

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

CASE NO. 6:20-cv-00771-ORL-37GJK

FREEDOM MEDICAL, INC. :

Plaintiff, :

v. :

MAHESHWAR SEWPERSAUD, a/k/a :
GAVIN SEWPERSAUD and USINE ROTEC, :
INC. D/B/A ROTEC INTERNATIONAL :

Defendants. :

PLAINTIFF’S MOTION FOR ORDER TO SHOW CAUSE

Plaintiff Freedom Medical, Inc. (“Freedom Medical” or “Plaintiff”), through his undersigned counsel, move before this Court for an order requiring Defendants, Maheshwar Sewpersaud (“Sewpersaud”) and Defendant Usine Rotec, Inc. (“Rotec” and jointly “Defendants”), to show cause (1) why Defendants should not be held in civil contempt and sanctioned for violating this Court’s temporary restraining order and preliminary injunction; and (2) why sanctions should not be imposed upon the Defendant Sewpersaud for repeatedly giving false sworn testimony.

In support of this motion, Plaintiff relies upon the memorandum in support thereof attached hereto and incorporated herein by reference in its entirety.

WHEREFORE, Plaintiff respectfully requests that this Court grant and enter the proposed form of order submitted with the motion.

LOCAL RULE 3.01(g) CERTIFICATION

Prior to the filing of this motion, counsel for Plaintiff conferred with counsel for Defendants who oppose the filing of this motion.

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION FOR ORDER TO SHOW CAUSE**

Plaintiff Freedom Medical, Inc. (“Freedom Medical” or “Plaintiff”) requests this Court: (i) order Defendants Sewpersaud and Rotec to show cause why they should not be held in civil contempt and sanctioned for violating this Court’s temporary restraining order and preliminary injunction and (ii) order Defendant Sewpersaud to show cause why he should not be sanctioned for repeatedly giving false sworn testimony.

I. INTRODUCTION AND BACKGROUND

Plaintiff commenced this Action on May 1, 2020, asserting claims against Defendant Maheshwar Sewpersaud (“Sewpersaud”) for alleged misappropriation of trade secrets, breach of contract, fraud, breach of fiduciary duty, tortious interference with existing and prospective business relationships and injunctive relief [D.E.1].

A. The TRO, Preliminary Injunction and Verified Amended Complaint

On May 6, 2020, the Court entered a Temporary Restraining Order (the “TRO”) [D.E.11] against Sewpersaud. Following a hearing on June 17, 2020 on Plaintiff’s Motion for Preliminary Injunction, the Court entered an Order and Preliminary Injunction on June 23, 2020 [D.E. 73].

Among other things, the Preliminary Injunction enjoined Defendant Sewpersaud from directly or indirectly “Soliciting, doing business with, selling to, renting to, or servicing any current or prospective client, customer, or account, who has been solicited or serviced by Freedom Medical” during the 12 months preceding the end of Sewpersaud’s employment with Plaintiff. [D.E.73 at 16]. During the hearing on June 17, 2020, the Court made clear there would be a second

inspection of Defendant Sewpersaud's devices to identify and remediate all Confidential Information of Plaintiff that remained in Defendant Sewpersaud's possession. The Court also directed counsel to Sewpersaud "to make sure that Mr. Sewpersaud understands that he's going to need to provide whatever password information is necessary in order to access the email account[s]" Hearing Transcript, 121:10-15. The Court specifically stated to Sewpersaud's counsel, in the presence of Mr. Sewpersaud, that "he needs to understand that it's critical that that information be retained and that he'll need to make those devices available for some reasonable period of time." Id., 122:20-123:1. A copy of the relevant portion of the hearing Transcript is attached as Exhibit 1.

Regarding the non-solicitation provision of the Preliminary Injunction announced by the Court at the hearing, later on June 23, 2020, Plaintiff informed Sewpersaud's counsel in an email, that,

We will get the list together so there is no doubt but Select, Interior Fusion, the Orlando VA, Halifax, etc. we all know he has done business with sold to or rented to or serviced so he must cease immediately.

On June 24, 2020 counsel for Sewpersaud responded that,

I agree with you that overlapping customers – those that were customers of Rotec before my client joined the company and were also customers or prospective customers of Freedom Medical in the last year of Mr. Sewpersaud's employment – are off limits, as are the Orlando VA and Interior Fusion. I need to see your complete list as to the other customers so that we can come to a broader resolution, so please send that ASAP.

Memorandum of Law in Support of Motion to Approve Customer List and Prospective Customer List. [D.E. 96 at 2].

