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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, et al., Plaintiffs, v. ORACLE CORPORATION Defendant.	CASE NO. C 04-0807 VRW Filed May 19, 2004 Hearing Date: May 21, 2004 at 9:00 AM **PLAINTIFFS' RESPONSE TO THIRD PARTIES' MOTION SUPPLEMENTING EXISTING PROTECTIVE ORDER**

RELIEF SOUGHT

Plaintiffs seek the Court's entry of an Order, pursuant to the Court's inherent supervisory powers and following the Court's suggestion at the May 15, 2004 conference, providing procedures for Third Parties to identify legitimate trade secrets and confidential business information to be sealed from public disclosure at trial, and in any motion, pleading, exhibit, or other paper filed with the Court. Plaintiffs oppose the motion filed by Siebel Systems, Inc.; Cap Gemini, FESCo, and Lawson Software (collectively "Filing Third Parties") as inconsistent with Ninth Circuit law. However, Plaintiffs support the appointment of Judge Charles A. Legge as a special master, and proposes procedures consistent with Ninth Circuit law for consideration by the Court.

ARGUMENT

Plaintiffs respond to the Filing Third Parties' Motion for Supplementing Existing Protective Order filed on May 10, 2004 to ensure that any adopted pre-trial and trial procedures comply with Ninth Circuit law and do not further disrupt either party's trial preparation. Plaintiffs recognize that many third parties are concerned about the treatment of their confidential business information in light of the Court's statements during the April 16, 2004 pre-trial conference. Several third parties have slowed down the production of documents or ceased production of documents altogether since that time. The Court can ensure that the pretrial process will proceed smoothly by establishing procedures now. Plaintiffs submit for consideration recommendations for trial procedures "to accommodate the legitimate confidentiality concerns of third parties." (Tr. at 8 (5/16/04)[1]

Plaintiffs recognize the strong presumption favoring the openness and transparency of the judicial process. See, Flotz v. State Farm Mutual Auto. Ins. Co., 331 F.3d 1122, 1134-1135 (9th Cir. 2003) (quoting Nixon v. Warner Communications, 435 U.S. 589, 598 (1978)). However, legitimate and identifiable confidential business information is routinely protected from public disclosure in civil trials.[2] Furthermore, the sealing or redacting of confidential information is the norm in civil antitrust trials.[3] The Plaintiffs are unaware of any antitrust merger trial—or its

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[1]Although part of the United States, the interests of the Department of Defense and the Department of Justice's Justice Management Division are the same as those of third party customers of HRM and FMS software, and their highly confidential information should be afforded the same protection.

[2]See, e.g., Flotz, 331 F.3d at 1137-38 (redacting medical and personnel information; directing district court to "specify sufficiently compelling reasons for maintaining a seal" over defendant's other proffered confidential financial information); In re Petroleum Prods. Antitrust Litig., 101 F.R.D. at 39 & 44 (listing refinery capacities, crude oil values, and past marketing plans; describing procedures for unsealing or continuing seal on certain documents); Pepsico, 46 F.3d at 31 (legitimate trade secrets); Home Box Office v. Am. Int'l Cablevision Inds., Inc., 26 F. Supp. 2d 606, 608 & 614 (S.D.N.Y. 1998) (sealing license fee documents, certain operations information, programming strategies, and customer surveys).

[3]See, e.g., Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1346 (7th Cir. 1986) (Easterbrook, J.) (sealing price information); Mark v. Valley Ins. Co., 275 F. Supp. 2d 1307 (D. Or. 2003) ("The redacted form of the Opinion and Order omits factual material of a

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accompanying dispositive motions and orders—where all trade secrets or confidential business information was unsealed or presented unredacted. The unsealing and public dissemination of such information would hinder the public interest by hindering the Government's and the States' ability to collect material evidence. Such a precedent would impede all future investigations, not just antitrust investigations. Cf. Center for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144, 151-52 (D.C. Cir. 2001); Dow Jones Co., Inc. v. FERC, 219 F.R.D. 167, 176 (C.D. Cal. 2003) (same).

