UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. NORTHWEST AIRLINES CORP. and CONTINENTAL AIRLINES, INC. *Defendants.*	)	Civil Action No. 98-74611 Judge Denise Page Hood Magistrate Judge Scheer

UNITED STATES' OPPOSITION TO CROSS-MOTION OF NORTHWEST AIRLINES CORPORATION FOR ENTRY OF DEFENDANTS' PROPOSED PROTECTIVE ORDER

On April 9, 1999, the United States moved the Court for entry of a protective order limiting the disclosure of sensitive commercial information produced during discovery in this litigation. Defendant Northwest filed in opposition to the United States' motion and a cross-motion for entry of Defendants' Protective Order on April 16.

Although the two proposed protective orders are largely identical, three important issues remain in dispute:

(1) Access by defendants' employees to materials designated as Confidential and Highly Confidential - Under the Government's proposed order, materials designated as Confidential or Highly Confidential could not be disclosed to defendants' business employees. US Protective Order ¶¶ 8-9. Materials designated as Confidential could be disclosed to defendants' inside counsel. US Protective Order ¶ 8. Northwest proposes

that specified inside counsel and business employees have access to both Confidential and Highly Confidential materials. NW Protective Order ¶¶ 8-9.

(2) Use of confidential materials for law enforcement purposes - The United States' proposed order provides that, subject to taking steps to insure confidentiality, the Government may retain and use materials covered by the protective order for valid law enforcement purposes. US Protective Order ¶¶ 2, 22. Northwest opposes these provisions.

(3) Production of privileged materials - Northwest proposes establishing a blanket rule that production of privileged material does not constitute a waiver of the privilege. NW Protective Order ¶ 15. The United States does not believe that it is necessary or appropriate to overrule the existing law on waiver.

For the reasons set forth below and in United States' Memorandum Supporting Entry of Proposed Protective Order, the Court should enter the protective order proposed by the United States.

I. Access by Defendants' Employees and Inside Counsel to Competitively Sensitive Materials Should Be Strictly Limited

Northwest does not dispute that the much of the materials that have been or will be produced in connection with this litigation include sensitive commercial information. Nor does Northwest dispute that access by defendants' employees to the sensitive commercial information of competing airlines has the potential to cause serious competitive harm to the producing party. Northwest has not shown that disclosure of confidential materials to defendants' employees is necessary to its defense of this case, and, given the potential for competitive harm, disclosure of such materials should be limited as proposed by the United States.

A. Business Employees

Access by defendants' business employees to the confidential materials of competitors -- including materials relating to pricing strategies, business plans, and entry and exit decisions -- has the potential to cause grave competitive harm to the third parties producing materials in connection with this litigation. Companies producing materials to the United States in connection with the investigation leading to the filing of this case -- including the defendants -- stressed the competitively sensitive nature of these materials and requested that the Department of Justice maintain the confidentiality of their documents and information. Airlines receiving subpoenas in this litigation have expressed similar concerns.[1] Northwest effectively concedes the potential competitive harm from disclosure in suggesting that the Court only allow business employees access to material designated as Confidential, while limiting materials designated as Highly Confidential to "attorneys' eyes only."[2]

Northwest contends that it is necessary to disclose confidential materials to defendants' business employees in order to "analyze and interpret the complex discovery materials that will be produced in this case." Cross-Motion at 9. Without the ability to disclose confidential materials to employees with specialized knowledge, Northwest claims that it would be

[1] In addition to the subpoenas served by the United States, the defendants recently served a number of competing airlines with subpoenas calling for the production of documents relating to a number of competitively sensitive areas, including business strategies, pricing, costs, yield management, and profitability.

[2] Defendant Northwest Airlines Corporation's Opposition to Plaintiff's Motion for Entry of Protective Order and Memorandum in Support of Its Cross-Motion for Entry of Defendants' Proposed Protective Order (hereinafter "Cross-Motion") at 10 n.4. Under Defendants' Proposed Order, three designated business employees would have access to materials designated as Confidential and one designated business employee would have access to materials designated as Highly Confidential. ¶¶ 8-9.

prejudiced in its defense of this case. But Northwest fails to explain why the alternatives available to it under the protective order proposed by the United States are not adequate.