On June 24, 2020, Plaintiff filed a Verified Amended Complaint, which added Usine Rotec, Inc. d/b/a Rotec International ("Rotec") as a Defendant, and asserted claims against Rotec for misappropriation, tortious interference and civil conspiracy [D.E. 75]. On June 25, 2020, Plaintiff

notified Rotec's counsel of the Court's June 23, 2020 Order and the restraints imposed upon Sewpersaud. Counsel's letter stated, among other things that "both Rotec and Mr. Sewpersaud are aware of certain such entities [subject to the nonsolicitation provisions of the Preliminary Injunction] including, without limitation...all Select hospitals..." A redacted copy of this letter is attached as Exhibit 2.

Following the hearing, counsel for the parties conferred regarding arrangements for the reinspection of Defendant Sewpersaud's devices and to access all his email accounts, for which access had previously been denied. In a letter to Sewpersaud's counsel on July 2, 2020, Plaintiff reminded counsel of Mr. Sewpersaud's duty of preservation and also noted that based on counsel's representation that Mr. Sewpersaud would be in training for several days the following week, the reinspection would take place on July 10, 2020. See attached Exhibit 3 at p. 3.

B. The Second Inspection reveals violations of the Preliminary Injunction

The second inspection of Mr. Sewpersaud's devices and the inspection of his email accounts took place at the offices of Capsicum in Ft. Lauderdale on July 10, 2020. Capsicum's examination of the devices and emails revealed that (i) Mr. Sewpersaud failed to preserve information as ordered by the Court and (ii) Rotec and Sewpersaud violated the non-solicitation provision of the preliminary injunction.

1. Failure to preserve relevant information on Sewpersaud's devices

Brian Halpin, Senior Vice President of Capsicum, has provided a Declaration on the results of the second inspection and other issues related to this motion, which is attached as Exhibit 4. The second inspection of Sewpersaud devices revealed that 137,063 texts and other messages residing on the iPhone 11 during the first inspection were reduced to only 4,056 messages at the time of the second inspection. Ex. 4, ¶ 18. Halpin attests that, among other messages permanently

deleted, were all the incriminating text chats¹, save one. Id. ¶ 19. The dramatic drop in the volume of messages was the result of two affirmative acts according to Mr. Halpin. Id., ¶ 20. The first affirmative act was that Sewpersaud changed the text retention settings on his iPhone 11 thirty-eight (38) minutes before turning over the phone for inspection on July 10. Ex. 4, ¶ 21. By changing the retention settings from “Forever,” which is the default setting, to “30 days,” all text messages and attachments between the first inspection on May 9, 2020 and June 10, 2020, 30 days before the second inspection, were permanently deleted and cannot be restored. Id., ¶ 22. This autodeletion setting change is ongoing such that with each passing day another day’s text messages are permanently deleted. The second affirmative action was to delete the WhatsApp application, which had 33,420 messages found during the first inspection. Id., ¶ 23. Because Sewpersaud’s iPhones were synced to his MacBook Pro, Capsicum searched it to see if any of the 137,063 deleted messages still resided there, however, this examination found that 45,634 messages were still unaccounted for. Id. ¶ 24.

2. Failure to preserve incriminating emails

Prior to the first inspection, counsel for Defendant Sewpersaud refused to provide email access rights to his personal email account gavin5579@outlook.com, requiring the Court to specifically direct Sewpersaud, during the hearing on June 17, 2020, to make the email account passwords available so the contents of his Outlook email account could be accessed during the second inspection.² The Declaration of Halpin attests that numerous emails reflecting email communications among Rotec, Interior Fusion and Sewpersaud between September 9, 2019 and

¹ These text chats were discussed at length in the Declaration of Mike Boylan submitted to the Court [D.E. 61-3¶¶ 10-11 and exhibit 9 there to] and referenced by the Court in its June 23, 2020 Order.

² “The other concern I have is with respect to these email accounts, Ms. Leibovitch. I am going to direct you to make sure that Mr. Sewpersaud understands that he’s going to need to provide whatever password information is necessary in order to access the email account so they can be reviewed to see whether or not they contain any proprietary information.” Hearing Transcript, 121:9-15.

October 15, 2019, which are attached as Exhibit 6 to his declaration, were not present in the second inspection, indicating they had all been deleted by the user. Ex. 4, ¶ 35. As discussed in detail below, the deleted emails constitute clear and convincing evidence that Sewpersaud and Rotec diverted the Orlando bed sale opportunity to Interior Fusion and acted in concert enabling Sewpersaud to commit additional acts constituting both breach of his employment agreement and his fiduciary duty while still employed by Freedom Medical.

3. Failure to comply with the non-solicitation provision of the TRO Preliminary Injunction

Despite the TRO entered on May 6, 2020 and the Preliminary Injunction entered on June 23, 2020, Sewpersaud on behalf of Rotec, has continued to solicit and service current and prospective customers of Freedom Medical, including, the Orlando VA, Interior Fusion, and the Coatesville, PA VA facility, which is covered by Plaintiff's Blanket Purchase Agreement with the Veterans Administration, and Select Specialty Hospital in Panama City, Florida, which is covered by Freedom Medical's national contract with Select Medical Corporation.

