UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	Civil Action No. 05 C 5140
Plaintiff,	)	
	)	Judge Filip
v.	)	
	)	Magistrate Judge Denlow
NATIONAL ASSOCIATION OF REALTORS	)	
	)	
Defendant.	)	

UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF PROTECTIVE ORDER

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SUMMARY

The United States moves, pursuant to Rule 26(c)(7) of the Federal Rules of Civil Procedure, for a protective order governing use of confidential information in this action. The order would allow third parties to protect legitimately confidential information produced in discovery in this litigation. The order proposed by the United States permits third parties to designate confidential information they believe needs protection, but also requires those parties to defend their designations when challenged. Such an order will ensure that the litigation proceeds efficiently, as targets of discovery will be able to produce information without repeatedly seeking protection from this Court. A protective order will also put those parties on notice that, because of the public interest in court filings and court proceedings being open to the public, they will need to make a clear showing as the litigation proceeds to justify continued protection of any materials that are used by the parties.

Defendant National Association of Realtors ("NAR") has refused to agree to a reasonable and workable protective order, arguing alternatively that no order is necessary, or that it is appropriate for competitively sensitive information to be shared with brokers who serve on NAR's principal governing body. For the reasons described below, the United States moves this Court to enter its proposed protective order, submitted with this motion.

FACTUAL BACKGROUND AND STATUS

In this case, the United States challenges rules adopted by NAR – an association of competitors – that favor NAR's traditional, brick-and-mortar members and discriminate against innovative brokers who compete by using the Internet to provide consumers better brokerage services at a lower cost. NAR adopted a policy that provides brick-and-mortar brokers with the

power to inhibit the growth of Internet-based business models. *See Austin Board of Realtors v. E-Realty, Inc.*, No. Civ. A.00-CA-154 JN, 2000 WL 34239114 (W.D. Tex. Mar. 30, 2000) (explaining the market, the services involved, and the potential for harm if innovative competition is suppressed). NAR is formally governed by a several-hundred-person board of directors, but is led, as a practical matter, by a "Leadership Team" of NAR member brokers holding its top elected offices. Several of these officers are currently affiliated with real estate brokerages, *see* Declaration of David C. Kully ("Kully Decl.") ¶ 4, and thus may compete with innovative competitors and established competitors from whom confidential information has been or will be sought.

In the course of its pre-complaint investigation, the United States obtained confidential business information from various entities. It did so in many cases pursuant to the Antitrust Civil Process Act ("ACPA"), 15 U.S.C. §§ 1311-14. The ACPA allows the United States' Antitrust Division to issue civil investigative demands ("CIDs") to firms for documents and information relevant to the investigation. The statute limits the Antitrust Division's freedom to disclose this material until litigation begins. Even then, because disclosure in litigation of such materials may cause third-party CID recipients to be less cooperative with the Division in the future, it is the Antitrust Division's policy to seek a protective order that preserves the defendant's right to obtain discovery, while also protecting third parties by denying access by the defendants' business personnel to competitively sensitive documents from competitors. The Division also works to ensure that affected third parties have an opportunity to obtain further protection from the court for any of their confidential material they believe is inadequately safeguarded by the protective order.

As a threshold matter, it is important to note that the United States' motion and its proposed protective order recognize the important distinction between discovery materials, which are not ordinarily filed with the court,[1] and materials that become part of the public record in this case. *See Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545 (7th Cir. 2002) (drawing a distinction between materials generated by pretrial discovery and materials that are in the public record because they form part of the judicial decision-making process). The proposed order would establish procedures under which third parties could protect materials that the United States collected during its pre-complaint investigation and those obtained by both parties during pretrial discovery. It also establishes procedures to govern the use and disclosure of information in court filings and at trial, while ensuring that third parties receive notice prior to such disclosure.

This motion follows the United States' attempt to reach agreement with defendant NAR on a stipulated protective order. In the discussion that follows, the United States will address three topics it believes most likely to be contentious: disclosure of information to competitors, notification before disclosure to experts and consultants who are competitors, and the treatment of designated material that becomes part of the Court's record.

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[1] The local rules of the Northern District of Illinois prohibit the filing of discovery materials as part of the public record except as evidence. L.R. 26.3. *See also* Fed. R. Civ. P. 5(d) (providing that certain discovery materials shall not be filed with the Clerk of the Court until used in the proceeding or the court orders filing).

