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

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

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

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ISSUES PRESENTED

1. Whether a protective order pursuant to Fed. R. Civ. P. 26(c)(7) should be entered limiting disclosure of confidential commercial information produced in connection with this antitrust litigation. Specifically, whether defendants' business employees and inside counsel should be denied access to certain confidential materials produced in connection with this case.

2. Whether the United States, subject to taking appropriate steps to preserve confidentiality, may use confidential materials produced in the course of this litigation for other valid law enforcement purposes.

3. Whether it is appropriate for the Court to enter an order providing that production of privileged materials does not constitute a waiver of the privilege.

AUTHORITY FOR RELIEF SOUGHT

Cases

Ball Memorial Hosp. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325 (7th Cir. 1986)

Brown Bag Software v. Symantec Corp., 960 F.2d 1465 (9th Cir.), *cert. denied,* 506 U.S. 869 (1992)

Chemical and Indus. Corp. v. Druffel, 301 F.2d 126 (6th Cir. 1962)

F.T.C. v. Exxon Corp., 636 F.2d 1336 (D.C. Cir. 1980)

Waelde v. Merck, Sharp & Dohme, 94 F.R.D. 27 (E.D. Mich. 1981)

Fox v. Massey-Ferguson, Inc., 172 F.R.D. 653 (E.D. Mich. 1995)

Liberty Folder v. Curtiss Anthony Corp., 90 F.R.D. 80 (S.D. Ohio 1981)

United States v. CBS, Inc., 103 F.R.D. 365 (C.D. Cal. 1984)

United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 (E.D. Mich. 1954)

Statutes and Regulations

Antitrust Civil Process Act, 15 U.S.C. § 1311 *et seq.*

Antitrust Directive ATR 2710.1 (rev. April 17, 1992)

Rules

Fed. R. Civ. P. 27(c)(7)

I. INTRODUCTION

The United States has moved, pursuant to Rule 26(c)(7) of the Federal Rules of Civil Procedure, for a protective order to ensure that disclosure of confidential material produced by parties and non-parties in this proceeding is appropriately limited. The United States' proposed protective order ensures that sensitive commercial information is not disclosed to competitors. At the same time, the order affords the parties' outside counsel and experts full access to confidential materials and establishes a procedure for disclosure of confidential materials to potential and actual trial witnesses. Entry of the proposed protective order will make it possible to complete discovery in a timely and efficient manner and eliminate the need for the parties and the Court to deal with multiple requests for protective orders by third parties who have or will produce materials in connection with this matter.

On October 23, 1998, the United States filed a complaint against defendants Northwest Airlines Corp. ("Northwest") and Continental Airlines, Inc. ("Continental") alleging that Northwest's acquisition of voting control of Continental violates Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 7 of the Clayton Act, 15 U.S.C. § 18. The parties have filed a joint Rule 26(f) report and a proposed case management schedule, which is pending before the Court. Under the proposed schedule, April 2, 1999 was the last day for serving document requests and interrogatories. Pursuant to the proposed schedule, the United States and the defendants have been conducting pretrial discovery.

The United States submits this memorandum in support of its motion for a protective order to insure that access to, and use of, confidential commercial information that has been or will be produced by parties and non-parties is appropriately limited. This motion follows the

United States' attempt to reach agreement with the defendants on a stipulated protective order to be proposed to the Court for entry in this action.[1] Although the parties have reached agreement on many provisions of the protective order, there remain three significant areas of disagreement.

First, the United States has proposed a two-tiered designation system for sensitive commercial materials. Under the Government's proposed protective order, a person producing materials in connection with this litigation may designate commercial information as "Confidential" or "Highly Confidential."[2] Material designated as "Highly Confidential" could not be disclosed to any of the defendants' employees, including inside counsel. Material designated as "Confidential" could be disclosed to defendants' inside counsel (and their secretaries and paralegals), but not to their other employees. (Proposed Protective Order ¶¶ 8-9) Outside counsel and experts would have access to all confidential materials. In addition, a procedure would be established to provide for disclosure to actual or potential witnesses. (Proposed Protective Order ¶¶ 8(I), 9(h), 10) Defendants propose that their inside counsel and a

[1] The United States sent a draft protective order to counsel for the defendants on January 28, 1999. After repeated requests for the defendants' response to the draft, the United States informed the defendants on March 23 that if they did not cooperate in negotiating a stipulated order, the United States would seek entry of its proposed protective order by the Court. On March 25, the Northwest sent the United States a response to its proposal. Counsel for both defendants have stated that they could not agree with plaintiff on the three issues discussed below.

