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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

FireClean LLC, et al.,
Plaintiffs,
v.
Andrew Tuohy,
Defendant.

No. CV-16-00604-TUC-JAS (EJM)
ORDER

Pending before the Court is Plaintiffs’ Motion for Protective Order (Doc. 51) and Defendant’s Motion to Compel Discovery Responses (Doc. 61). Both motions have been fully briefed and are ripe for ruling.

I. Factual and Procedural Background

Plaintiffs filed this action on September 11, 2016 (Doc. 1) and filed their first amended complaint on February 8, 2017 (Doc. 11). This matter was originally assigned to United States District Judge Soto, and later referred to the undersigned for all pretrial proceedings and report and recommendation. (Doc. 50).

Plaintiffs Edward Sugg and David Sugg own FireClean LLC, a company that produces a weapon lubricant marketed under the name FIREClean (“FC”). (Doc. 47 at 2). Plaintiffs allege that Defendant Andrew Tuohy published false and disparaging statements against FC online and caused Plaintiffs economic and noneconomic harm. *Id.* Specifically, Plaintiffs allege that:

1 Between September 12, 2015, and January 18, 2016, Mr.
2 Tuohy, through his website and social media pages, widely
3 published the false allegations that FIREClean® is a single
4 oil, a common soybean or canola oil of the kind sold in U.S.
5 grocery stores, not the proprietary blend of substances the
6 Plaintiffs had informed their consumers it was. Mr. Tuohy
7 claimed he had independently commissioned accurate and
8 appropriate scientific tests that confirmed his statements were
9 true. Mr. Tuohy falsely accused the Plaintiffs of deceiving
10 their consumers by manipulating a comparison test between
11 FIREClean® and another product that showed FIREClean®
12 is the more effective lubricant. Mr. Tuohy also claimed that
13 the Plaintiffs had overinflated the price of their product by
14 charging at least 100 times what it cost to produce it,
15 intentionally deceived the public, and engaged [in] unlawful
16 deceptive trade practices.

17 *Id.* at 2–3.

18 Plaintiffs’ first amended complaint states claims against Defendant for defamation,
19 injurious falsehood (trade libel), false advertising (Lanham Act), intentional interference
20 with business relations, false light invasion of privacy, and aiding and abetting tortious
21 conduct. (Doc. 11). Defendant filed a motion to dismiss the defamation and Lanham Act
22 claims (Doc. 26), and Judge Soto granted the motion in part and dismissed the Lanham
23 Act claim (Doc. 42).

24 On January 12, 2018 Plaintiffs filed a Motion for Protective Order seeking to
25 protect two expert reports. (Doc. 51). Plaintiffs allege that the documents contain
26 proprietary information and trade secrets, and state that redisclosure of the reports would
27 cause Plaintiffs irreparable commercial harm. Plaintiffs request that the Court enter an
28 order ordering that 1) the two reports may only be used in this litigation; 2) the reports
must be returned to Plaintiffs after conclusion of the litigation; and 3) that reasonable
efforts be made to limit disclosure of the information contained in the reports. Defendant
does not oppose an order protecting Plaintiffs’ private financial information, but contends
that the expert reports do not contain any information that qualifies for protection under
Fed. R. Civ. P. 26(c). (Doc. 60).

On February 6, 2018 Defendant filed a Motion to Compel certain discovery
responses. (Doc. 61). Defendant states that Plaintiffs are refusing to respond to

1 interrogatories about FC’s ingredients because their formula is allegedly a trade secret.
2 Defendant contends that even if the formula is a trade secret, he is still entitled to
3 discovery, and that even if the Court enters a protective order, Plaintiffs cannot prevent
4 Defendant from obtaining relevant and exculpatory evidence. Plaintiffs argue that FC’s
5 formula, source of components, method of production, and research and development are
6 all trade secrets, and that Defendant has failed to meet his burden to show that the trade
7 secret information is both relevant and necessary to any claim or defense. (Doc. 65).

8 **II. Motion for Protective Order**

9 **A. Law**

10 Pursuant to Federal Rule of Civil Procedure 26(b), “[p]arties may obtain discovery
11 regarding any nonprivileged matter that is relevant to any party’s claim or defense”
12 “Generally, the public can gain access to litigation documents and information produced
13 during discovery unless the party opposing disclosure shows ‘good cause’ why a
14 protective order is necessary.” *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307
15 F.3d 1206, 1210 (9th Cir. 2002). Pursuant to Federal Rule of Civil Procedure 26(c),
16 “[t]he court may, for good cause, issue an order to protect a party or person from
17 annoyance, embarrassment, oppression, or undue burden or expense, including . . .
18 requiring that a trade secret or other confidential research, development, or commercial
19 information not be revealed or be revealed only in a specified way” Fed. R. Civ. P.
20 26(c)(G).