ARGUMENT

A. <u>There is Good Cause for a Protective Order.</u>

The Court may issue an order protecting trade secrets and other confidential research, development, or commercial information ("business confidential information") upon a showing of "good cause." Fed. R. Civ. P. 26(c)(7). This protection can prevent disclosure or allow for it only in a designated way. A court may enter "any order which justice requires." *Id.*

Good cause "generally signifies a sound basis or legitimate need to take judicial action." *Hobley v. Chicago Police Commander Burge*, 225 F.R.D. 221, 224 (N.D. Ill. 2004) (finding good cause to enter a protective order), *citing Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997). Good cause may be established by "showing that the disclosure will cause a clearly defined and serious injury." *Id., citing Felling v. Knight*, No. IP 01-0571-C-T/K, 2001 WL 1782360, at *2 (S.D. Ind. Dec. 21, 2001).

In determining whether there is good cause for a protective order, the court must balance the interests involved. *Doe v. Marsalis*, 202 F.R.D. 233, 237 (N.D. Ill. 2001). A court should "weigh fairly the competing needs and interests of parties affected by discovery." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984); *see also Beauchem v. Rockford*, No. 01-C50134, 2002 WL 1870050, at *2 (N.D. Ill. Aug. 13, 2002) (comparing the parties' hardship and "giving more weight to interests that have a distinctively social value than to purely private interests").

The facts here establish the existence of competitively sensitive information and the "good cause" necessary for a protective order. While the United States itself is not the entity in need of protection, it seeks this order on behalf of third parties who have produced confidential business information during the pre-complaint investigation and who have expressed concerns

about maintaining the confidentiality of their documents because of concerns about the competitive harm they would suffer if their confidential information were disclosed to competitors. *See* Kully Decl. ¶ 3. It also seeks this order on behalf of third parties who will produce competitively sensitive information during this case.

Among the documents and information the United States has obtained or will seek – and NAR likely will seek as well – are the internal strategic plans of innovative competitors who, according to the complaint, have been disadvantaged in their efforts to compete with established brick-and-mortar brokers. Both parties also will likely seek discovery from established brokers concerning their cost structures, business plans, and other sensitive internal business information.

1. <u>Competitors, including members of NAR's Leadership Team, should not have access to competitively sensitive information.</u>

Absent a protective order, confidential information obtained by NAR through discovery from third parties could be shared with competitors of the producing entity, including competitors who serve on NAR's Leadership Team. *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994) ("Absent a protective order, parties . . . may disseminate materials . . . as they see fit."). This disclosure could injure both the competitor whose information is disclosed and the competitive process, which depends on allowing and encouraging firms to try to "steal a march" on their competitors. *See Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1388 (7th Cir. 1986) (Posner, J.).

The potential for competitive harm is easily foreseeable. *See Fieldturf Intern., Inc. v. Triexe Mgmt. Group, Inc.*, No. 03-C3512, 2004 WL 866494, at *3 (N.D. Ill. Apr. 16, 2004) (recognizing that "disclosure of confidential financial information to competitor[s] may cause a

party great harm" and limiting disclosure to outside counsel). Allowing members of NAR's Leadership Team access to the confidential business information of competitors, including detailed materials relating to Internet strategies, costs, online partnerships, and business plans, may seriously damage the competitive position of the producing company. *See, e.g., Doskocil Cos. v. C&F Packing Co.*, No. 89-C0600, 1989 WL 152808 (N.D. Ill. Nov. 20, 1989) (denying defendant's motion to modify protective order to disclose confidential documents to in-house personnel because of potential competitive harm); *see also Safe Flight Instrument Corp. v. Sundstrand Data Control, Inc.*, 682 F. Supp. 20, 21 (D. Del. 1988) (precluding party's president from accessing confidential documents as he "might (whether consciously or subconsciously) abuse the confidential . . . information revealed to [the producing entity's] competitive disadvantage. The potential for abuse [and] competitive loss is real").

The likelihood of economic injury is particularly high with these innovative new competitors who have or will produce documents in the case, and who may be vulnerable to the competitive reactions of the brokers who serve in NAR's leadership. NAR's current president, for instance, is a Senior Vice President in the nation's largest brokerage, NRT, Inc., which operates brokerage offices in over thirty-five of the largest cities in the United States. (NRT is owned by Cendant Corporation, which also operates as a real estate franchisor, controlling the Century 21, Coldwell Banker and ERA brands.) Other members of NAR's Leadership Team are also affiliated with real estate brokerages. *See* Kully Decl. ¶¶ 4-5. Third parties with discoverable information, thus, may be competitors of brokers who participate on NAR's Leadership Team. These third parties have a legitimate concern about the disclosure of their most sensitive documents to these individuals.