First, outside counsel and experts will have full access to all confidential materials. Northwest may hire economic consultants or industry experts (including former airline employees) with knowledge about the industry to assist in this litigation. Second, Northwest can obtain information necessary to analyze materials produced in discovery through depositions of persons with knowledge of the materials at issue. (Note that in both of these respects Northwest is in precisely the same position as the United States -- none of the attorneys litigating this case on behalf of the Government has ever been employed in the airline industry.) Finally, nothing in the United States' proposed protective order prevents Northwest's outside counsel and experts from consulting business employees to obtain industry information, provided they do not disclose confidential information. Northwest's generalized claim of a need to disclose confidential materials to business employees is insufficient to outweigh the potential competitive harm of such disclosure.

Requiring employees with access to confidential materials to sign acknowledgment forms is not, as Northwest argues, sufficient to protect the interests of the producing companies. Once defendants' employees have access to the confidential materials of their competitors such information cannot be unlearned. Even if employees act with the best of intentions they will naturally and inevitably take such information into account when making competitive decisions. See Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1471 (9th Cir. 1992). Such subtle, indirect use of confidential material will, as a practical matter, be impossible to detect and prove.

It is likewise inappropriate to place the burden on third parties to petition the Court to preclude disclosure of confidential information as Northwest proposes. Counter-Motion at 9-10. Such an approach invites multiple petitions for additional protection from other airlines, which will unnecessarily burden the Court and further delay discovery in this case.[3]

B. Inside Counsel

Disclosure of sensitive business information to the inside counsel of defendants, who frequently advise their companies on matters relating to competition, raises similar concerns about potential harm to producing parties. Recognizing that inside counsel generally do not have direct responsibility for competitive decisions, however, the United States' proposed protective order would allow inside counsel access to materials designated as Confidential. US Protective Order ¶ 8. The only dispute is whether inside counsel should also have access to Highly Confidential materials, as proposed by Northwest. NW Protective Order ¶ 9.

Determining whether inside counsel should have access to confidential materials "requires the district court to examine factually all the risks and safeguards surrounding inadvertent disclosure by any counsel, whether in-house or retained." Brown Bag, 960 F.2d at 1470. The appropriate test is not whether inside counsel has direct responsibility for business decisions (few do), but rather the particular inside counsel's involvement in "competitive decisionmaking," defined as "counsel's *advice and participation in any or all* of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor." U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468 n.3 (Fed. Cir.

[3] The United States' proposed protective order provides a mechanism for parties to challenge confidentiality designations of particular materials. US Protective Order ¶ 17. Northwest is thus free to seek disclosure of otherwise restricted materials to particular persons.

1984)(emphasis added); see also Sullivan Marketing, Inc. v. Valassis Communications, Inc., No. 93 CIV. 6350 (PKL), 1994 WL 177795 (S.D.N.Y.) at 3 (test is counsel's "specific involvement in competitive decisions")(attached as Exhibit 1).

The court in Sullivan, in denying access to inside counsel, noted that "[i]t is often difficult to draw the line between legal and business advice. Moreover, where advice on a seemingly legal issue such as an antitrust question is sought, counsel's intimate knowledge of a competitor's pricing policies would surely influence the nature of the advice given." Id. Similarly, in Brown Bag the court concluded that an inside attorney involved in "advising his employer on a gamut of legal issues, including contracts, marketing and employment" would necessarily become involved in matters relating to its competitors trade secrets and therefore denied the counsel access. 960 F.2d at 1471. In Carpenter Technology Corp. v. Armco, Inc., 132 F.R.D. 24, 27-28 (E.D. Penn. 1990), a case cited by Northwest, the court allowed an inside attorney who had "absolutely no involvement" in pricing, marketing, and product design to have access to confidential materials. The court refused, however, to permit disclosure to an inside counsel who appeared to have "some involvement, albeit probably small, with competitive decisions," including participating in contract negotiations that involved competitive issues. Id. at 28. See also Matsushita Electric Industrial Co., Ltd. v. United States, 929 F.2d 1577, 1579-80 (Fed. Cir. 1991)(allowing disclosure of competitively sensitive material to inside counsel whose primary responsibilities related to employee benefit plans).[4]