21 “For good cause to exist, the party seeking protection bears the burden of showing
22 specific prejudice or harm will result if no protective order is granted.” *Phillips*, 307 F.3d
23 at 1210–1211. “If a court finds particularized harm will result from disclosure of
24 information to the public, then it balances the public and private interests to decide
25 whether a protective order is necessary.” *Id.*

26 “Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly.”
27 *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). In particular, “[a]lthough [Rule 26(c)]
28 contains no specific reference to privacy or to other rights or interests that may be

1 implicated, such matters are implicit in the broad purpose and language of the Rule.”
2 *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 n. 21 (1984). However, “there is no
3 absolute privilege for trade secrets and similar confidential information.” *Fed. Open*
4 *Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 362 (1979) (quoting 8 C.
5 Wright & A. Miller, *Federal Practice and Procedure* § 2043, p. 300 (1970)). Rather, the
6 Court must weigh the claim to privacy against the need for disclosure. *Id.*

7 **B. Parties’ Arguments**

8 Plaintiffs argue that a protective order is necessary in this case to protect
9 proprietary information and trade secrets contained in two expert reports. Plaintiffs state
10 that they are willing to disclose the information contained in the reports as long as
11 Defendant is precluded from using the information outside of this litigation. Plaintiffs
12 allege that Defendant has publically disparaged their company and publishes court
13 documents on his blog, leading Plaintiffs to believe that Defendant intends to publish any
14 documents acquired through this litigation. (Doc. 51 at 2). Plaintiffs state that as a private
15 company, their private financial records are entitled to protection. Plaintiffs further state
16 that although FC’s specific formulation is not identified in Dr. Davis’s chemical
17 comparison report, the report contains information on “chemical comparisons among
18 [FC] and canola oil and soybean oil[,]” and “provides data not generally known to the
19 public that could be used, in combination with previously disclosed information, to
20 narrow down or identify the components of the trade-secret formulation.” *Id.* at 3–4.
21 Plaintiffs further explain that protection of Dr. Davis’s report is necessary because FC’s
22 formulation is a closely guarded trade secret and that their competitors have gone to great
23 lengths to obtain the formula. *Id.* at 4.

24 Defendant contends that the two expert reports do not contain any information that
25 qualifies for protection under Rule 26(c) and that Plaintiffs have failed to show good
26 cause for protecting the reports. Defendant states that because Dr. Linsley’s report on
27 Plaintiffs’ economic losses contains some information that was already disclosed in the
28

1 Fennell action,¹ there is no basis to protect it here. (Doc. 60 at 9–11). Defendant does not
2 oppose an order protecting Plaintiffs’ private tax and other financial data that has not
3 been previously disclosed. (Doc. 60 at 17). Defendant further argues that Dr. Davis’s
4 chemistry report is so heavily redacted that Defendant is unable to determine whether
5 there is good cause to protect it, but regardless, the report does not identify FC’s
6 components or its formula and thus does not qualify for protection. *Id.* at 11. Defendant
7 further argues that FC’s formula is not a trade secret because most of the formula’s
8 details have already been disclosed by Plaintiffs and because the formula can easily be
9 discovered with testing; thus, there is no basis to protect Davis’s report. *Id.* at 12, 16.²

10 In response to Defendant’s arguments, Plaintiffs note that they are not asking to
11 withhold the reports—they just want the information contained in the reports kept
12 confidential. (Doc. 64 at 1). Plaintiffs state that Dr. Linsley’s report contains new
13 information not previously disclosed in the Virginia action and maintain that this sales
14 and profit/loss information should be kept confidential. *Id.* at 2. As to Dr. Davis’s report,
15 Plaintiffs state that the report addresses the following questions: 1) whether it is
16 necessary to know FC’s formula to compare it to soybean and canola oil; 2) whether the
17 test used by Defendant is a suitable technique; 3) whether the test shows a difference
18 between FC’s formula and canola and soybean oils; and 4) whether it is possible that

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20 ¹ Plaintiffs state that George Fennell is a competitor who set out to harm Plaintiffs
21 by falsely spreading rumors that FC is Crisco cooking oil. (Doc. 11 at 45). Plaintiffs filed
22 suit against Fennell in Virginia and have since settled.

23 ² However, Defendant also directly contravenes this argument in his Reply to his
24 Motion to Compel, contending that without knowing which three oils comprise FC, an
25 expert would have to compare FC with thousands of possible three-oil blends—in other
26 words, the formula cannot be easily discovered without lengthy testing. (Doc. 67 at 9–
27 10).