Examples of emails evidencing Sewpersaud's continued dealings with the Orlando VA and Interior Fusion are attached as Exhibit 5. Sewpersaud's efforts to solicit the Coatesville, PA VA facility are attached as Exhibit 6.

The second inspection also revealed emails between Rotec, Sewpersaud and Select Hospital-Panama City which did not exist during the first inspection. These new emails show that after the Court's converted the TRO to a Preliminary Injunction on June 17, 2020, Sewpersaud and Rotec continued plans that began in May 2020 for Sewpersaud to visit a Select hospital in

Panama City on July 8, 2020 to provide clinicians with educational training on Rotec beds (known as in-servicing in the industry).³ A copy of emails in this regard are attached as Exhibit 7.

There is no dispute that Select Medical Corporation is a national account Freedom Medical has had since October 1, 2019. Plaintiff has produced in discovery a copy of the Select Agreement (FM121223-121241), marked Attorneys' Eyes Only, which covers "all locations" listed on Exhibit B and includes Select Specialty Hospital-Panama City. Plaintiff has also produced the Freedom Medical Coverage Plan for Select Medical dated April 27, 2020 (FM121248-121266), also marked Attorneys' Eyes Only, describing Plaintiff's plan to be in a position to service all of Select's facilities, including the Panama City facility, by October 1, 2020.⁴ Sewpersaud visited the Select-Panama City facility on July 8, 2020 and provided in-servicing education on Rotec beds. His visit, at the direction of Defendant Rotec, violated the terms of the Preliminary Injunction and also delayed the second inspection for several days, which had the effect of permanently deleting 2-3 days of text messages due to the change in retention settings.

Following Sewpersaud's second deposition on August 13, 2020 during which he was questioned about his in-servicing at the Select Specialty Hospital in Panama City, Sewpersaud provided Answers to Plaintiff's First Interrogatories on August 17, 2020 (copy attached as Exhibit 8) in which he admitted to soliciting and servicing numerous customers and prospective customers of Plaintiff, including the Orlando VA and the Select Hospital on July 8, 2020, Id., p. 8.

³ In-servicing is provided both as a part of marketing to prospective customers and on an ongoing basis to customers, whenever a customer requests an educational presentation to new or existing clinicians. Defendant Sewpersaud admitted during his deposition that he received training on the Rotec beds and how to provide in-service education on Rotec beds during his employment with Plaintiff. Ex. 10, 153:3-18; 250:1-8.

⁴ Defendant Rotec contends it also has a national contract with Select, however, it has not been produced in discovery although called for by Plaintiff's Document Requests No. 6 and 11.

C. Sewpersaud’s repeated dishonest testimony under oath

In its Order of June 23, 2020, the Court observed that “[a]t the hearing, Sewpersaud testified and denied working with Rotec or Interior Fusion on the Orlando VA bid. (*See* Doc. 69.) But this testimony is not credible.” The Court added: “And Sewpersaud has demonstrated a willingness to lie or hid unfavorable facts...” [D.E.73 at fn 8]. Notwithstanding the Court’s assessment and the examples it cited of Mr. Sewpersaud’s “willingness to lie,” Sewpersaud has continued to do so. Sewpersaud has (i) filed a Declaration under Oath dated June 10, 2020 [D.E.56]; (ii) testified under oath in deposition on June 15, 2020; (iii) testified under oath at the June 17, 2020 hearing, (iv) testified in a further deposition on August 13, 2020, and (v) provided sworn answers to Interrogatories on August 17, 2020. On each of these five occasions, he has given false testimony or statements on issues material to the resolution of this dispute.

1. Sewpersaud’s false testimony about his involvement in the misappropriated Orlando VA bed sale opportunity

On June 10, 2020, Sewpersaud gave a sworn Declaration submitted to the Court in opposition to Plaintiff’s Motion for Preliminary Injunction in which he attested, among other things, that “[a]fter I started working at Rotec, I learned that Interior Fusion was awarded the Orlando VA contract and that I would be responsible for servicing the account, including product education and maintenance.” [D.E. 56-1 at ¶ 31]. At the hearing before the Court on June 17, 2020, Sewpersaud testified he did not know Interior Fusion submitted a proposal to the Orlando VA for sale of beds until “I was no longer at Freedom Medical.” An excerpt of the Hearing Transcript in this regard is attached as Exhibit 9, at 83:3-6. Sewpersaud was also asked whether he had any involvement in the Interior Fusion bid that was submitted to the Orlando VA and he testified “No.” Ex 9, 90:1-3.

