inc. v. Globus Medical, Inc., 04-CV-1235.

L.L.C. v. Synthes Spine Co., L.P., C.A. No. 3:04-CV-094), while the second action was filed on September 27, 2004 in the district of South Carolina (4Spine, L.L.C. v. Synthes Spine Co., L.P., C.A. No. 3:04-22199-22).

The negotiated settlement between the parties, which was to become the Final Order, addressed the necessity of dismissing these outstanding actions in order to bring the litigation between the parties to a close. Paragraph 5 of the Final Order states that

This case will be marked settled except that this Court shall retain jurisdiction to enforce the terms of this Order. All other litigation pending in Georgia and South Carolina will be withdrawn with prejudice. This specifically means the following: (1) Robert M. Walden v. Synthes Spine Company, L.P., C.A. No. 2004-CP-3693 (In the Court of Common Pleas, Ninth Judicial Circuit, County of Charleston, South Carolina); (2) Christopher M. Bell v. Synthes Spine Company, L.P., No. 04-1-6942-28 (In the Superior Court of Cobb County, Georgia); (3) 4Spine, L.L.C. v. Synthes Spine Company, L.P., C.A. No. 3:04-22199-22 (D.S.C.); (4) 4Spine, L.L.C. v. Synthes Spine Company, L.P., C.A. No. 3:04-CV-094 (N.D. GA).

Final Order ¶ 5 (Doc. No. 19). A representative of 4Spine was present at the negotiations between the parties that led to the settlement agreement and Final Order. 1/19/05 Bell Depo. at 9; 1/19/05 Walden Depo. at 15. Upon questioning by the Court at a September 27, 2004 hearing, counsel for Defendants represented that dismissals of all four of the actions would be delivered within 3 days. 9/27/04 Hrng. Tr. at 4.

Defendants Bell and Walden have dismissed the state court actions in which they were the named plaintiffs with prejudice. Pl.'s Mot. for Contempt at 4. 4Spine has also apparently dismissed the federal action in South Carolina without prejudice. Id. at 5 n.1. The federal action in Georgia has not been dismissed at all.

B. Non-Solicitation Provisions

The Final Order acts to prohibit Defendants from engaging in certain competitive activities for a term of six months from the date of the Final Order. Specifically, Defendants may not “engage in sales calls, promotion of products, or support of surgeries, for 4Spine, Globus, or any other competitor of Plaintiff Synthes Spine Company” in the “territories formerly assigned to them as of August 13, 2004 as employees of Plaintiff Synthes Spine Company.” Final Order at ¶

1. Defendants are also prohibited from “solicit[ing] business from any hospital, hospital employee, physician, or physician staff member” whom they had solicited in the last year of their employment with Plaintiff. *Id.* at ¶ 2. Furthermore, Defendants are barred from referring business to other persons in their former territories, providing business advice about their former territories, and planning business development in their former territories. *Id.* at ¶ 3. Defendant Walden’s former territory was known as the “Charleston South” territory, while Defendants Bell and Stovall collectively worked in an area known as the “Atlanta West” territory. *Id.* at ¶ 1.

Plaintiff claims that Defendant Walden’s alleged contacts with various individuals who make up a private practice known as Charleston Neurological Associates (“CNA”) are in violation of the Final Order. The CNA private practice is made up of three doctors, Drs. Rawe, Khoury, and Cuddy, and a nurse practitioner, Cindy Anderson. Hrng. Tr. at 41; 1/19/05 Walden Depo. (“Walden Depo.”) at 20. The CNA doctors have privileges at Trident Hospital, which is in the Charleston South territory, and St. Francis Hospital, which is not.² Hrng. Tr. at 41-42; Walden Depo. at 20. Ms. Anderson’s responsibilities include attending surgeries with Drs. Rawe

² The Charleston South territory includes the following three hospitals: Trident Hospital, Beaufort Memorial Hospital, and Roper Hospital. According to Walden, Drs. Khoury and Cuddy perform about 85 to 90 percent of their surgeries at St. Francis, with the remaining 10 to 15 percent at Trident. Walden Depo. at 26-27.

and Khoury and seeing patients at both the CNA clinic and at Trident and St. Francis Hospitals. Hrng. Tr. at 42. Synthes employee Linda Haas testified that, with regard to the physicians' use of implant products of the kind offered by Synthes and Globus, CNA does not mandate that its physicians use a certain kind of product. Id. at 54. Each physician is free to choose the implant that they find to be most appropriate for their practice. Id. at 54-55.