28 The Court also notes that Defendant’s assertion that “most if not all of the details
of the formula have already been publically disclosed by Plaintiffs” is plainly false. (Doc.
60 at 12). Plaintiffs aver that the only two individuals who know FC’s specific
components and formulation are Edward and David Sugg (Doc. 51 Ex. A), and Plaintiffs’
patent application does not identify the specific oils used in FC; rather, the patent
application notes that FC is comprised of at least three different vegetable oils and then
provides a list of 16 different possible oils (Doc. 11 Ex. A at 15). This hardly qualifies as
publically disclosing FC’s formula.

1 canola or soybean oil are components of FC. *Id.* at 2–3. Plaintiffs allege that public
2 disclosure of this information will put Plaintiffs at a competitive disadvantage. *Id.* at 4.
3 Plaintiffs further state that Rule 26 does not limit confidential business information to
4 only trade secrets, and that the Court does not have to determine whether Plaintiffs do in
5 fact have any trade secrets in ruling on the Motion for Protective Order. *Id.* at 3.

6 C. Analysis

7 Importantly, Plaintiffs do not object to disclosing the information in the two expert
8 reports—Plaintiffs simply request that the use of the reports be limited to this litigation,
9 that the information in the reports not be publically disclosed, and that the reports be
10 returned to Plaintiffs at the conclusion of this lawsuit. The Court finds this request is
11 reasonable, and will grant Plaintiff’s motion.

12 While Defendant spends much of his Response arguing why FC’s formula does
13 not qualify as a trade secret, it is not necessary for the Court to determine whether FC’s
14 formula constitutes a trade secret in order to resolve Plaintiffs’ motion. As Plaintiffs point
15 out, Rule 26(c) extends protection to other confidential business information, not just
16 information that specifically qualifies as a trade secret. Thus, for purposes of Plaintiff’s
17 Motion for Protective Order, the Court need only determine whether the information
18 Plaintiffs wish to keep confidential qualifies for protection under Rule 26(c).³

19 Here, the Court finds that Plaintiffs have met their burden under Rule 26(c).
20 Plaintiffs have shown good cause to keep Dr. Linsley’s report confidential because
21 FireClean is a private company and the report contains Plaintiffs’ private financial
22 information. While Defendant argues that there is no need to keep the information
23 confidential because the same or similar information was already disclosed in the Fennell
24 action, Defendant also states that he does not oppose an order protecting Plaintiffs’
25 private financial information. And, Plaintiffs explain that Dr. Linsley’s report contains
26 more recent information that has not been previously disclosed.

27
28 ³ Likewise, Defendant’s argument that because Plaintiffs have failed to show that
FC’s formula is a trade secret, nothing in Davis’s report constitutes confidential or
proprietary information entitled to protection, simply makes no sense.

1 The Court further finds that Plaintiffs have shown good cause to keep Dr. Davis's
2 chemistry report confidential. While the report does not contain FC's specific formulation
3 or ingredients, it does contain information and test results indicating whether there are
4 differences between FC and soybean or canola oil, and whether it is possible that either of
5 these oils are components of FC. The Court finds that disclosure of this information could
6 place Plaintiffs at a competitive disadvantage.

7 Having found that disclosure of the information in the reports will likely result in
8 harm to Plaintiffs, the Court must balance the public and private interests to determine
9 whether a protective order is necessary. *Phillips*, 307 F.3d at 1210–1211. The factors the
10 Court considers are:

11 (1) whether disclosure will violate any privacy interests; (2)
12 whether the information is being sought for a legitimate
13 purpose or for an improper purpose; (3) whether disclosure of
14 the information will cause a party embarrassment; (4)
15 whether confidentiality is being sought over information
16 important to public health and safety; (5) whether the sharing
 of information among litigants will promote fairness and
 efficiency; (6) whether a party benefitting from the order of
 confidentiality is a public entity or official; and (7) whether
 the case involves issues important to the public.

17 *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 424–25 n.5 (9th
18 Cir. 2011) (citing *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995)).