There are several other reasons supporting the protection of confidential business information in the present case. The disclosure of confidential business information during antitrust trials could frustrate the antitrust laws' goal of preserving competition. Some of the confidential business information in this litigation may include detailed price, cost and quality information, the very information that antitrust law forbids competitors to exchange in highly concentrated markets. See, e.g., In re Baby Food Antitrust Litig., 166 F.3d 118 (3d Cir. 1999); Ball Mem'l Hosp., Inc., 784 F.2d at 1346 (citing General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 597 (7th Cir. 1984)); Areeda, Antitrust Law ¶ 2111.d.1 (2004). Second, by their very position as non-

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[3](...continued)
proprietary and confidential nature."); United States v. UPM-Kymmene Oyj, 2003-2 Trade Cases P 74,101 (N.D. Ill. July 25, 2003) (redacted memorandum and order issuing preliminary injunction); Hall v. United Airlines, Inc., 296 F. Supp. 2d 652, 678-80 (E.D.N.C. 2003) (creating procedure to seal competitively sensitive documents); United States v. Sungard Data Systems, Inc., 172 F. Supp. 2d 172 (D.D.C. 2001) (redacted version); FTC v. Swedish Match, 131 F. Supp.2d 151 (D.D.C. 2000) (same); United States v. Franklin Elec. Co., Inc., 130 F. Supp. 2d 1025 (W.D. Wis. 2000) (same); FTC v. Staples, 970 F. Supp. 1066 (D.D.C. 1997) (same); American Rockwool, Inc. v. Owens-Corning Fiberglass Corp., 640 F. Supp. 1411, (E.D.N.C. 1986) (same); see also, e.g., United Phosphorus, Ltd. v. Angus Chemical Co., 322 F.3d 942 (7th Cir. 2003) (en banc) (accepting redacted appellate briefs); United States v. AMR Corp., 335 F.3d 1109, 1121 n.16 (10th Cir. 2003) (accepting and sealing redacted appellate briefs) aff'g in part United States v. AMR Corp., 140 F. Supp. 2d 1141 (D. Kan. 2001) (accepting redacted summary judgment briefs); Allied Signal, Inc. v. B.F. Goodrich, Co., 183 F.3d 568 (7th Cir. 1999) (sealing appellate preliminary injunction briefs' attachments; remanding with instructions for district court to determine extent of seal); Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn., 108 F. Supp. 2d 549 (W.D. Va. 2000) (accepting redacted summary judgment briefs).

litigants, third parties face a greater risk of injury as the owner of confidential information because they were "never in a position to accept or reject the risk of disclosure of confidential information." Dentsply Int'l, Inc., 187 F.R.D. at 180 & n.7 (protecting confidential third party information from disclosure to defendant's in-house counsel when defendant was third parties' competitor). Lastly, third parties reasonably relied on the Protective Orders in the course of complying with discovery in this litigation. Courts are more willing to seal confidential financial information if a party reasonably relied on a protective order. See Beckman Ins., Inc. v. Int'l Ins. Co., 966 F.2d 470, 475 (9th Cir. 1992). The third parties reasonably relied on the Protective Order entered in this action because: (1) the Protective Order is not a blanket protective order; (2) the Protective Order includes repeated strong language protecting third party confidentiality interests; (3) most third parties designated only documents as highly confidential when they believed in good faith that such documents met the Fed. R. Civ. P. 26(c)(7) requirements; and (4) the Orders provide that the Court will "issue further orders as necessary to protect any protected third party's or party's protected information from improper disclosure." (Revised PO ¶ 24; Original PO ¶ 23.) The concern expressed by third parties since the Court's April 16, 2004 comments further demonstrate the degree to which third parties relied on the protective orders to shield thier valuable confidences from unwarranted disclosure.