With respect to the individual doctors and other professionals at CNA, Defendant Walden had some contact with all three doctors and Ms. Anderson while he was a sales consultant for Synthes. At his March 10, 2005 deposition, Walden testified that he called on both Dr. Rawe and Ms. Anderson in the last twelve months of his employment with Synthes. Walden Depo. at 20, 63. Walden did not solicit Dr. Cuddy during the last twelve months of his employment with Synthes. Id. at 27. Walden also stated that, though he had called on Dr. Khoury "[l]ong, long ago" for Synthes, he had not solicited that physician in the last twelve months of his employment with Plaintiff. Id.

Plaintiff has also alleged that Walden's participation in a conference held by the Carolina Spine Society is in violation of the Final Order. The Carolina Spine Society is a professional medical society; its members are physicians and other medical personnel who work with patients suffering from spinal disorders. Hrng. Tr. at 43. The Society sponsors an annual conference that showcases developments in the treatment of those disorders. Id.; Walden Depo. at 59. Linda Haas attended the conference on behalf of Synthes and testified that both Synthes and 4Spine operated display tables showcasing the products they market to medical professionals who treat those with spinal disorders. Hrng. Tr. at 43-44. Walden testified at his deposition that the 4Spine table was staffed by himself and two other 4Spine employees and that his activities in promoting

4Spine products were limited to non-protected physicians. Walden Depo. at 61, 67. While attending the conference, Ms. Haas testified that Dr. Rawe introduced her to Defendant Walden. Dr. Rawe approached Walden to make the introduction; Walden did not initiate contact with Dr. Rawe and Ms. Haas. Id. at 44.

Walden's most extensive contacts at issue in this motion for contempt are with Dr. Khoury. At his deposition, Defendant Walden testified that he visited the CNA offices three times between October 2004 and December 2004 and that the purpose of his visits was to call upon Dr. Khoury. Id. at 21-22. During Walden's first visit to Dr. Khoury in October of 2004, he explained that he was prohibited from calling on Dr. Rawe, but that he would be able to call on Drs. Khoury and Cuddy. Id. at 26. On the visit, Walden showed Dr. Khoury the Globus product line and solicited Dr. Khoury's participation in an upcoming cervical disk study. Id. at 28-29. Walden also asked Dr. Khoury to use the Globus products at St. Francis only, as he could only work alongside him at that facility. Id. at 30. On Walden's next visit to Dr. Khoury in November of 2004, Dr. Khoury agreed to "book some cases" with Walden. Id. at 39. The first cases performed by Dr. Khoury with Globus products were at Trident Hospital. Id. Walden did not attend these procedures; other 4Spine representatives attended the surgeries instead. Id. at 39-40. Walden's testimony reflects that two such surgeries were performed by Dr. Khoury and attended by other 4Spine representatives at Trident. Id. at 43. At Walden's December 2004 meeting with Dr. Khoury, the two discussed Dr. Khoury's surgeries at Trident using the Globus products, his interest in a cervical disc product that was to be the subject of a Globus study, and the potential of Dr. Khoury booking some cases with Walden at St. Francis Hospital. Id. at 42-44. Also in December 2004, Walden took Dr. Khoury on a tour of the Globus facility. Id. at 44-

45. Lastly, at some point after October 2004, Walden set up and attended a dinner with Dr. Khoury, Ms. Anderson, and David Paul, a Globus executive, in San Francisco during a Congress of Neuroscience conference, at which Mr. Paul pitched the idea that CNA participate in the Globus cervical disk study. *Id.* at 33-34, 37-38.

Plaintiff also alleges that Walden's contacts with Dr. Reuben, a former customer of Walden's while at Synthes, are in violation of the Final Order. **At a deposition taken before the entry of the Final Order, Walden stated that Dr. Reuben "was the person that used the most [Synthes] products" in his former territory. 9/22/04 Walden Depo. at 25. Walden also stated that Dr. Reuben was "a very close friend." *Id.* Walden later testified that he had been in contact with Dr. Reuben monthly since the entry of the Final Order. Walden Depo. at 80. Walden stated that his interactions with Dr. Reuben have been purely social since the entry of the Final Order and that he has not solicited any business from Dr. Reuben on behalf of 4Spine. *Id.* at 80-82. Ms. Haas testified that Dr. Reuben has remained a "good Synthes customer" based on the volume of Synthes product he purchases from Plaintiff. Hrng. Tr. at 56.**

II. STANDARD OF LAW

In order to establish contempt, a petitioner must show, by clear and convincing evidence: (1) that a valid court order existed, (2) that the defendants had knowledge of the order, and (3) that the defendants disobeyed the order. Roe v. Operation Rescue, 919 F.2d 857, 871 (3d Cir. 1990). It is settled law that "the absence of willfulness does not relieve from civil contempt," as civil contempt sanctions are remedial in nature, rather than punitive. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949).