19 First, disclosure of the expert reports will violate Plaintiffs' privacy interests in
20 their private financial information and their confidential business information. Second,
21 Defendant properly seeks disclosure of the reports pursuant to the discovery rules for use
22 in this litigation; however, if the reports are not subject to a protective order, Plaintiffs
23 have alleged that they have good reason to believe that Defendant may publish the reports
24 on his personal blog. Third, disclosure of the reports may cause Plaintiffs embarrassment
25 to the extent that their sales have evidently fallen since publication of Defendant's
26 alleged defamatory statements. Fourth, the reports do not contain information important
27 to public health or safety. Fifth, sharing the information among litigants will promote
28 fairness; however, disclosing the information to Defendant for purposes of this lawsuit

1 does not necessarily mean it must also be publically disclosed. Sixth, none of the parties
2 to this action are public entities or officials. Finally, Judge Soto has previously found that
3 this case involves issues important to the public. While the undersigned does not dispute
4 that finding, it is not necessary to publically reveal Plaintiffs’ private financial
5 information or the chemistry report detailing the similarities or differences between FC
6 and canola and soybean oil in order to prove the truth or falsity of Defendant’s
7 statements. Accordingly, the undersigned finds that the balance between public and
8 private interests weighs in favor of granting Plaintiff’s motion.

9 **III. Motion to Compel**

10 Defendant moves the Court for an order requiring Plaintiffs to respond to several
11 interrogatories and a document request. Defendant argues that even if FC’s formula is a
12 trade secret, Defendant is still entitled to discovery in order to prove whether his
13 statements about FC are true. (Doc. 61 at 2). However, the parties appear to have
14 different theories as to what Defendant actually meant when he published his statements
15 that FC was “probably” just vegetable oil, thus making the present Motion to Compel
16 more complicated than it might seem at first glance.⁴

17 **A. Law**

18 As noted above, Federal Rule of Civil Procedure 26(b)(1) allows parties to “obtain
19 discovery regarding any nonprivileged matter that is relevant to any party’s claim or
20 defense” When a party fails to respond or refuses to comply with a discovery
21 request, the requesting “party may move for an order compelling disclosure or discovery .
22 . . [including] an answer, designation, production, or inspection . . . if . . . a party fails to
23 answer an interrogatory . . . or a party fails to produce documents” Fed. R. Civ. P.
24 37(a)(3)(B).

25 _____
26 ⁴ Defendant notes that what his blog post actually said was that “FireClean is
27 probably a modern unsaturated vegetable oil, virtually the same as many oils used for
28 cooking.” (Doc. 61 at 3 n. 1). Defendant further notes that in the same blog post, he also
said he did not believe that FC was Crisco because “it wouldn’t really make sense to buy
a name brand product at a high price if the goal was to resell and make money.” (Doc. 61
at 3 n. 2).

1 B. Interrogatories

2 Defendant’s first interrogatory asks whether FC contains any vegetable oil, and if
3 so, what percentage of the product is and is not vegetable oil. Defendant notes that this
4 request does not ask for the specific formula, names of ingredients, or proportions, and is
5 therefore not seeking trade secret information. (Doc. 61 at 8). Plaintiffs state that they
6 already answered that FC “is comprised of at least three distinct plant-based oils, and that
7 the selection of oils comprises over 99% of the formulation. It can easily be calculated
8 that less than 1% of the formulation is something other than that blend of oils.” (Doc. 65
9 at 3).

10 Defendant’s second interrogatory asks Plaintiffs to identify each ingredient in FC
11 and its percentage of the total product. Defendant argues that even if FC’s formula is a
12 trade secret, Plaintiffs can still be compelled to provide this information under a
13 protective order. (Doc. 61 at 13). Defendant also notes that Plaintiffs stated that someone
14 would need more than just the ingredients and percentages to produce a copycat product,
15 and therefore Plaintiffs cannot justify refusing to answer Interrogatory No. 2. *Id.*

16 Defendant’s third interrogatory asks Plaintiffs to state the name of every
17 ingredient in FC and the name of the vendor the ingredient was purchased from.
18 Defendant maintains that he is not seeking the specific formula, just the names of the
19 ingredients and the suppliers in order to identify the records custodians who will be able
20 to verify the ingredients used. (Doc. 61 at 14).

21 In response to the first, second, and third interrogatories, Plaintiffs allege that FC’s
22 formula, the sources of its components, method of production, and research and
23 development are all trade secrets, and that Defendant’s requests for the components,
24 percentages, and vendors are an attempt to discover the trade secrets. (Doc. 65 at 3–4).
25 Plaintiffs further note that the question of whether a protective order will adequately
26 protect the information need only be addressed after Defendant establishes that the
27 information sought is both relevant and necessary to a claim or defense, and suggest that
28 such an order may not be adequate here because of the risk that Defendant will expose

1 information about FC to its competitors. (Doc. 65 at 14).

2 1. Analysis

3 a. *Whether the information qualifies as a trade secret*

4 In trade secret discovery disputes, “the party opposing discovery must [first] show
5 that the information is a ‘trade secret or other confidential research, development, or
6 commercial information,’ under Rule 26(c)(7) and that its disclosure would be harmful to
7 the party’s interest in the property.” *In re Remington Arms Co., Inc.*, 952 F.2d 1029, 1032
8 (8th Cir. 1991).

