

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

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

ANTHEM, INC., and CIGNA CORP.,

Defendants.

Civil Action No. 1:16-cv-1493-ABJ

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

AETNA INC., and HUMANA INC.,

Defendants.

Civil Action No. 1:16-cv-1494-JDB

**NOTICE OF SUBMISSION TO THE SPECIAL MASTER OF PLAINTIFFS'
RESPONSES TO AON PLC'S AND UNITEDHEALTH GROUP'S
MOTIONS FOR ADDITIONAL RELIEF UNDER THE PROTECTIVE ORDER**

Pursuant to the Order appointing the Hon. Richard A. Levie (Ret.) as Special Master (ECF No. 53), Plaintiffs hereby give notice that Plaintiffs' Response to Aon plc's Motion for Additional Relief Under the Protective Order and Plaintiffs' Response to UnitedHealth Group's Motion to Amend the Protective Order have been submitted to Special Master Levie for his consideration. A copy of Plaintiffs' Response to Aon plc's Motion for Additional Relief Under the Protective Order is attached to this notice as Exhibit A. A copy of Plaintiffs' Response to UnitedHealth Group's Motion to Amend the Protective Order is attached to this notice as Exhibit B.

Date: September 8, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2016, a true and correct copy of the foregoing was served on all counsel of record via the Court's CM/ECF system.

Date: September 8, 2016

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EXHIBIT A

**UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

ANTHEM, INC. and CIGNA CORP.,

Defendants.

Case No. 1:16-cv-01493 (ABJ)
Submitted to the Special Master,
The Hon. Richard A. Levie (Ret.)

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

AETNA INC. and HUMANA INC.,

Defendants.

Case No. 1:16-cv-1494 (JDB)
Submitted to the Special Master,
The Hon. Richard A. Levie (Ret.)

**PLAINTIFFS' RESPONSE TO AON PLC'S MOTION FOR
ADDITIONAL RELIEF UNDER THE PROTECTIVE ORDERS**

Plaintiffs hereby oppose the motion by Aon plc ("Aon") for additional relief under the Protective Orders. Plaintiffs take the confidentiality of third-party materials seriously. But the current Protective Orders adequately protect Aon's Confidential Information, and Aon's proposed modifications are unusual, unworkable, and likely to burden all parties and delay these proceedings.

I. AON BEARS THE BURDEN OF SHOWING GOOD CAUSE TO MODIFY THE PROTECTIVE ORDER

Special Master Report and Recommendation No. 1 recognized that "[t]he party which seeks to modify a protective order . . . bears the burden of showing that good cause exists to justify the desired change." Slip Op. at 8, Dkt. No. 93 (Sept. 5, 2016) (citing *Infineon Tech. A.G.*

v. Green Power Tech, Ltd., 247 F.R.D. 1, 2 (D.D.C. 2005)). “[B]road allegations of harm unsubstantiated by specific examples will not suffice to justify the issuance of modification of a protective order.” *Alexander v. FBI*, 186 F.R.D. 54, 57 (D.D.C. 1998); *see also In re “Agent Orange” Prod. Liability Litig.*, 821 F.2d 139, 145-46 (2d Cir. 1987) (stating that moving party is required to establish good cause by a “particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements”). As discussed below, Aon has not met its burden of making a particularized showing of good cause for any of its proposed modifications.

II. AON’S PROPOSED MODIFICATIONS TO THE PROTECTIVE ORDER ARE UNNECESSARY AND UNWORKABLE

Aon’s motion focuses on 72 “Benchmark Reports” (the “Reports”), which contain competitively sensitive information. Aon proposes to create a class of “Highly Confidential Information,” into which the Reports would be placed, and limit the disclosure of Highly Confidential Information to the Parties and Court personnel. Although Aon accepts that experts might need to see Highly Confidential Information, including the Reports, it requests that it or other Protected Parties receive advanced notice of which experts would receive Confidential Information and an opportunity to object. Aon also asks that the Court not permit disclosure of Highly Confidential Information to vendors, consultants, mediators/arbitrators, or persons who have access to this information under the current Protective Orders.