The petitioner carries "a heavy burden to show a defendant guilty of civil contempt . . .

where there is ground to doubt the wrongfulness of the conduct of the defendant, he should not be adjudged in contempt.” Fox v. Capital Co., 96 F.2d 684, 686 (3d Cir. 1938), cited in Quinter v. Volkswagen of America, 676 F.2d 969, 974 (3d Cir. 1982). Ambiguities are ordinarily resolved in favor of the party charged with contempt. Harris v. City of Philadelphia, 47 F.3d 1342, 1350 (3d Cir.1995).

III. DISCUSSION

A. Failure to Dismiss Pending Federal Court Actions

Plaintiff claims that Defendants’ failure to dismiss the pending federal actions in Georgia and South Carolina is in flagrant violation of paragraph 5 of the Final Order. Defendants claim that, under the doctrine of impossibility, they cannot be held in contempt for 4Spine’s failure to dismiss those actions.

Contempt is a conditional sanction, meaning that one accused of contempt may always remedy his or her situation by coming into compliance with a court’s order. Thus, courts have recognized that a person held in civil contempt must be given an opportunity to effect such compliance. See Lance v. Plummer, 353 F.2d 585, 592 (5th Cir. 1965). When a party has no hope of bringing themselves into compliance with a court order, the law recognizes his or her inability to comply as a complete defense to an allegation of contempt. Newman v. Graddick, 740 F.2d 1513, 1525 (11th Cir. 1984) (citations omitted).

The defense, of course, bears the burden of showing the impossibility of conforming his or her conduct to the Court’s order. The Third Circuit has held that, in order to successfully avoid a finding of contempt by using the doctrine of impossibility, the burden is on the defendant to “introduce evidence beyond a mere assertion of inability, and to show that it has made in good

faith all reasonable efforts to comply.” Harris v. City of Philadelphia, 47 F.3d 1311, 1324 (3d Cir. 1995) (internal citations omitted).

Assuming *arguendo* that the Order is unambiguous that the responsibility of dismissing the federal court actions falls upon Defendants Walden, Bell, and Stovall,³ the Court finds that Defendants have proven that, as a matter of law, it is impossible for them to comply with the Final Order. Rule 41 of the Federal Rules of Civil Procedure governs the voluntary dismissal of federal court actions by a plaintiff. The Rule states that “an action may be dismissed by the plaintiff without order of court . . . by filing a stipulation of dismissal signed by all parties who have appeared in the action.” Fed. R. Civ. P. 41(a). As Defendants note, neither Rule 41 nor any other Rule of Federal Civil Procedure provides a mechanism by which a non-party can dismiss a suit with or without prejudice.

Moreover, the Court finds that, despite the patent impossibility of their effecting a dismissal of the federal actions brought by 4Spine, the Defendants in this matter have made good-faith, reasonable efforts to comply with the Order. Plaintiff points to the statements of Bell and Stovall at their deposition that they took no specific steps to effect 4Spine’s dismissal of the federal court actions as evidence of Defendants’ lack of good faith effort to comply with the Court’s Order. 1/19/05 Bell Depo. at 15; 1/19/05 Walden Depo. at 89-90. Plaintiff also alleges that defense counsel’s statements at the September 27, 2004 hearing that all four suits would be dismissed is further evidence of Defendants’ bad faith. However, it is beyond dispute that

³ Defendants argue that the Final Order is ambiguous as to which parties are responsible for effecting the dismissal of the federal court actions. Because the Court finds that it is impossible for the three named Defendants to effect this dismissal no matter to whom the Final Order assigns responsibility, it does not reach the issue of whether the Final Order is ambiguous.

Defendants Bell and Stovall moved to promptly dismiss the cases they had pending in Georgia and South Carolina state court against Plaintiff. The Defendants also provided 4Spine with a copy of the Final Order on the day it was entered, as evidenced by the letter received by this Court from Counsel to 4Spine in the federal case in Georgia, Robert W. Scholtz referencing the Final Order.⁴ Defs.' Hrng. Ex. E.

As to defense counsel's representations at the September 27, 2005 hearing, the Court notes that counsel for 4Spine was present at the negotiations. It is certainly feasible that counsel believed that 4Spine would dismiss the federal court actions at the time he made those representations to the Court based on 4Spine's participation in the settlement discussions; it is also possible that counsel could not have predicted 4Spine's later intransigence with respect to the dismissal of those matters. In any event, 4Spine is neither a party to this action nor to the Final Agreement and 4Spine is the only party with the ability to dismiss the federal court actions at issue in this contempt motion. The Court does not have the power to force it to comply with the Final Order and the Court will not penalize Defendants for matters which are beyond their control.