The disclosure of innovative brokers' strategic business plans to their competitors could seriously and predictably undermine their ability to carry out those plans. The competitors to whom this sensitive information would be disclosed would have an opportunity to usurp creative ideas, to forestall new competition, or otherwise to use the innovative brokers' information to their advantage.

2. <u>NAR's employees should not have access to competitively sensitive information.</u>

Because NAR itself also participates in some aspects of the real estate marketplace through its official website, Realtor.com, the disclosure of some confidential information to NAR employees could also result in harm to third parties who have produced or will produce documents in this case. NAR's website, which advertises homes for sale in markets nationwide, competes with real estate franchisors – recipients of CIDs from the United States and likely sources of discovery in this case – for contracts with web entities such as AOL or Yahoo. *See* Kully Decl. ¶ 3. The disclosure to NAR of the terms of these franchisors' deals with third-party Internet portals would provide NAR with an unfair advantage in subsequent competition for renewal or renegotiation of those deals. Because of similar concerns, the Seventh Circuit Court of Appeals in *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.,* affirmed the entry of a protective order restricting the plaintiff hospitals' access to the confidential price data of their customer, a health insurance company. 784 F.2d 1325, 1345-46 (7th Cir. 1986). The court recognized that the plaintiff could "use [the price data] to advantage in the next round of negotiations." *Id*. at 1346; *see also Akzo N.V. v. U.S. Int'l Trade Comm'n*, 808 F.2d 1471, 1483 (Fed. Cir. 1986) ("Obviously, where confidential material is disclosed to an employee of a

competitor, the risk of the competitor's obtaining an unfair business advantage may be substantially increased.").

3. A protective order will ensure an efficient discovery process.

Providing inadequate protection for third-parties' confidential information at the discovery stage would discourage third parties from cooperating with discovery in this litigation. Ensuring "[c]onfidentiality while information is being gathered not only protects trade secrets but also promotes disclosure: parties having arguable grounds to resist discovery are more likely to turn over their information if they know that the audience is limited and the court will entertain arguments focused on vital knowledge that a party wants to use later." *In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992) (discussing justifications for protective orders in civil cases).

B. The Court Should Adopt the United States' Proposed Two-Tiered System to Protect Confidential Information from Disclosure to Competitors.

The protective order proposed by the United States addresses these concerns through its adoption of a commonly used two-tier designation system for confidential materials under which the most sensitive documents can be disclosed to outside counsel and two designated members of inside counsel, but not to business people or competitors. The United States' proposed protective order allows third parties to designate discovery materials as "Confidential" or "Highly Confidential."[2] Material designated as "Highly Confidential" could be disclosed to the

[2] "Confidential Information" means any trade secret or other confidential research, development, or commercial information, as such terms are used in Fed. R. Civ. P. 26(c)(7). "Highly Confidential Information" means any Confidential Information that the protected person reasonably believes to be so competitively sensitive that the Protected Person could suffer competitive harm if such information were disclosed to broker members who participate on defendant's governing bodies or to non-lawyer employees of defendant. (Proposed Protective Order ¶¶ 1(a), (d).)

United States and defendant's outside counsel, two of defendant's in-house attorneys, those who have had prior lawful access to the materials, and testifying or consulting experts other than competitors. (Proposed Protective Order ¶ 12.) Material designated as "Confidential" also could be disclosed to a broader group of individuals, including to NAR's entire Leadership Team. (Proposed Protective Order ¶ 13.)

1. <u>The protections proposed by the United States are no broader than those adopted in similar cases, and are consistent with this Court's practices</u>.

Protective orders frequently limit the disclosure of confidential material to outside attorneys only.[3] The United States' proposal is less restrictive than those orders, and is comparable to orders entered in other antitrust cases. *See, e.g., United States v. Oracle Corp.*, No. C04-0807-VRW (N.D. Cal. Apr. 13, 2004) (Highly Confidential material disclosed to two designated in-house counsel), *available at* http://www.usdoj.gov/atr/cases/f203200/203260.pdf; *United States v. Visa U.S.A., Inc.*, 98 Civ. 7076 (S.D.N.Y. Dec. 11, 1998) (disclosure of confidential material to "two specifically identified in-house counsel for each of the defendants"), *available at* http://www.usdoj.gov/atr/cases/f2100/2128.htm.