9 Pursuant to the Arizona Trade Secrets Act,

10 “Trade secret” means information, including a formula,
11 pattern, compilation, program, device, method, technique or
process, that both:

12 (a) Derives independent economic value, actual or potential,
13 from not being generally known to, and not being readily
ascertainable by proper means by, other persons who can
14 obtain economic value from its disclosure or use.

15 (b) Is the subject of efforts that are reasonable under the
circumstances to maintain its secrecy.

16 Ariz. Rev. Stat. Ann. § 44-401. “This rather expansive definition emphasizes the secrecy
17 of the alleged trade secret, as well as the competitive advantage afforded by it.” *Enter.*
18 *Leasing Co. of Phoenix v. Ehmke*, 197 Ariz. 144, 149 (App. 1999). The Restatement of
19 Torts provides additional guidance by adopting a six-factor test:

20 (1) the extent to which the information is known outside of
21 his business; (2) the extent to which it is known by employees
22 and others involved in his business; (3) the extent of measures
taken by him to guard the secrecy of the information; (4) the
23 value of the information to him and to his competitors; (5) the
amount of effort or money expended by him in developing
24 the information; (6) the ease or difficulty with which the
information could be properly acquired or duplicated by
25 others.

26 Restatement (First) of Torts § 757 cmt. b (1939).

27 Here, the Court finds that FC’s formula qualifies as a trade secret. Plaintiffs have
28 taken substantial steps to ensure that the formula remains secret, and aver that only the

1 two Sugg brothers know FC's components and formula.⁵ *See Enter. Leasing Co.*, 197
2 Ariz. at 150 ("the most important factor in gaining trade-secret protection is
3 demonstrating that the owner has taken such precautions as are reasonable under the
4 circumstances to preserve the secrecy of the information."). Plaintiffs also derive
5 significant economic value from FC's formula because it gives them a competitive
6 advantage in the gun lubricant industry. If that formula became public knowledge, then
7 Plaintiffs' competitors would be able to produce a same or similar product and effectively
8 ruin Plaintiffs' business.

9 While Defendant argues that Plaintiffs have already publically revealed FC's
10 formula in their patent application,⁶ Plaintiffs' patent application does not actually
11 disclose the formula nor any of the specific ingredients used in FC— it provides a list of
12 16 oils and states that FC is comprised of a three-oil blend, but does not specify which
13 oils or their percentages. *See W.L. Gore*, 872 F.Supp.2d at 899 ("Disclosure of a trade
14 secret in a patent places the information comprising the secret into the public domain and
15 eliminates trade secret protection" (internal quotations and citation omitted)).

16 The Court also finds it significant that in the Fennell action, the Virginia court
17 found that Plaintiffs had sufficiently established that FC's formula is a trade secret. (Doc.
18 65 Ex A).⁷

19 ...

20
21 ⁵ Plaintiffs state that FC has "kept secret the formula of its product, the sources of
22 its components, the methods involved in producing and bottling it, and many of the
23 research and development efforts used to develop the product." (Doc. 65 at 5). Edward
24 Sugg declared that FC's formula is not publically available and that he and his brother are
25 the only two individuals who know the formula and have gone to great lengths to protect
26 it. (Doc. 51 Ex. A at ¶¶ 6–8).

27 Plaintiffs further state that they have "worked diligently to protect their trade
28 secrets because the greatest asset the company has is its product[,] . . . [and i]f the
formulation became public knowledge, or if the company voluntarily discloses it, the
harm to the company would be disastrous." (Doc. 65 at 7).

⁶ See n. 2 above

⁷ Plaintiffs note that in that case, the court denied Fennell's motion to compel
disclosure of FC's formula, and further denied Fennell's two subsequent motions for
reconsideration. (Doc. 65 at 8).

1 Plaintiffs also argue that Defendant does not need to know FC's formula,
2 components, or vendors in order to prepare his case for trial because Dr. Davis's report
3 establishes that scientific testing can be used to make comparisons between FC and other
4 commercially available oils, and therefore revealing FC's specific ingredients or
5 percentages is unnecessary for a factfinder to assess whether it is true or false that FC is
6 the same as canola or soybean oil. (Doc. 65 at 10; Doc. 61 Ex. B).⁸ Plaintiffs state that
7 they have already disclosed test results to Defendant showing that FC is not the same or
8 substantially the same as canola or soybean oil, and argue that Defendant does not need
9 FC's formula in order to confirm or challenge those results. (Doc. 65 at 12; Doc. 61 Ex.
10 D at 44). Plaintiffs also state that they can disclose the fatty acid percentages of FC's
11 components and are willing to do so with a protective order in place. (Doc. 61 Ex. B).