The Court finds that Defendants in this matter have made a good faith effort to comply with the demands of paragraph 5 of the Final Order. They have dismissed the lawsuits to which they were named parties. As to the federal court actions, despite being faced with the hopeless task of dismissing a lawsuit to which they were not a party, Defendants delivered a copy of the Final Order to their employer. The Court is not sure what more it can ask Defendants to do with

⁴ Plaintiff challenges this letter as hearsay, but the Court finds that it may be offered to show 4Spine's knowledge of the Final Order rather than the truth of the matters asserted therein.

respect to those federal suits. As such, Plaintiff's motion for contempt based on Defendants' failure to dismiss the federal actions in Georgia and South Carolina is denied due to impossibility.

B. Activities of Defendant Walden

Plaintiff alleges that Defendant Walden violated paragraph 1 of the Final Order by (1) calling on Dr. Khoury and Nurse Practitioner Cindy Anderson of Charleston Neurological Associates and soliciting them to join a cervical disk study being conducted by Globus, (2) promoting Globus products at the Spine Society Meeting, and (3) remaining in contact with Dr. Reuben. Pl.'s Post-Hrng. Br. at 25. Plaintiff further alleges that Defendant Walden also violated paragraph 3 of the Final Order by (1) arranging for other 4Spine representatives to cover Dr. Khoury's surgeries at a hospital in Walden's former territory, (2) arranging for Dr. Khoury to visit Globus, and (3) using Dr. Khoury to pitch the idea of Charleston Neurological Associates to be a clinical test city for the cervical disk study. Id.

Based on Walden's deposition testimony and other admissible evidence, the Court finds that the following activities would clearly be prohibited under the Final Order: (1) engaging in any competitive activity at Trident Hospital, which was part of Walden's former Charleston South territory; (2) soliciting Dr. Rawe, who was a customer of Walden's during his last twelve months of employment at Synthes, (3) soliciting Dr. Reuben, who was a customer of Walden's during his last twelve months of employment at Synthes, (4) soliciting Cindy Anderson, who was a customer of Walden's during his last twelve months of employment at Synthes, and (5) referring business to other persons at Trident Hospital, providing business advice about Trident Hospital, or planning business development at Trident Hospital. It is clear that contact between

Walden and Drs. Khoury and Cuddy are not *per se* prohibited;⁵ however, contacts with those doctors that would result in Walden's engaging in competitive activity within the Charleston South territory would be prohibited.

1. Contacts with Dr. Khoury and Cindy Anderson.

Synthes argues that Walden's contacts with Dr. Khoury and Ms. Anderson violate the provisions of the Final Order forbidding him from engaging in competitive activity in his former sales territory and, with respect to Ms. Anderson, from soliciting any business from a physician staff member who he had solicited in the last twelve months of his employment. Walden argues that he cannot be held in contempt of the Final Order because Dr. Khoury is not located in the Charleston South territory and because any solicitation of Cindy Anderson has been limited to surgeries performed outside of the Charleston South territory.

While Walden is correct that there is no blanket prohibition on his solicitation of Dr. Khoury because that physician was not Walden's customer within the last 12 months of his employment with Synthes, certain contacts with Dr. Khoury are prohibited by the Final Order. Namely, contacts with Dr. Khoury that would result in referrals of business to and business development in the Charleston South territory would be prohibited by paragraph 3 of the Final Order. Moreover, inducing Dr. Khoury to use Globus products at Trident Hospital, which is in

⁵ Plaintiff argues, that because contacts with Dr. Rawe would be prohibited under the Final Order, contacts with any physician at CNA would be likewise prohibited under the Final Order. Pl.'s Post-Hrng. Br. at 26. Linda Haas testified that each CNA physician is free to choose the implant devices that are best suited to their practice. Hrng. Tr. at 54-55. Walden's solicitation of one CNA physician in the twelve months prior to his departure from Synthes would not then make the entirety of CNA his customer. As such, the Court finds that his prior contacts with Dr. Rawe do not operate to bar contact with all CNA physicians after the entry of the Final Order, so long as those interactions do not result in competitive activity within the Charleston South territory.

the Charleston South territory, would be prohibited by paragraph 1 of the Final Order.⁶ The Court finds that the contacts between Walden and Dr. Khoury that took place between October and December of 2004 that led to Dr. Khoury's use of Globus products during surgeries at Trident Hospital, surgeries that were attended by other 4Spine representatives, are in violation of both paragraphs 1 and 3 of this Court's Final Order. Walden's deposition testimony is clear and convincing evidence of these contacts; this evidence is supported by Linda Haas' testimony that she knew Dr. Khoury to be using Globus products. Hrng. Tr. at 49.