[2] "Confidential" means competitively sensitive business or financial information, or any trade secret or other confidential research, development or commercial information as defined in Rule 26(c)(7). "Highly Confidential" means confidential information that, if disclosed to the producing person's competitors, would materially affect that person's business, commercial or financial interests. Proposed Protective Order ¶ 1(k)-(l).

limited number of specified business employees have access to all confidential materials. (NW Draft ¶¶ 8-9)[3]

Second, the protective order proposed by the United States provides that, subject to appropriate restrictions on disclosure, the Government may retain and use confidential materials for other valid law enforcement purposes. (Proposed Protective Order ¶¶ 2, 22) Defendants object to these provisions.

Finally, the defendants propose including a paragraph in the protective order providing that production of privileged materials is not a waiver of privilege. The United States does not believe it is necessary or appropriate to overrule existing precedent on production of privileged materials. (NW Draft ¶ 15)

II. DISCUSSION OF DISPUTED ISSUES

A. Defendants' Business Employees and In-House Counsel Should Not Have Access to Sensitive Competitive Information

Rule 26(c)(7) provides that a court may enter a protective order requiring that "a trade secret or other confidential . . . commercial information not be revealed or be revealed only in a designated way." In deciding whether a protective order is appropriate, the court must weigh the harm that would result from disclosure and the need of the party seeking disclosure for access to the confidential material. Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1470 (9th Cir.), *cert. denied,* 506 U.S. 869 (1992). Where a case involves a large volume of confidential business materials, an "umbrella" protective order covering all of the confidential material

[3] Defendants' proposed draft protective order is attached as Exhibit 1. Subsequent to this draft, counsel for Northwest informed the Government that they would amend their proposed paragraphs 8(e) and 9(e) by deleting the language from "as may be agreed" to the end of the subparagraph and inserting "unless otherwise ordered by the Court."

produced by parties and non-parties may "'greatly expedite the flow of discovery material while affording protection against unwarranted disclosures.'" Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1123 n.19 (3d Cir. 1986)(*quoting* MANUAL FOR COMPLEX LITIGATION SECOND § 21.431 at 53 (1985)).

The airlines that produced documents and information in connection with the investigation leading to this case -- including the defendants -- all expressed concern about maintaining the confidentiality of their internal documents. Airlines receiving subpoenas in this case have already expressed similar concerns. Absent a protective order appropriately limiting disclosure of confidential materials, the Court and the parties will be forced to deal with multiple requests from third parties for orders to protect the confidentiality of their sensitive commercial documents. The United States' proposed protective order facilitates the parties' discovery of confidential commercial documents by generally limiting disclosure of such materials to the Court, the Department of Justice, the defendants' outside counsel, testifying and consulting experts, and, with appropriate restrictions, to actual and potential witnesses. Proposed Protective Order ¶¶ 8-9.

The nature of competition in the airline industry is a central issue in this case. Defendants and other airlines have or will produce documents and information relating to a number of the most competitively sensitive areas including pricing, costs, strategic planning, contracts with corporations and travel agents, and entry and exit decisions.[4] Broadening

[4] The Government has served interrogatories and document requests on the defendants and Rule 45 subpoenas on a number of competing airlines. In addition, the Government obtained documents from the defendants and a number of third parties during the investigation leading to the filing of this litigation. Defendants have served document requests on the United States calling for production of third party documents.

disclosure of such materials to the inside counsel and business employees of the defendants 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)(contrasting protective orders in antitrust suits with those in drug products liability cases).