12 Finally, Plaintiffs note that if Defendant's argument to the jury is that his
13 statements were referring to FC as a blend of plant-based oils, then he already has
14 admissions and evidence of that fact and he does not need FC's formula to present that
15 theory to the jury. (Doc. 65 at 12–13).

16 From Defendant's perspective, there is no material difference as to whether his
17 comment that FC was probably just vegetable oil was referring to a single oil or to an oil
18 blend; the point is that Plaintiffs misrepresented the revolutionary nature of their product
19 by falsely suggesting that it is different from common vegetable oil. (Doc. 61 Ex. A; Doc.
20 67 at 3–4).⁹ Thus, Defendant believes he is entitled to pursue discovery showing that FC
21 contains vegetable oil of any kind, from any brand. (Doc. 67 at 2). Defendant further
22 argues that the issue of where Plaintiffs purchased their ingredients is relevant to his
23 claim that Plaintiffs have taken a product commonly used in one sphere and introduced it

24
25 ⁸ In their response to Defendant's discovery request, Plaintiffs included a
26 declaration from Dr. Davis from the Fennell litigation wherein he opined that it was not
27 necessary to know FC's specific formula in order to conduct chemical comparison of FC
28 to Crisco or generic canola or soybean oil. (Doc. 61 Ex. D Attach. 1).

⁹ Defendant further argues that "Plaintiffs' admission that FIREClean is 'at least
99% vegetable oil' should be (and likely will be) largely dispositive of their claims as a
matter of law." (Doc. 61 at 4). However this issue is not relevant to the present motions
and is more appropriately addressed in a motion for summary judgment.

1 to another sphere—specifically, Defendant believes that Plaintiffs are purchasing jugs of
2 generic canola and other oils from Restaurant Depot and repacking them. (Doc. 61 at 14).

3 While both parties make strong arguments regarding relevance and necessity, to
4 paraphrase the court in *In re Remington*, discovery should be denied unless Defendant
5 establishes the relevance of FC’s trade secret formula to his case, demonstrates a true
6 need for the information, and shows that the potential harm to Plaintiffs is outweighed by
7 his need for discovery. 952 F.2d at 1033. The Court finds that Defendant has failed to
8 meet that burden here. For purposes of Defendant’s argument that FC is nothing more
9 than common vegetable oil used for cooking, Plaintiffs have already provided chemical
10 testing evidence that FC is not the same or substantially the same as canola or soybean
11 oil. Plaintiffs are also willing to disclose test results showing FC’s fatty acid composition,
12 and will provide samples of FC if Defendant would like to conduct further testing to
13 compare FC to other oils. Further, as Plaintiffs point out, if Defendant’s argument is that
14 his statements were referring to FC as a blend of plant-based oils and not just a single oil,
15 then Defendant already has evidence to support this argument in the form of Plaintiffs’
16 patent application describing FC as a blend of at least three plant-based oils as well as
17 Plaintiffs’ answer to Interrogatory No. 1.

18 *c. Weighing the harm of disclosure to Plaintiffs against the*
19 *harm of withholding the information from Defendant*

20 If the party seeking discovery establishes that the information is relevant and
21 necessary, the Court “must then weigh the risk of disclosure of the trade secret to
22 unauthorized parties with the risk that a protective order will impede prosecution or
23 defense of the claims.” *Trevino*, 232 F.R.D. at 617; *see also In re Remington*, 952 F.2d at
24 1032 (“the court must weigh the injury that disclosure might cause to the property against
25 the moving party’s need for the information.”).

26 Assuming for the sake of argument that Defendant has shown relevance and
27 necessity, requiring Plaintiffs to disclose FC’s ingredients and formula would
28 undoubtedly cause great harm to Plaintiffs. FC is the only product Plaintiffs produce, and

1 if the formula were to become public knowledge, Plaintiffs could effectively be forced
2 out of business if their competitors produced a copycat product at a lower price point. On
3 the other hand, if the Court does not compel Plaintiffs to disclose FC's ingredients and
4 percentages, then it may be more difficult for Defendant to prove his allegation that FC is
5 nothing more than common vegetable oil because Defendant may have to conduct further
6 chemical testing to compare FC to other plant-based oils. However, Plaintiffs state that
7 they have already provided testing results to Defendant showing that FC is not the same
8 or substantially the same as soybean or canola oil, and further state that they are willing
9 to disclose additional testing showing FC's fatty acid composition.