[4] Another important consideration in determining whether to allow access by inside counsel is the nature of the confidential information to be disclosed. The patent cases cited by Northwest involve highly technical scientific materials. E.g., Glaxo Inc. v. Genpharm Pharmaceuticals, Inc., 796 F. Supp. 872, 874 (E.D.N.C. 1992)(anti-ulcer drug ranitidine hydrochloride); Boehringer Ingelheim Pharmaceuticals, Inc. v. Hercon Laboratories Corp., 18

Northwest states that if inside counsel are allowed access to Highly Confidential materials that it would designate its Associate General Counsel, Peter B. Kenney, Jr., to review such materials. Cross-Motion at 6. Mr. Kenney[5] states in his declaration that he provides counseling and advice on antitrust matters, and indicates that, although he has no responsibility for business decisions, he is consulted concerning the legal implications of decisions involving "pricing, marketing, scheduling, or strategic planning." Kenney Declaration at ¶ 3. He further states that, as a result of his experience at Northwest, he has gained "specialized, technical knowledge" concerning the airline industry, Kenney Declaration at ¶ 4, presumably through extensive involvement with the Northwest employees responsible for competitively sensitive matters. While the precise nature of Mr. Kenney's role in competitive decision-making is unclear, his apparent involvement is sufficient to raise concerns about the potential for competitive harm from allowing someone in his position access to the confidential materials of Northwest's competitors. See Carpenter, 132 F.R.D. at 28. It is likely that any other inside counsel defendants specified to receive access to Highly Confidential materials would likewise be involved in advising their company on competitively sensitive matters.

U.S.P.Q.2d 1166 (D. Del. 1990)(skin patch that transdermally administers the drug clonidine). See also Safe Flight Instrument Corp. v. Sunstrand Data Control, Inc., 682 F. Supp. 20, 22 (D. Del. 1988)(allowing access to materials on wind shear detection systems to inside counsel but not inside aeronautical engineer). Here, third parties will be producing strategy documents and business plans. Disclosure of such materials to inside counsel raises much more serious competitive concerns than disclosure of the highly technical scientific materials, as inside counsel are rarely involved in technical research and development, but often participate in discussions involving pricing, marketing, and other competitively sensitive issues.

[5] Counsel for the United States has known Mr. Kenney for several years and has great respect for him professionally. The following discussion is not intended to impugn Mr. Kenney's integrity in any way, but merely to point out the potential risks of disclosing the confidential information of Northwest's competitors to someone in Mr. Kenney's position.

Northwest, as the party seeking disclosure of Highly Confidential material to inside counsel, bears the burden of showing that its need for such disclosure outweighs the potential competitive harm. See Hirsh, Inc. v. United States, 657 F. Supp. 1297, 1303 (C.I.T. 1987). For the reasons discussed above with respect to business employees, the protective order proposed by the United States, which allows outside counsel and experts complete access to confidential materials, is fully adequate to allow Northwest to prepare its defense. See Akzo N.V. v. International Trade Commission, 808 F.2d 1471, 1482-85 (Fed. Cir. 1986)(restrictions on disclosure to inside counsel did not violate due process rights). Furthermore, it is important to note that inside counsel will have access to some confidential materials -- those designated as Confidential pursuant to the protective order. If Northwest is correct that disclosure to inside counsel would be competitively benign, other airlines producing materials will presumably recognize this and designate materials as Confidential rather than Highly Confidential, thus permitting disclosure to inside counsel.