First, allowing the defendants' business employees access to the confidential business information of competitors, including materials relating to pricing strategies, costs, and business plans, may seriously damage the competitive position of the producing company. See Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1345-46 (7th Cir. 1986)(restricting access to price data to outside counsel); Chemical and Indus. Corp. v. Druffel, 301 F.2d 126, 129 (6th Cir. 1962)(protective order designed to prevent disclosure of "any secret formulae or process" necessary to avoid irreparable damage). This is particularly true of the smaller new entrant carriers who have or will produce documents in the case, and who are highly vulnerable to the competitive reactions of larger carriers such as Northwest or Continental. Courts routinely provide greater protections to non-parties, particularly where, as here, the non-parties' confidential commercial information will be disclosed to direct competitors. See United States v. CBS, Inc., 103 F.R.D. 365, 368 (C.D. Cal. 1984). In order to adequately guard against competitive harm arising from disclosure of confidential information, it is appropriate for a court to "limit access to the requested information to [outside] counsel, and counsel's associates and employees (and thereby preclude disclosure to any of [the producing party's] competitors...)." Liberty Folder v. Curtiss Anthony Corp., 90 F.R.D. 80, 82-83 (S.D. Ohio 1981).

Second, disclosure of confidential commercial information to defendants' inside counsel raises similar competitive concerns. In-house counsel "stand in a unique relationship to the corporation in which they are employed. Although in-house counsel serve as legal advocates and advisors for their client, their continuing employment often intimately involves them in the management and operation of the corporation of which they are a part." F.T.C. v. Exxon Corp., 636 F.2d 1336, 1350 (D.C. Cir. 1980). Courts therefore frequently deny inside counsel access to confidential information where such disclosure presents competitive risks. Id. at 1349-51; Brown Bag Software, 960 F.2d at 1471. Defendants' inside counsel advise their companies in a wide range of competitively sensitive areas, and therefore third-party competitors producing documents must have the ability to designate materials that should be withheld from inside counsel as well as business employees.[5]

The potential competitive harm that may result from disclosure of sensitive competitive materials to defendants' employees and inside counsel far outweighs the need of the defendants for such disclosure. The proposed protective order allows the defendants' outside counsel and experts full access to Confidential and Highly Confidential materials, and provides a procedure for disclosing such materials to actual or potential witnesses. Such restrictions on disclosure are routine in antitrust cases, and will not hamper defendants' ability to prepare for trial in this case.

[5] Such restrictions on disclosure do not call into question the integrity of inside counsel, but merely recognize that as a practical matter a person cannot "lock-up trade secrets in his mind, safe from inadvertent disclosure to his employer once he had read the documents." Brown Bag Software, 960 F.2d at 1471.

B. The United States Should Be Allowed to Use and Maintain Discovery Materials for Law Enforcement Purposes

The Department of Justice is the chief law enforcement agency of the federal government, with primary responsibility to investigate and prosecute violations of the antitrust laws and other federal statutes. In addition, the Department works closely with other federal enforcement agencies. Under the proposed protective order, the United States would be permitted to retain and use relevant Confidential and Highly Confidential material to investigate and prosecute possible violations of federal law, and to make reports to appropriate executive branch officials.[6] The proposed protective order requires the Department to inform the producing party of such use of confidential materials (unless prohibited by law), and to take appropriate steps to insure confidentiality. (Proposed Protective Order ¶¶ 2, 22) Defendants object to these provisions.

It is understandable that the defendants might wish to hamper the Government's ability to investigate and prosecute violations of the law that might be revealed by materials produced during this litigation. Given that the Government will be required to take steps to maintain the confidentiality of such materials, however, they have no legitimate interest in preventing the United States from using confidential materials for valid law enforcement purposes.

The provisions in the proposed protective order are consistent with the regulations and statutes governing the Department of Justice's use of materials obtained during the course of its investigations and cases. Antitrust Division Directive ATR 2710.1 (rev. April 17, 1992) (Exhibit 2), promulgated pursuant to the Federal Records Act, 44 U.S.C. § 3101, *et seq.*, sets out five

[6] If the Department of Justice discovered evidence of safety violations, for example, that information could be shared with the Federal Aviation Administration.

criteria under which government attorneys are required to retain documents after the completion of an investigation or case. Two of these provisions contemplate that the Government will use retained materials for other law enforcement purposes:

> (b) The documents are relevant to a current or actively contemplated Department investigation or case ...
>
> ***
>
> (e) Copies of such documents will be of substantial assistance in the Division's continuing enforcement responsibilities ...

U.S. Department of Justice, Antitrust Division Directive ATR 2710.1 ¶ 13.b(3)(b), (e).