During Sewpersaud's second deposition on August 13, 2020, he was reminded on the record of his sworn statement in his Declaration on this subject and his sworn testimony to the Court at the hearing on June 17, 2020. Nevertheless, he continued to insist "I learned after I started at Rotec, yes" even when reminded that both his previous statements had been given under oath. See attached excerpt from Sewpersaud deposition, as Exhibit 10, at 313:1-11.

Defendant Sewpersaud's deposition was completed on August 13, 2020 and on August 14, 2020, Rotec belatedly produced documents responsive to Plaintiff's Document Requests served on July 7, 2020. The Rotec document production included over sixty Outlook emails that did not exist at the time of the second inspection that included inspection of Sewpersaud's email accounts. Ex. 4, ¶ 35 and referenced exhibit 6.

During Sewpersaud's continued deposition he repeatedly lied under oath. For example, he insisted that he did not learn about the award of the bed sale to the Orlando VA until after he began working for Rotec, even when confronted with a screenshot of a text message from Mara Adams dated the September 21, 2019, which included a copy of the first page of the VA Purchase Order for 50 beds awarded to Interior Fusion the day before on September 20, 2019. A copy of this text message is Exhibit 12 of the Verified Amended Complaint [D.E. 75-12]. During his continued deposition, Sewpersaud insisted he never received a copy of this text from Mara Adams (Ex. 10, 313:18-316:22). The Declaration of Brian Halpin attests that this screenshot was located on Sewpersaud's iPhone 11 during the first inspection and represents a screenshot that Mr. Sewpersaud took and sent to himself. Ex. 4, ¶ 25. This is one of the texts deleted by Sewpersaud when he changed the retention settings on the iPhone. Id.

The following day, August 14, 2020, Rotec produced about 200 pages of documents, a number of which reveal that Sewpersaud was instrumental in obtaining approval from Rotec for

Interior Fusion to sell Rotec beds to the Orlando VA. After the award of the bed sale, the late-produced Rotec documents indicate Sewpersaud worked on behalf of Interior Fusion and Rotec to finalize a purchase order from Interior Fusion to Rotec to fill the 50-bed order awarded to Interior Fusion by the Orlando VA. Copies of Sewpersaud's personal emails regarding Sewpersaud's role in obtaining a letter of authorization from Rotec for Interior Fusion are attached as Exhibit 11. Specifically, on September 9, 2019, Interior Fusion provided Sewpersaud with forms of letters of authorization that Interior Fusion would need in order to submit a quote to sell Rotec beds to the Orlando VA, which Sewpersaud forwarded to Richard Hains, Rotec's Director of Sales, informing him, "[w]e will need you to do both for 2 different companies (SDVOSB). . . ." Ex. 11, at RI000103-107. Hains asked Sewpersaud the next day: "Who are those dealers? Which one is quoting on the 66 bariatric beds bid?" Id., RI000204-205. Despite apparently having never heard of either Interior Fusion or Maness Medical before, Hains spoke with Sewpersaud and sent him letters of authorization on behalf of Rotec later the same day. Id., RI000112-116. After Interior Fusion was awarded the bed sale on September 20, 2019, as reflected in subsequent emails between Sewpersaud, Interior Fusion and Rotec, Sewpersaud obtained shipping cost information from Rotec on September 24, 2020, which he provided to Interior Fusion, telling Richard Fendley "Please send PO to Richard Hains today." R1000193. Interior Fusion used the information from Sewpersaud to prepare a purchase order it issued to Rotec on September 25, 2019. RI000176-178.⁵ These emails are attached as Exhibit 12.

⁵ In his Declaration [D.E.56-1, at 7] Sewpersaud falsely attested that "Freedom Medical alleges that I solicited pricing from Rotec for the beds that were included in this bid, but I did not do so."

2. Sewpersaud's false testimony about Freedom Medical's quote to the Orlando VA

Plaintiff alleged in its Memorandum in Further Support [D.E. 61, 7-8] and at the Preliminary Injunction hearing that Sewpersaud never responded to several questions about the Freedom Medical quote to the Orlando VA raised by Ms. Alvarez in an email exchange with Mr. Sewpersaud on September 11, 2019, in effect abandoning Freedom Medical's quote to the Orlando VA. Ex.9, 24:19-25:1. During Mr. Sewpersaud's testimony at the hearing when questioned by his counsel whether there was ever a time when he "dropped the ball on a quote by failing to respond to the Orlando VA's questions about the proposal?," Sewpersaud answered: "Not that I know of." Ex. 9, 85:20-23. He also testified he did not believe that he failed to respond to the Orlando VA's questions about the bed proposal. Id., 86:1-3.