The United States' proposed order is also consistent with the law in this circuit and this Court's procedures.[4] The United States' proposed order is general enough to meet the needs of

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[3] *See, e.g., United States v. UPM-Kymmene Oyj*, No. 03-C2528 (N.D. Ill. Apr. 21, 2003) (Zagel, J.) (outside counsel only), *available at* http://www.usdoj.gov/atr/cases/f209600/209687.pdf; *OHM Res. Recovery Corp. v. Industrial Fuels & Res., Inc.*, No. S90-511, 1991 WL 146234, at *5 (N.D. Ill. July 24, 1991) (outside counsel only); *United States v. Dentsply Int'l, Inc.*, 187 F.R.D. 152, 161 (D. Del. 1999) (finding in antitrust case "unacceptably high risk of either utilization or inadvertent disclosure of confidential information [by in-house counsel] to the severe detriment of nonparties").

[4] *Case Mgmt. Procedures*, Presumption of Public Access to Court Filings, *available at* http://www.ilnd.uscourts.gov/JUDGE/FILIP/mfpage.htm (*citing Jepson, Inc. v. Makita Elec.*

most persons with genuinely confidential information, but specific enough to assist the Court and the parties by "winnow[ing] out properly confidential information" and establishing procedures to minimize the burden on the Court, the parties, and third parties. *Plair v. E.J. Brach & Sons, Inc.*, No. 94-C244, 1996 WL 67975, at *5 (N.D. Ill. Feb. 15, 1996).

The United States' order permits third parties – those in the best position to do so – to designate confidential information in a way appropriate for pretrial discovery. These designations must be made in "good faith." (Proposed Protective Order ¶¶ 2-3.) Yet the order explicitly allows either party to challenge the designation of particular documents "at any time" and requires third parties to defend their designations when challenged. (Proposed Protective Order ¶¶ 9-10.)

2. NAR's apparent alternative would be ineffective and unworkable.

In the United States' attempt to reach agreement with NAR on the terms of a proposed order to present to the Court, NAR has opposed the United States' proposal as providing insufficient access to confidential information to NAR's Leadership Team. Broadening disclosure of confidential business materials to defendant's Leadership Team, however, raises serious competitive concerns "because of the certainty that the information would in fact be obtained by the competitor and the obvious likelihood of competitive injury." *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 29 (E.D. Mich. 1981).

NAR now appears to agree, however, that broker members of its Leadership Team who compete with parties producing documents should not have access to the producing entities'

Works, Ltd., 30 F.3d 854, 859 (7th Cir. 1994)); *Case Mgmt. Procedures*, Protective Orders, *available at* http://www.ilnd.uscourts.gov/JUDGE/DENLOW/mdpage.htm. The proposed order contains the provisions mandated in these procedures.

confidential materials. But rather than accept the United States' proposal, NAR has suggested a system under which documents can be disclosed to the particular members of the Leadership Team who do not compete with the producing entity. Under NAR's suggested approach (as the United States understands it), NAR would decide which members of its Leadership Team compete with a producing entity, and would disclose that producing entity's documents to the Leadership Team members NAR deems to be noncompetitors (without notice to the producing entity).

NAR's proposed system would be unworkably complex. Because Defendant's proposal encompasses disclosure to as many as thirteen people, there are hundreds of possible combinations of restrictions that could be applied to different documents (*e.g.*, some documents could be disclosed to twelve people but not Mr. A; some could be disclosed to ten people but not Ms. B, Mr. A, or Ms. C; and so on). Presumably each document would have to have a separate marking of those to whom disclosure is prohibited. Because the composition of NAR's Leadership Team changes each year, the complex process would have to be revisited annually.

NAR's system would also likely be ineffective. The complexity increases the likelihood of mistaken disclosures to competitors. Moreover, the staggered disclosures might themselves reveal confidential information to the individual from whom a particular entity's documents were withheld. If a producing entity's document would reveal, for example, that entity's intention to enter the Tulsa market, then the meaning could be quite plain when the document is handed out to all Leadership Team members – except the one who operates in Tulsa.