The Antitrust Civil Process Act, 15 U.S.C. § 1311, *et seq.*, which provides the Department authority to obtain documents and information in the course of civil investigations, specifically authorizes the Department to keep copies of documents obtained during civil investigations. 15 U.S.C. § 1313(e). The House Committee report to the Act stated that the public interest in consistent, evenhanded antitrust enforcement would be harmed if "the Division is immediately stripped of all such information once it closes an investigation." H.R. Rep. No. 94-1343 at 15 n.41, 1976 U.S. Code Cong. & Admin. News at 2610.

Similarly, in promulgating regulations to implement the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, which allows the Department to obtain documents and information in the course of merger investigations, the Department of Justice and the Federal Trade Commission rejected proposals to require the return of materials submitted pursuant to the Act. The antitrust enforcement agencies found that:

> Nothing in the language or legislative history of the Act appears to prohibit the use of data submitted under the Act for subsequent challenge to a reported acquisition or, in fact, *for any other law enforcement purpose*....To return the materials after the waiting period expires would seriously hinder law enforcement efforts.

43 Fed. Reg. 33,450 at 33,518 (July 31, 1978)(emphasis added).

Consistent with established Congressional mandates and Departmental policy, protective orders entered in antitrust cases brought by the Government routinely include provisions that allow the Department of Justice to retain and use confidential materials for law enforcement purposes.[7] Defendants can offer no principled objection to a protective order that protects the ability of the Department to carry out its continuing law enforcement obligations.

C. It is Inappropriate to Overrule the Established Law on Production of Privileged Documents

The defendants propose adoption of a rule that production of privileged material does not constitute a waiver of the privilege. The United States believes that it is unnecessary and inappropriate to overrule controlling legal precedent on production of privileged materials through the protective order.[8]

In this District, production of privileged documents may result in a waiver of the privilege. Fox v. Massey-Ferguson, Inc., 172 F.R.D. 653, 671-74 (E.D. Mich. 1995); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 464-65 (E.D. Mich. 1954). Determination of the waiver question requires an examination of the facts to determine whether the production was in fact inadvertent. Whether a waiver has occurred depends on a number of factors, including the reasonableness of precautionary measures taken to prevent disclosure, the number of inadvertent disclosures, the magnitude of disclosures, mitigation measures taken following

[7] Indeed, the provisions at issue here are virtually identical to provisions in the stipulated protective order entered in United States v. Airline Tariff Publishing Co. (D.D.C., entered April 21, 1993), in which both Northwest and Continental were parties.

[8] Defendants propose that upon a request for the return of any privileged material that was "inadvertently produced," parties would be required to return or destroy the material, and would be precluded from asserting that production of the material constituted a waiver of the privilege.

discovery of the disclosure, and the interests of justice. Fox, 172 F.R.D. at 671.[9] Under defendants' proposal, the Government and the Court would be precluded from inquiring into the facts and circumstances of the alleged inadvertent production as a means of determining whether there has been a waiver of privilege.

The Government agrees to be bound by the existing precedent on production of privileged materials in this District, which provides for appropriate challenge and review of claims of privilege. The Court should not set in place, over the Government's objection, a process that requires the return of documents without even allowing an inquiry into the facts and circumstances of the production.

III. CONCLUSION

The United States has proposed a protective order that appropriately limits the disclosure of material that a producing party or non-party designates as confidential. The order affords the parties' outside counsel and experts full access to confidential information and establishes a

[9] Other district courts in the Sixth Circuit have followed the same approach. See e.g., Edwards v. Whitaker, 868 F. Supp. 226, 228-29 (M.D. Tenn. 1994); Federal Deposit Ins. Corp. v. Ernst & Whinney, 137 F.R.D. 14, 17-18 (E.D. Tenn. 1991); Dyson v. Amway Corp., 17 U.S.P.Q.2d 1965 (W.D. Mich. 1990); Ranney-Brown Distributors, Inc. v. E.T. Barwick Indus., Inc., 75 F.R.D. 3 (S.D. Ohio 1977); but see Transportation Equipment Sales Corp. v. BMY Wheeled Vehicles, 930 F. Supp. 1187 (N.D. Ohio 1996); Resolution Trust Corp. v. First of America Bank, 868 F. Supp. 217 (W.D. Mich. 1994).

workable procedure for disclosure of confidential material to potential and actual trial witnesses. Accordingly, the Court should enter the United States' proposed protective order.

Respectfully submitted,

"/s/"

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