Subsequently, during his continued deposition on August 13, 2020, Sewpersaud affirmed his previous testimony at the hearing on this subject but added, "I could have made a phone call to her or –that's probably what happened, but I don't remember. I can't recall." Ex. 10, 323:15-24. Mr. Sewpersaud was then shown email exchanges with Ms. Alvarez on September 19 and 20 about this issue,(copies attached as Exhibit 14) in which Alvarez again requested a requote and Sewpersaud promised "I will get you a quote on the side rail pad shortly" but did not. In an email late the next day, September 20, 2019, the same day the bed opportunity was awarded to the Orlando VA, Ms. Alvarez asked Sewpersaud "Please rush on the quote. They are getting ansy!" When asked wasn't it clear he hadn't given her the information she had been requesting since September 11, Sewpersaud testified "Like I said, I don't know if I made a phone call or what. The only way I would know [is] if you guys were to call her and ask her. I can't remember. But that's correct." Id. at 327, 5-12.

3. Sewpersaud’s false testimony about the misappropriated marketing strategy and bed design insights

In support of its Motion for Preliminary Injunctions, Plaintiff submitted a Declaration from Jeff Allen Schmutz, Director of Clinical Services, who attested about an excel spreadsheet document entitled “Rotec Bed Improvements” found during the first forensic inspection on May 9, 2020, which describes specific changes for Rotec to make to its Versatech 600 and Versatech 1100 beds. Mr. Schmutz specifically attested:

Each line item in this spreadsheet was described in our training and ongoing interactions with our sales professionals as “must have features” when clinicians are considering which branded bed to select for their clinical setting.

D.E. 61-2, ¶ 17 and Ex. 5

Mr. Schmutz added that “we use this information as a key part of the marketing strategy we expect our sales professionals to use in identifying features we believe provide our beds with a competitive advantage over Rotec beds.” Id.

During the hearing before the Court on June 17, 2020, Mr. Sewpersaud was questioned about this excel spreadsheet and he testified:

This is a document that I created in my computer while I was in training with Rotec in December after leaving Freedom. It was a summary of like eight people brainstorming and what –Rotec needed to do.

* * *

This is confidential information that came from Rotec during this brainstorming meeting.

Hearing Transcript, Ex. 9, at 65:12-23

Subsequently, the continued deposition of Mr. Sewpersaud took place on August 13, 2020 during which he was questioned at length about this document and he insisted the document was prepared by him on December 17, 2020 during this brainstorming session and that all the ideas in the excel spreadsheet came from other Rotec employees.

Q So your testimony is that the document that was Exhibit-5 that we just looked at, Mr. Schmutz's Declaration, that spreadsheet is a document that you created while you were in training with Rotec in December after leaving Freedom Medical's employment; is that correct?

A Correct.

* * *

Q So how did you decide what to put on the spreadsheet?

A I had my computer, so I was just writing, typing.

Q All right. Well, did those present identify specific ideas and instruct you to type them down on your computer?

A No. I was just taking notes.

Q So if somebody raised an idea, you would just type it on the spreadsheet?

A Correct.

Q Did you type on the spreadsheet every idea that was ventilated during this brainstorming session?

A Yeah --

MS. IREL: Object to form.

BY MR. MATHEWS:

Q What was the answer?

A Yes.

Q So all these ideas came from people other than yourself during this brainstorming session? Is that your testimony?

A Yes.

Ex.10, 280:4-282:23

Contrary to Mr. Sewpersaud's repeated sworn testimony, the forensic analysis of the metadata associated with this excel spreadsheet make clear that the document is located on Sewpersaud's MacBook Pro and was created on December 16, 2019 at 7:50am and last saved on December 16, 2019 at 8:13 AM. Ex. 4, ¶ 26. Consistent with the results of the forensic analysis, Plaintiff has located and produced in discovery an email from Sewpersaud to Richard Hains, Rotec's Director of Sales at about 4:30pm on December 16, 2019 attaching a copy of the excel spreadsheet, which is attached as Exhibit 13. This was the day *before* the brainstorming session that Sewpersaud insisted was the origin of the excel spreadsheet, which he testified reflected solely the ideas of other Rotec employees.

4. Sewpersaud's false testimony about always acting for the benefit of his employer and not sharing Confidential Information of Freedom Medical

At the hearing on June 17, 2020, Sewpersaud testified Sewpersaud's counsel asked him whether he was so upset about the loss of a contract with AdventHealth that he would sabotage the Orlando VA contract for Freedom Medical, and Sewpersaud insisted "I would never, ever, ever do that to Freedom Medical." Ex. 9, 91:4-9. He added that "If I know that it would jeopardize Freedom or lose it business, . . . I would never, ever do that to Freedom." Id., 91:13-15. He also was asked whether he ever shared Confidential Information of Freedom Medical with anyone not authorized to have access, and he testified "No, I did not." Id., 64:10-16.