II. The Government Should Have the Ability to Retain and Use Confidential Materials for Valid Law Enforcement Purposes

The protective order proposed by the United States provides that the Government may retain and use confidential materials for valid law enforcement purposes. The Department of Justice is responsible for enforcing a wide range of federal laws in the public interest. 28 U.S.C. § 519. Through its lawyers, investigators, agents, and other personnel, the Department plays a key role in ensuring healthy business competition in a free enterprise system, in safeguarding the consumer, and in enforcing tax, civil rights, environmental, and immigration and naturalization laws. There is a strong public interest in effective and efficient law enforcement, and Northwest

has raised no principled objection to the Government's ability to retain and use confidential materials for law enforcement purposes.[6]

The protective order expressly provides that the Government must take appropriate steps to insure confidentiality. Contrary to Northwest's assertion that the Government will have a "blanket license to disseminate" confidential material, Cross-Motion at 13, the proposed protective order restricts use to valid law enforcement purposes, and (unless prohibited by law) requires the Government to notify the producing party of any such disclosure. Northwest has a valid interest only in preventing "disclosure of matters which are truly secret, where disclosure thereof will affect the operation of their business, but not their potential liability" for violations of the law. Cipollone v. Liggett Group Inc., 106 F.R.D. 573, 577 (D. N.J. 1985).

Northwest's suggestion that the Government should petition the Court for approval of any law enforcement use of confidential material is unworkable. Such a petition and any subsequent litigation over it may result in disclosure of the details of Government law enforcement actions, possibly compromising ongoing investigations, and would needlessly slow enforcement efforts, in some cases (for example, investigation of safety violations) with potentially serious harm to the public.

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[6] Northwest, in opposing the Government's ability to use such materials for law enforcement purposes relies almost exclusively on a single, unpublished, district court opinion. United States v. Epstein, 96 Civ. 8307 (DC), 1998 U.S. Dist. LEXIS 1772 (S.D.N.Y. Feb. 17, 1998). Epstein itself relies for the proposition that the Government may not use discovery materials for other law enforcement purposes on GAF Corp. v. Eastman Kodak Co., 415 F. Supp. 129, 132 (S.D.N.Y. 1976), a decision that was statutorily overruled, see 15 U.S.C. §§ 1311-12, see also United States v. GAF Corp., 596 F.2d 10,13 (2d Cir. 1979), and Martindell v. International Tel. & Tel. Corp., 594 F.2d 291 (2d Cir. 1979), a decision that has been criticized by a number of other Circuits, see In re Grand Jury Subpoena, 138 F.3d 442, 444-45 (1st Cir.), *cert. denied,* (1998)(and cases cited therein).

It is inappropriate for a protective order to restrict the use of discovery materials without a showing of good cause as required by Rule 26(c). See Sharjah Investment Co. (UK) Ltd. v. P.C. Telemart, Inc., 107 F.R.D. 81, 82-83 (S.D.N.Y. 1985). Northwest has failed to show good cause for the Court to subordinate the public interest in effective law enforcement to the interests of an individual party. See In re Grand Jury Subpoena, 138 F.3d 442, 445 (1st Cir. 1998).

III. The Non-Waiver Rule Proposed by Northwest is Unnecessary and Inappropriate

Northwest makes no persuasive argument -- and cites no law -- in support of its proposed rule that production of privileged material does not constitute a waiver. The United States believes that such a rule is inappropriate and that parties should retain the right to argue that privilege has been waived by disclosure. See Fox v. Massey-Ferguson, Inc., 172 F.R.D. 653, 671 (E.D. Mich. 1995).

Northwest's primary argument for its proposed rule is that adhering to existing law would require a series of "mini-trials" on waiver issues. Cross-Motion at 15. This is a red herring. Assuming parties exercise reasonable care in making their productions, few if any claims of inadvertent production will likely be made.[7] Furthermore, where the circumstances indicate that the production was clearly inadvertent, parties will likely simply return or destroy the requested materials rather than waste resources litigating the waiver issue.

[7] Northwest and Continental produced a large volume of documents in the investigation preceding this action and made no requests for the return of inadvertently produced privileged material. Northwest makes the peculiar argument that without its proposed rule it will be required to take significantly greater precautions to ensure no privileged material is produced, thus slowing production. Cross-Motion at 15. It is unclear why Northwest would not do its utmost to avoid producing privileged materials irrespective of the waiver rule.

While no-waiver provisions such as that proposed by Northwest are sometimes stipulated to by parties to litigation, the United States is aware of no case where such a provision was entered over the objection of a party.

CONCLUSION

For the reasons set forth above and in United States' Memorandum Supporting Entry of Proposed Protective Order, the Court should enter the protective order proposed by the United States.

Respectfully submitted,

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