It should be noted that most third parties in this action have made an honest and forthright attempt to properly designate documents.[4] They have not simply labeled every document as

[4]The entities that have designated only certain documents or portions of documents as Highly Confidential include: (1) BankOne; (2) ADP; (3) Gartner, Inc.; (4) Cap Gemini Ernst & Young; (5) Hewitt Associations LLC; (6) IFS North America, Inc.; (7) BearingPoint, Inc.; (8) American Management Systems, Inc.; (9) CH2M Hill Companies, Ltd.; (10) FESCo; (11) Geac Computer Corp. Ltd.; (12) Greyhound Lines, Inc.; (13) IBM; (14) Intentia Americas, Inc.; (15) Keane, Inc.; (16) KerrMcGee Corp.; (17) Lawson Software, Inc.; (18) Microsoft Corp.; (19) Morgan Stanley & Co.; (20) National Instruments; (21) State of Utah; (22) Nextel Communications, Inc.; (23) QAD; (24) SAP America, Inc.; (25) Systems & Computer Technology Corp.; (26) Smithsonian Institution; (27) Smurfit-Stone Container Corp.; (28) SunGard Bi-Tech, Inc.; (29) Sybase, Inc.; (30) United States Department of Defense; (31) PeopleSoft, Inc.; and (32) the United (continued...)

confidential, but have reviewed their documents to make correct designations. To date, only Oracle, and a small handful of the third parties have simply labeled all documents as highly confidential.[5]

Plaintiffs do not oppose the sealing of legitimately confidential business information at trial or the Filing Third Parties' goals. However, Plaintiffs cannot support three features in the Filing Third Parties' proposed order:

(1) The Filing Third Parties' proposed pre-trial deadlines for the parties to notify third parties if their documents or deposition designations appear on an exhibit list, or will otherwise be proffered at trial, is not administratively achievable.[6] The May 14, 2004 written notice deadline for documents that appear on exhibit lists is simply too early because it is twelve days prior to the

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[4](...continued)
States Department of Justice (Justice Management Division). In addition, Exult, Inc. provided four documents labeled as Highly Confidential, but informed the parties that redacted versions are publicly available from and on file with the Securities and Exchange Commission.

[5]The third parties that designated all documents as Highly Confidential are: (1) Accenture; (2) Qualcomm, Inc.; (3) Nieman Marcus Group, Inc.; (4) Verizon; (5) Target Corp.; (6) Deloitte Consulting, LLP; (7) Daimler Chrysler; and (8) SSA Global Technologies, Inc.

[6] The Filing Third Parties' request, ¶ 1.b, for the parties to notify them if their employees will be named on a parties witness list is not needed because the witness lists will be made publicly available and third party witnesses will receive subpoenas. Further, we have no objection to notifying third parties whose deposition testimony is designated or counter-designated by May 28, 2004 as long as the parties need not provide a line-by-line designation by May 28 because the administrative burden would be too great. Plaintiffs read the Filing Third Parties Proposed Supplemental Protective Order ¶ 1.c. to require written notice only that the deposition testimony has been designated, but not written notice of the actual line designations. Plaintiffs believe that it would administratively possible to provide line designations to the third parties within two days after notifying Oracle of the line designations.

May 26 deadline set in the parties' recent stipulated agreement.[7] (Third Parties' Proposed Supplemental Protective Order ¶ 1.a (5/10/04).)

(2) Plaintiffs cannot support the procedure allowing third parties to designate, after consultation with the parties, documents and deposition testimony that should be sealed at trial. (Id. ¶ 2.)[8] Under Ninth Circuit case law, it is the Court—and not the parties—that must articulate findings into the record as to why particular information should be sealed from public dissemination.

(3) Plaintiffs likewise cannot support presumptively sealing documents the third parties self-certify as fitting within one of the three categories listed in paragraph 4.a. (Id. ¶¶ 4.a.i-iii.) Again, Ninth Circuit case law requires Court review, which paragraph four would avoid.

Plaintiffs' submit for consideration alternative procedures that are commonly used in other antitrust matters for handling confidential information at trial. These procedures comply with Ninth Circuit case law and establish a process by which the Court can accommodate legitimate third party concerns with: (1) minimal disruption to the proceedings; and (2) minimal effects on the public's access to evidence presented.