Contrary to this testimony, as discussed above, Sewpersaud worked with Rotec to both the Orlando bed sale opportunity and Plaintiff's confidential marketing strategy and bed design insights. In addition, he started working secretly for the benefit of Rotec, his future employer, while he was still employed with Freedom Medical in October 2019 against their interest of his current employer. In this regard, the late-produced documents by Rotec include emails using the Outlook email account that Sewpersaud deleted, which show that Sewpersaud was acting in the interest of Rotec not only in finalizing the diversion of the bed sale opportunity for the benefit of Rotec and Interior Fusion in September 2019 but also in covertly working for Rotec against Freedom Medical's interests beginning October 1, 2019. On October 1, 2019, Sewpersaud asked Valero and Hains for brochures on every bed Rotec was allowed to sell in the US because "I would like to start working on a comparison and pricing." On October 7, 2019 Hains provided the requested information on the bed models "we will be selling in US." Then on October 15, 2019, Sewpersaud sent a further email to Rotec in which he stated: "As discussed, we will need to readjust the pricing on the Versatech 600 and 1100 2.0 as Umano is selling their 500lb capacity at \$5200 and the 1000 LB at \$9000 on some contracts. I know this is very competitive. Let's discuss

soon.” Copies of the emails, which Sewpersaud deleted but were produced on August 17, 2020 by Rotec are attached as Exhibit 15.

At the time of these emails, both Rotec and Sewpersaud were aware that Freedom Medical had a Distribution Agreement with Rotec with fixed pricing for Rotec bed products. Lowering the pricing of Rotec beds to be sold directly by Sewpersaud on behalf of Rotec would inevitably adversely affect Freedom Medical’s ability to make capital sales of Rotec beds pursuant to the Distribution Agreement and to rent Freedom 500 and Freedom 1000 beds manufactured by Umamo.

5. Sewpersaud’s false testimony about the reasons Rotec and Sewpersaud violated the Preliminary Injunction

During his first deposition, Sewpersaud acknowledged that he had received training from Freedom Medical on providing nursing education on not only the Freedom Medical branded beds but also on the Rotec branded beds. Ex. 10, 153:3-18. He also acknowledged that he knew about Freedom Medical’s national contract with Select Medical, and “they were in the process of rolling out Select,” but “[i]t was a slow rollout.” Id. 154:7-20. During his continued deposition, Sewpersaud was questioned about the reason he provided in-servicing to Select Specialty Hospital in Panama City in light of the nonsolicitation provision of the Court’s June 23, 2020 Order. He testified that “Due to our director for sales couldn’t travel, the North American -Richard [Hains] couldn’t travel because of the pandemic, the hospital needed in-service done.” Ex. 10, 356:17-21.⁶ Sewpersaud also testified that since the Court’s Order didn’t say anything about education, he thought it was okay for him to deliver in-service education programs to any customers or prospective customers of Freedom Medical. Id., 358:19-24.

⁶ The documents included in Ex 7 reflect that Rotec had no in-service training form and that Sewpersaud created one using the training and knowledge of such forms which he acquired from Freedom Medical.

Contrary to this testimony, there were no travel restrictions on Canadians travelling to the US to do essential work, according to the Announcement by the Department of Homeland Security on March 20, 2020 and subsequent press reporting, copies of which are attached as Exhibit 16. Further, as reflected in emails beginning in May 2020, included in Exhibit 17, Rotec had always planned for Sewpersaud to perform the in-servicing to Select-Panama City, regardless of the pandemic and the Court's Order of June 23, 2020.

II. ARGUMENT

Plaintiff believes the record is clear that Rotec and Sewpersaud have violated the Court's TRO and Preliminary Injunction. Rotec withheld highly incriminating emails that it knew Sewpersaud had deleted until after his deposition. Further, Sewpersaud has engaged in ongoing conduct for months constituting false testimony under oath, which warrants appropriate and severe sanctions. Both Sewpersaud and Rotec should be held in civil contempt and be sanctioned.

A. Legal Standard

In addition to the discovery sanctions afforded under Fed. R. Civ. P. 37, Courts have inherent authority to enforce their orders and to address a party's contempt of those orders. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-65 (1980) An injunction is enforced through a district court's contempt power. *Faught v. Am. Home Shield Corp.*, 660 F.3d 1289, 1293 (11th Cir. 2011); *Thomas v. Blue Cross & Blue Shield Ass'n.*, 594 F.3d 823, 828-29 (11th Cir. 2010).