10 While both parties have compelling interests in this case, the Court finds that
11 Plaintiffs' interest in maintaining the secrecy of their only product outweighs Defendant's
12 interest in knowing FC's exact ingredients and formula. Further, the Court is not
13 convinced that a protective order will adequately protect the trade secret information in
14 this case. Given Plaintiffs' allegations that Defendant has aided and abetted George
15 Fennell, one of Plaintiffs' competitors, in attempting to expose FC's formula, and that
16 Defendant has previously published court documents on his blog, there is a risk that
17 Defendant will disclose Plaintiffs' trade secret information to others outside of this
18 litigation. Defendant's response that Plaintiffs would be able to file suit for trade secret
19 infringement does little to assuage the economic harm that Plaintiffs would suffer should
20 FC's formula be revealed. *See In re Remington*, 952 F.2d at 1033 ("for once the
21 information is wrongfully released, the trade secret is lost forever and no sanction
22 imposed on the violator can retrieve it.").

23 2. Conclusion

24 Accordingly, based on the foregoing analysis, the Court finds that Plaintiffs should
25 be required to fully respond to Defendant's Interrogatory No. 1 because this interrogatory
26 only requires Plaintiffs to state what percentage of FC is and is not vegetable oil and does
27 not seek any confidential or trade secret information such as FC's exact formula or the
28 specific percentage of each oil in the formula. Further, Plaintiffs' answer to Interrogatory

1 No. 1 does not require that they admit or agree with Defendant’s position as to the
2 meaning of his allegedly defamatory statements. As to Interrogatories No. 2 and No. 3,
3 the Court finds that the information requested qualifies as a trade secret and that a
4 protective order would not be adequate in this case to prevent unauthorized disclosure of
5 the information. Plaintiffs are therefore not required to respond to Interrogatory No. 2 or
6 No. 3.

7 C. Document Request

8 Defendant’s first document request asks Plaintiffs to produce a copy of their
9 settlement agreement with Mr. Fennell from the Virginia action. Defendant maintains
10 that the agreement is relevant under A.R.S. § 12-2504 because Plaintiffs allege Defendant
11 conspired with Fennell. (Doc. 61 at 16). Defendant contends that the statute clearly
12 applies because Plaintiffs are alleging that Defendant acted in concert with Fennell and
13 that he is jointly and severally liable for at least some of Fennell’s conduct.

14 Plaintiffs argue that they are contractually obligated to keep the settlement
15 agreement confidential and that judicial and public policy interests favoring
16 confidentiality support keeping the information secret. (Doc. 65 at 15). Plaintiffs further
17 argue that A.R.S. § 12-2504 does not apply to Plaintiff’s aiding and abetting claim
18 because the statute is specific to joint and several liability, which Plaintiffs are not
19 alleging, and because it requires “acting in concert,” which is a greater showing than
20 aiding and abetting. *Id.* at 16. Finally, Plaintiffs argue that even if the statute did apply
21 here, the only relevant information from the settlement agreement is the settlement
22 amount, and that would only be relevant if judgment is entered against Defendant for the
23 aiding and abetting claim. (Doc. 65 at 17).

24 1. Law

25 Pursuant to the Uniform Contribution Among Tortfeasors Act, “[i]n an action for
26 personal injury, property damage or wrongful death, the liability of each defendant for
27 damages is several only and is not joint, except as otherwise provided in this section.”
28 A.R.S. § 12-2506(A). Section 12-2504 governs joint and several liability in cases of a

1 release or covenant not to sue:

2 If a release or a covenant not to sue or not to enforce
3 judgment is given in good faith to one of two or more persons
4 liable in tort for the same injury or the same wrongful death
5 both of the following apply:

6 1. It does not discharge any of the other tortfeasors from
7 liability for the injury or wrongful death unless its terms so
8 provide, but it reduces the claim against the others to the
9 extent of any amount stipulated by the release or the covenant
10 or in the amount of the consideration paid for it, whichever is
11 the greater.

12 2. It discharges the tortfeasor to whom it is given from all
13 liability for contribution to any other tortfeasor.

14 A.R.S. § 12-2504. However, while § 12-2504 has not been abrogated, § 12-2506
15 subsequently abolished joint and several liability except in the following limited
16 circumstances:

17 D. The liability of each defendant is several only and is not
18 joint, except that a party is responsible for the fault of another
19 person, or for payment of the proportionate share of another
20 person, if any of the following applies:

21 1. Both the party and the other person were acting in concert.

22 2. The other person was acting as an agent or servant of the
23 party.

24 3. The party's liability for the fault of another person arises
25 out of a duty created by the federal employers' liability act,
26 45 United States Code § 51.