Walden's assistance in soliciting Cindy Anderson during a dinner in San Francisco after the entry of the Final Order is also in violation of that Order. As stated above, because Walden had contact with Ms. Anderson in the twelve months prior to his departure from Synthes, she is a protected person under paragraph 1 of the Final Order. Though Walden testified that it was David Paul who actually spoke to Ms. Anderson and Dr. Khoury about participating in the Globus study, Walden was the person responsible for setting up the meeting. Given Ms. Anderson's status under paragraph 1, it is clear that Walden was engaging in the practice of "soliciting business from [a] . . . physician staff member" whom he had solicited in the year prior to leaving Synthes. Walden's sworn deposition testimony is clear and convincing evidence of this contemptuous behavior.

2. *Attendance at the Spine Society Meeting*

Synthes has offered no evidence that Walden's attendance at or any activity that he

⁶ Though Walden might not have intended for Dr. Khoury to use the Globus products at Trident Hospital, his subjective intent is irrelevant for a finding of civil contempt. See McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949) ("An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.").

engaged in during the Spine Society meeting is contemptuous. The Court agrees with Defendant Walden that his mere presence at the Spine Society meeting was not violative of the Final Order, as Synthes produced no evidence that the meeting took place in the Charleston South territory.⁷ Synthes has presented no evidence that Walden affirmatively engaged or solicited a prohibited physician or that he assisted the other 4Spine representatives in doing so. The only alleged contact with a protected physician was the meeting between Ms. Haas, Dr. Rawe, and Walden, and Ms. Haas testified that the introduction was initiated by Dr. Rawe. She further testified that she had no knowledge of any improper solicitation of Drs. Khoury or Rawe at the Society Meeting by Walden. As there is no evidence of any improper behavior on the part of Walden at the Spine Society meeting, much less clear and convincing evidence, Synthes' motion for contempt is denied on this ground.

3. *Contacts with Dr. Reuben*

Walden argues that his contacts with Dr. Reuben were purely social and that social contacts are not prohibited under the Final Order, which proscribes only "competitive activity." In its post-hearing brief, Synthes states that "it is clear from the record that Walden's alleged 'social' contacts with Dr. Reuben are in fact not 'social' at all but rather, a way of doing business." Pl.'s Post-Hrng. Br. at 29. Synthes has come forth with no evidence that would allow this Court to find that Walden's contacts with Dr. Reuben are improper. The evidence before the Court indicates that Walden purchased Dr. Reuben a Christmas gift and allowed him to stay at his home. Walden Depo. at 71, 80. Synthes' assertion that these contacts are more than merely

⁷ In its post-hearing memorandum, Synthes asserts that the Spine Society meeting took place within Walden's former territory, but the Court could find no evidence in the record to support that contention. See Pl.'s Post-Hrng. Br. at 26-27.

social are insufficient to carry its burden of producing clear and convincing evidence of contempt.

C. Damages

Plaintiff is required to show that the two violations that the Court has identified as a result of the March 11, 2005 proceedings resulted in tangible damages. A finding of contempt does not automatically require the imposition of sanctions. Thompson v. Johnson, 410 F. Supp. 633, 643 (E.D. Pa.1976). Damages for civil contempt must be also proven by clear and convincing evidence. Nelson Tool & Mach. Co., Inc. v. Wonderland Originals, Ltd., 491 F. Supp. 268, 269 (E.D. Pa. 1980) (citing Thompson, 410 F. Supp. at 643). The parties did not fully brief the issue of damages for the Court, nor was this issue explored in any meaningful way at the March 11 hearing. The Court will therefore hold another hearing, at a time that comports with its schedule, at which Plaintiff will be required to come forward with such evidence.

IV. CONCLUSION

For the reasons that follow, the Motion is DENIED with respect to the allegations that Defendants Walden, Bell, and Stovall failed to dismiss the federal court actions in South Carolina and Georgia and GRANTED with respect Defendant Walden's contacts with Dr. Khoury that led to his use of Globus products at Trident Hospital and his solicitation of CNA's participation in a Globus study directed at Cindy Anderson during a dinner meeting in San Francisco. A hearing on damages will be held at a later date to be set by the Court.

BY THE COURT:

/s/
Legrome D. Davis, J.