Federal courts also possess the inherent power to sanction parties and attorneys who conduct litigation in bad faith or who perpetrate fraud on the court. *Quantum Communications Corp. v. Star Broadcasting, Inc.*, 473 F. Supp. 2d 1249, 1268 (S.D. Fla. 2007), *affirmed* 290 Fed. Appx. 324 (11th Cir. 2008)(citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-51 (1991)). A party seeking a civil contempt finding must establish by clear and convincing evidence that (1) the allegedly

violated order was valid and lawful; (2) the order was clear and unambiguous; (3) the alleged violator had the ability to comply with the order; and (4) the order was violated. *F.T.C. v. Leshin*, 618 F.3d 1221, 1232 (11th Cir. 2010). “The focus of a district court’s inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in complying with the court order, but whether in fact their conduct complied with the order at issue.” *Smith Barney, Inc. v. Hyland*, 969 F. Supp. 719, 722-23 (M.D. Fla. 1997). The inherent powers doctrine is most often invoked when a party commits perjury or destroys or doctors evidence. *Quantum Communications*, 473 F. Supp. 2d at 1269, citing *Vargas v. Peltz*, 901 F. Supp. 1572, 1581-82 (S.D. Fla. 1995)(dismissing suit when plaintiff fabricated evidence and lied in deposition); *Chemtall, Inc. v. Citi-Chem, Inc.* 992 F. Supp. 13980, 1410 (S.D. Ga. 1998(finding by clear and convincing evidence defendant engaged in abusive conduct, including lying under oath, and finding that a lesser sanction that default judgment would not suffice).

Once the moving party has made a prima facie case that the respondent violated a prior court order, the burden shifts to the respondent to prove that it has not violated the prior order or that there exists a valid defense which justifies noncompliance. *CFTC v. Wellington Precious Metals, Inc.*, 950 F. 2d 1525, 1529 (11th Cir. 1992).

B. Analysis

There is clear and convincing evidence that both Defendants Sewpersaud and Rotec violated the TRO and the Preliminary Injunction, that both Defendants obstructed this proceeding, and that Defendant Sewpersaud has lied under oath repeatedly, warranting severe sanctions against both Defendants. Entry of default judgment against Sewpersaud on several counts is warranted.

1. There is clear and convincing evidence that both Defendants engaged in wrongful conduct, including violation of the TRO and Preliminary Injunction

Although the TRO, by its terms, only applied to Defendant Sewpersaud, Rotec has been on Notice since March 30, 2020 due to its employment of Sewpersaud and Sewpersaud's violations of the restrictive covenants, which constituted tortious interference with Plaintiff's employment agreement with Sewpersaud [D.E. 1, Ex. 9]. Rotec has been represented by counsel and actively involved in this lawsuit since soon after the TRO was issued. See, e.g. D.E. 61-16. Despite the March 30, 2020 notice, Rotec did nothing to restrain Defendant Sewpersaud from soliciting and servicing customers and prospective customers of Plaintiff. In considering hiring Sewpersaud in August 2019, Rotec requested and received Sewpersaud's resume listing numerous customers of Plaintiff including, in particular, the Orlando Va. A copy of Sewpersaud's resume and covering email is attached as Exhibit 17. Before the TRO was issued, as described in detail above, Defendant Rotec joined with Sewpersaud in conduct that violated his employment agreement, amounted to breach of his fiduciary duty of loyalty, and diverted the Orlando bed sale opportunity to Interior Fusion, which the Court found constituted a trade secret.[D.E. 11 at 7-8]. Indeed, Rotec knowingly obtained from Sewpersaud Confidential Information of Plaintiff related to the Orlando bed sale opportunity, bed pricing information, and a spreadsheet of suggested bed design improvements in December 2019, which the court found in its Order of June 23, 2020 also amounted to trade secret marketing strategy and design insight information.[D.E. 73 at 8]. After entry of the TRO and the Preliminary Injunction, Defendant Rotec continued to do nothing to restrain Sewpersaud., other than issuing a self-serving email, nearly a month after the TRO was entered, a copy of which is attached as Exhibit 18. Indeed, Rotec expected and required Sewpersaud to continue to service the Orlando VA and a Select facility covered by Plaintiff's national contract of which Rotec had notice, as described in detail above. The evidence is thus

clear and convincing that not only Sewpersaud but also his employer Rotec violated this Court's Orders. "An injunction is binding only upon the parties to the action, their officers, agents, servants, employees and attorneys, and *upon those persons in active concert or participation with them* who receive actual notice of the order by personal service or otherwise." Fed.R.Civ.P. 65(d) (emphasis added). Despite having actual notice of the Court's Orders, Rotec acted in concert with Sewpersaud, its employee, to violate the Preliminary Injunction and thereby subjected itself to sanctions for its violation.