27 A.R.S. § 12-2506(D). The statute further defines "acting in concert" as:

28 [E]ntering into a conscious agreement to pursue a common
plan or design to commit an intentional tort and actively
taking part in that intentional tort. Acting in concert does not
apply to any person whose conduct was negligent in any of its
degrees rather than intentional. A person's conduct that
provides substantial assistance to one committing an
intentional tort does not constitute acting in concert if the
person has not consciously agreed with the other to commit
the intentional tort.

A.R.S. § 12-2506(F).

In contrast to "acting in concert," to "[a]id and abet means simply to encourage,

1 counsel, advise or assist in the commission of an act.” *Ramirez v. Chavez*, 71 Ariz. 239,
2 243 (1951). Thus, acting in concert requires a greater showing that the parties entered
3 into a conscious agreement, whereas aiding and abetting is a much lesser showing that a
4 party rendered assistance “by acts or words of encouragement or support.” *Id.*

5 2. Analysis

6 Assuming that Plaintiffs are contractually required to keep the settlement
7 agreement from the Virginia action confidential unless otherwise ordered by the Court,
8 the Court finds that Plaintiffs shall not be compelled to produce the settlement agreement
9 at this point in the litigation for the following reasons.

10 First, it is unclear at this juncture whether A.R.S. § 12-2504 will apply. Count Six
11 of Plaintiffs’ complaint states a cause of action for “aiding and abetting George Fennell’s
12 tortious conduct.” (Doc. 11 at 45). It does not directly state a claim for acting in concert
13 or joint and several liability. However, Count Six also alleges that “Mr. Fennell and Mr.
14 Tuohy agreed to help each other publish false and disparaging statements about the
15 Plaintiffs.” (Doc. 11 at 46 ¶342). Thus, Plaintiffs are arguably making a claim that
16 Defendant and Fennell acted in concert by “entering into a conscious agreement to pursue
17 a common plan or design to commit an intentional tort.” A.R.S. § 12-2506(F). However,
18 “[a] prima facie case under A.R.S. § 12–2506(D)(1) requires proof supporting the
19 conclusion that the parties made a conscious agreement to commit an intentional tort —
20 not a tort that involves merely negligence ‘in any of its degrees’—and actively took part
21 in the intentional tort.” *Mein ex rel. Mein v. Cook*, 219 Ariz. 96, 99 (Ct. App. 2008).
22 Thus, it is also possible that Plaintiffs will be unable to make this showing at trial and
23 therefore § 12-2504 would not apply.

24 Second, if a jury does find Defendant guilty of Count Six, and if the Court
25 determines that A.R.S. § 12-2504 does apply, then only the amount of the settlement
26 agreement between Plaintiffs and Fennell is relevant, not the entirety of the agreement.
27 Thus, there is no reason for Plaintiffs to produce a copy of the settlement agreement at
28 this point in the litigation.

1 Finally, the Court notes that there are strong public policy and judicial reasons that
2 support keeping settlement agreements confidential. *See Kalinauskas v. Wong*, 151
3 F.R.D. 363, 365 (D. Nev. 1993) (“Confidential settlements benefit society and the parties
4 involved by resolving disputes relatively quickly, with slight judicial intervention, and
5 presumably result in greater satisfaction to the parties. Sound judicial policy fosters and
6 protects this form of alternative dispute resolution.”). While Defendant notes that “the
7 pro-settlement posture of the federal courts does not absolutely shield settlement
8 agreements from disclosure[,]” it is also true that the federal courts have a “policy of
9 encouraging settlements by safeguarding the confidentiality of settlement agreements.”
10 *Abbott Diabetes Care Inc. v. Roche Diagnostics Corp.*, 2007 WL 4166030, at *4 (N.D.
11 Cal. Nov. 19, 2007). Further, in *Abbott* the court specifically noted that in order to protect
12 the parties’ confidentiality interests, the agreement would be redacted to disclose only
13 those portions of the agreement that were directly relevant. *Id.* Thus, should the Court
14 determine that § 12-2504 does apply here, the Court will order redaction of the agreement
15 to disclose only the settlement amount.

16 **IV. Conclusion**

17 Accordingly, based on the foregoing, **IT IS HEREBY ORDERED:**

- 18 1) Plaintiff’s Motion for Protective Order (Doc. 51) is granted.
19 2) Defendant’s Motion to Compel (Doc. 61) is granted in part to the extent that
20 Plaintiffs are hereby ordered to fully respond to Defendant’s Interrogatory No. 1.
21 The remainder of the motion is denied.

22 Dated this 17th day of April, 2018.

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26 
Eric J. Markovich
United States Magistrate Judge