3. <u>The United States' proposed protective order will ensure that litigation proceeds efficiently.</u>

In contrast, the United States' proposed order ensures the efficient functioning of the pretrial processes. Rule 1 of the Federal Rules of Civil Procedure requires the Rules to be construed "to secure the just, speedy, and inexpensive determination of every action." *See Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545 (7th Cir. 2002) (noting that "broad secrecy agreement" to protect commercially sensitive information and expedite the process is appropriate at the discovery stage). *Cf. Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944-46 (7th Cir. 1999) (recognizing the public interest in all stages of a judicial proceeding, but in the context of criticizing an order that permitted sealing portions of the public record). The United States' approach means that serious confidentiality issues need be faced only when there are serious interests in conflict (*i.e.*, matters that one party wants to put before the Court) or challenges to specific designations.

C. <u>**The Court Should Adopt the United States' Proposed Procedures for Disclosure of Highly Confidential Information to Competitor-Experts**</u>.

Under the United States' proposal, if either party wished to disclose Highly Confidential materials to an expert or consultant who competes with the producing entity, notice must be given to that producing entity. The producing entity could then seek relief from this Court to limit the disclosure of its Highly Confidential discovery materials to the expert or consultant. Significantly, the proposed procedures would not require the party who retained the expert or consultant to disclose the expert's or consultant's name to its adversary in this litigation. (Proposed Protective Order ¶ 12(f).)

NAR objects to this proposal, suggesting that its ability to retain experts or consultants to assist it in this litigation would be unduly restricted if it could not disclose third parties' Highly Confidential documents to competitors without notifying the third parties. The United States' proposal protects the rights of third parties, both by giving them notice of the impending disclosure and the opportunity to resolve any dispute before the Court, and would not unduly prejudice or limit the ability of either party to litigate its case. *See, e.g., IP Innovation L.L.C. v. Thomson, Inc.*, No. 03-CV-0216-JDT-TAB, 2004 WL 771233, at *2-3 (S.D. Ind. Apr. 8, 2004) (Baker, J.) (denying party's motion to allow its competitor-expert access to "Highly Confidential" documents under a protective order); *United States v. UPM-Kymmene Oyj*, No. 03-C2528 (N.D. Ill. Apr. 21, 2003) (permitting disclosure to consultants or experts "provided they are not employed by or affiliated with a Defendant"), *available at* http://www.usdoj.gov/atr/cases/f209600/209687.pdf.

D. <u>The Court Should Adopt the United States' Proposed Procedures for Treatment of Confidential Material that Becomes Part of the Court's Record</u>

The United States' proposed protective order includes procedures to enable specific decisions on the treatment of confidential information submitted with court filings or used during trial. (Proposed Protective Order ¶¶ 17-18.) The proposed order establishes procedures to govern use and disclosure of previously confidential information included in court filings or submitted at trial, but provides the producing entities advance notice of that disclosure and an opportunity to work with the parties to resolve confidentiality concerns or to petition the Court for continued protection.

Through these procedures, the United States' order puts third parties fairly on notice that an additional factor must be considered in the balance at a later stage of litigation – the public's right to be informed about what the courts are doing. *Union Oil Co. v. Leavell*, 220 F.3d 562 (7th Cir. 2000). As discussed in *Baxter Int'l, Inc.*, the public interest in access to materials that form the basis of a judicial decision is greater than in other materials generated in the discovery process. 297 F.3d at 545. Thus it may be appropriate for a careful re-evaluation of any confidentiality claims at that point. *See, e.g., In re Bank One*, 222 F.R.D. 582, 592 (N.D. Ill. 2004) (unsealing "stale" documents in the court record where party unable to show continued good cause three years later). Establishing such procedures in the protective order now will clarify to third parties the protection that they are agreeing to accept by seeking protection under the order, and it honors this Court's (and this Circuit's) policies on treatment of confidential information that becomes part of the Court's record. *See Case Mgmt. Procedures*, Presumption of Public Access to Court Filings (*citing Jepson, Inc.*, 30 F.3d at 859 (when a party or a member of the public moves for relief from the order's limitations, the Court will engage in "an appropriate assessment of the interests between privacy and public access" to determine whether there is good cause to protect the challenged document(s)). Putting in place procedures in anticipation of these later stages ensures that third parties have notice and are not misled into thinking that all designated materials will necessarily be filed under seal without further consideration.

CONCLUSION

The United States has proposed a protective order that allows defendant's counsel and, with appropriate notification, its experts access to confidential materials, ensures that litigation proceeds efficiently, and establishes a workable procedure – with notice – for the treatment of designated matter that becomes part of the public record. Such restrictions on disclosure are routine in antitrust cases, where competitively sensitive information is obtained, and the proposed order appropriately balances the interests of the litigants, third parties, and the public.

Respectfully submitted,

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