2. There is clear and convincing evidence of Sewpersaud's ceaseless false testimony

As described in detail above, Sewpersaud has lied under oath in written submissions to the Court, in testimony before the Court, and in his deposition. Sewpersaud is completely unrepentant, refusing to start telling the truth on issues material to this case even after the Court made express findings that he had lied. Indeed, when caught lying, Sewpersaud simply changes his testimony to a different lie, as where he testified he must have called Ms. Alvarez and answered her questions when he was confronted with emails proving conclusively that he never answered her questions about the Freedom quote to the Orlando VA. He also lied when caught violating the Preliminary Injunction by suggesting Mr. Hains couldn't travel to the United States to do the in-servicing of the Select facility because of the pandemic. After the second inspection revealed Sewpersaud changed the text retention settings on his iPhone 11, in violation of the Preliminary Injunction, he falsely testified that he changed the retention setting on his iPhone 11 in early May before the TRO was issued, in a fruitless effort to avoid being found to have violated the Court's TRO and Preliminary Injunction. In this regard, after the second inspection revealed the change in retention settings resulted in the permanent loss of thousands of texts, he testified on August 13, 2020 that

the change of retention settings “was done before I was served. I remember, I did it before I was Served.” Ex. 10, 199:5-8.

Sewpersaud’s never-ending, everchanging falsehoods have imposed excessive burdens on Plaintiff, impeded the fact-finding process, and amounted to a fraud on the Court. “Those who lie, evade and fail to tell the *whole* truth obviously enjoy an advantage over honest litigants. The victimized opponent winds up, as in this case, consuming substantial resources to respond to and ‘undo’ the victimizer’s lies and distortions.” *Quantum*, 473 at 1276. The court added that “the Court itself is prevented from actually reaching the merits of the case- as well as resolving other cases-by having to stop and, as it has done here, exhaustively examine what is, at bottom, sanctionable perjury and fraud upon the Court.” *Id.*, citing *Chemtall, Inc. v. Citi-Chem, Inc.*, 992 F. Supp. 1390, 1409-10 (S.D. Ga. 1998).

The evidence is clear and convincing that Sewpersaud’s knowing, intentional ongoing false testimony amounts to bad faith intended to conceal the overwhelming evidence of his misappropriation of Plaintiff’s trade secrets, breach of fiduciary duty, and breach of his employment agreement. Under all the circumstances, the Court should impose the sanction of entry of default judgment against Sewpersaud on these counts. “[U]se of the ‘ultimate sanction’ addresses not only prejudice suffered by the opposing litigants, but also vindicates the judicial system as a whole, for such misconduct threatens the very integrity of the courts, which otherwise ‘cannot command respect if they cannot maintain a level playing field among participants’” *Chemtall, Inc.*, 992 F. Supp. at 1409(cited case omitted).

III. CONCLUSION

For the foregoing reasons, Plaintiff requests the Court Order the Defendants to show cause why they should not be (1) held in civil contempt for violating, or aiding and abetting the violation

of the temporary restraining order and , the June 23, 2020 Preliminary Injunction; (2) pay Plaintiff's fees and costs for this motion and Sewpersaud's continued deposition on August 13, 2020; (3) enjoin Rotec from using or disclosing any Confidential Information of Plaintiff, including without limitation, the suggested improvements in the Rotec beds set forth in the spreadsheet provided to Rotec by Sewpersaud; (4) direct Rotec to assure Sewpersaud's compliance with the Preliminary Injunction, (5) extend the Preliminary Injunction by two months in light of the violations of the TRO and Preliminary Injunction between May 6, 2020 and July 10, 2020, and (6) enter a default judgment against Sewpersaud on Plaintiff's counts I, II, III, IV and VI of the Verified Amended Complaint.

Respectfully submitted,

ROIG LAWYERS

/s/ Nelson C. Bellido

Nelson C. Bellido
44 W. Flagler Street, Suite 2100
Miami, FL 33130
Tel: 305-405-0997
Fax: 305-405-1022
nbellido@roiglaxwers.com

KANG HAGGERTY & FETBROYT LLC

/s/ Gregory H. Mathews

Edward T. Kang
Gregory H. Mathews
123 S. Broad Street, Suite 1670
Philadelphia, PA 19109
Tel: 215-525-5850
Fax: 215-525-5860
ekang@KHFlaw.com
gmathews@KHFlaw.com

Attorneys for Plaintiff

Dated: August 24, 2020

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2020, I electronically filed the foregoing with the Clerk of the Court by using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the matter specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

Monica L. Irel
DENTONS US LLP
Capital Plaza
10700 N. Kendall Dr., Suite 303
Miami, FL 33176
Monica.irel@dentons.com
Attorney for Usine Rotec Inc.

Ellen M. Leibovitch, Esq.
Assouline & Berlowe
2300 Glades Rd. East Tower #135
Boca Raton, FL 33431
Email: eml@assoulineberlowe.com
Attorney for Maheshwar Sewpersaud

By: /s/Gregory H. Mathews
Gregory H. Mathews