The parties should be responsible for identifying any confidential information likely to be brought out during testimony.

It is advisable that any presentation of a third party's confidential evidence take place in camera when the court determines whether to continue its protection. See Flotz, 331 F.3d at 1136 n.6 (citing Mueller & Kirkpatrick, Federal Evidence §§ 216, 222 (1994 & Supp. 2001)).

Any document determined to contain sealable information that is admissible into evidence should be entered into the Court's record in a redacted format when possible. See Flotz, 331 F.3d

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[7]The agreement is pending the Court's approval. The May 26th exhibit list exchange deadline was agreed to in writing by the parties on May 9, 2004 and, at that time, Oracle's counsel agreed to draft and submit, by May 10, a motion to the Court seeking the Court's approval of the modification. It was received by Plaintiffs on May 14, and finalized by the parties for filing.

[8]The Filing Third Parties' Proposed Supplemental Protective Order at ¶ 2.b inadvertently references a non-existent paragraph 2(c). It appears that the correct reference is to ¶ 4.a.

at 1137 (unsealing redacted versions of documents when minimal effort required to redact confidential information).

Witness testimony should begin in public and if possible, the testimony should be presented in such a manner as to avoid public disclosure. For example, when a sealed or redacted document is introduced during the public portion of the testimony, then the document should be shown to the witness, the Court, and opposing counsel, while the parties' questions and the witness's answers should refer to the document without reciting specific details or numbers. If a witness is asked to disclose business confidential information and cannot be presented in the foregoing manner, then the courtroom should be cleared for a brief session towards the end of a particular witness's testimony. If the witness' testimony does not reveal or discuss confidential information, then the transcript should be released to the public. See Phoenix Newspapers, Inc. v. United States Dist. Court, 156 F.3d 940, 947-48 (9th Cir. 1998) ("[T]ranscripts of public trial proceedings must be released when the factors militating in favor of closure no longer exist.") The party examining a witness should bear the responsibility to present the information in a manner that minimizes disruption to the Court's process.

Any motions, pleadings, exhibits, memoranda, Court orders, and Court opinions that contain confidential information could be filed under seal with a redacted version filed for public disclosure. As mentioned above, redacted opinions are routine practice in antitrust cases.[9] The Department of Justice regularly publishes redacted Court Orders and Memoranda on its Internet

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[9] As Judge Easterbrook advised:

> Still, the traditional way for judges to accommodate the legitimate competing interests is to keep the secrets themselves under seal, referring to them only indirectly in the opinion. That is the best policy in this case too. The district judge should prepare an opinion suitable for general circulation, rather than preparing an opinion on the assumption that the whole document will remain secret and then releasing copies with sentences and paragraphs blotted out, as if Glavlit (the Soviet Union's censorship bureau) had got its hands on the document.

Pepsico, 46 F.3d at 31.

website at http://www.usdoj/atr/cases.html, along with the Department's own redacted pleadings, motions, and memoranda.

These procedures will allow the Court to receive all relevant information while minimizing the amount of information withheld from public view. At the same time, the public's need for information can be fulfilled by reading redacted briefs and, if necessary, the Court's redacted decision. Decisions and memoranda that explain the general terms of a contract, the contours of a document, or describe financial terms in generalities will allow the public evaluate the Court's reasoning without harming third parties. Legitimate confidential business information can be withheld in such a way that the public can still adequately monitor these proceedings.

CONCLUSION

Third parties in this action may have a sufficient compelling reason for sealing certain confidential business information. Sealing or redacting limited documents and testimony will not impede the public's ability to monitor the judicial system because the public record, including redacted motions, pleadings, exhibits, and Court Orders will provide sufficient information. Publicly disclosing certain third-party trade secrets and confidential business information could cause specific harm or prejudice. Balancing competing interests and weighing additional relevant factors in this case clearly require sealing and redacting sensitive information that could further impede competition in this highly concentrated market.

Dated: May 19, 2004

Respectfully submitted,

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