As an initial matter, Plaintiffs note that they proposed a two-tier approach to confidentiality, similar to the one proposed by Aon, (Pl. Motion to Enter Protective Order at 6-7, Exhibit B) but Judge Bates rejected it when he entered the current Protective Order. Aon has not shown a compelling need for this Court to revisit Judge Bates’s decision. Further, reversing Judge Bates’ decision at this stage of the litigation would severely bog down the expedited discovery process, as Protected Persons may seek to re-designate information as Highly Confidential.

Aon's proposed restrictions are also unworkable because they would, in effect, prevent the parties from using outside vendors, trial consultants, or taking effective depositions of Protected Parties. These practices are common in antitrust merger litigation. Aon's proposal would hamstring the parties and make litigating these cases unmanageable. Aon has shown no particular and specific demonstration of facts sufficient to impose such an extraordinary burden.

III. AON HAS NOT SHOWN THAT ITS BENCHMARK REPORTS DESERVE SPECIAL PROTECTION

Aon requests protections for its Reports but it does not provide any reason why the Reports deserve heightened protection or are more sensitive than confidential information provided by other Protected Persons. The Protective Order already protects Confidential Information. Under the Protective Order, disclosure of Confidential Information is limited to a narrow group of persons who have a need to know as part of this litigation (Section E(1)) and those persons can use that information "solely for the prosecution and defense" of the actions (Section E(4)). Further, recipients of Confidential Information must read the Protective Order and sign an Agreement Concerning Confidentiality (Section E(2)), and violating that agreement subjects the individual to civil and criminal penalties.

Aon's proposals are unusual and unworkable even as applied only to the Reports. Courts in antitrust cases routinely allow access to confidential information by experts, outside service providers, trial consultants, and individuals who previously had access to such information. *See, e.g.*, Protective Order Governing Confidential Material ¶7, *FTC v. Sysco Corp.*, 1:15-cv-00256 (entered Feb. 23, 2015); Stipulated Protective Order Regarding Confidentiality ¶IV(10), *United States v. AB Electrolux*, 1:15-cv-01039-EGS (entered July 16, 2015); Protective Order ¶7, *FTC v. Staples, Inc.*, 1:15-cv-02115-EGS (entered January 9, 2016); Stipulated Protective Order Concerning Confidentiality ¶C(9), *United States, et al., v. US Airways Group, Inc.*, 1:13-cv-01236-CKK (entered August 30, 2013). Aon has provided no reason why the usual practice would not protect its interests here.¹

¹ The cases on which Aon relies involve exceptional circumstances not present here. *See*

The other restrictions Aon proposes are also unworkable in this case. Aon proposes, for example, to limit disclosure of the Reports to document vendors, but the use of document vendors is standard practice in complex litigations such as these. Aon's restrictions on the disclosure of the Reports to Aon personnel are particularly unworkable because the parties may wish to depose Aon (or its employees) to establish the foundation and accuracy of the Reports.²

Aon's motion should accordingly be denied.

Bank of N.Y. v. Meridien BIAO Bank Tanzania Ltd., 1717 F.R.D. 135, 145 (S.D.N.Y. 1997) (noting that “exceptional circumstances” existed due to “the type of economic injury to which BNY could be exposed as a result of the [confidential information’s] unwarranted disclosure to competitors”); *Gerffert Co. v. Dean*, 2012 WL 2054243, at *5 (E.D.N.Y. June 6, 2012) (requiring pre-disclosure of experts where “problems in [the] case [had] already occurred with respect to confidences and secrets”), *Genetech, Inc. v. Bowen*, 1987 WL 10500, at *2, *4 (D.D.C. Apr. 21, 1987) (requiring pre-identification in pharmaceutical case without explanation where “the only issue presented is whether disclosure may be made to employees of the parties”).

² Aon has also requested that the Reports be transmitted only through secure transmission. Plaintiffs routinely use secure transmission to produce or transmit the documents of Protected Persons. However, an order that required all Confidential Information—including, for example, emails that discussed facts derived from Confidential Information—to be transmitted via secure transmission would be burdensome and would unnecessarily inhibit communication between Parties and their retained experts.

Date: September 8, 2016

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I hereby certify that on September 8, 2016, a true and correct copy of the foregoing was served on all counsel of record by email pursuant to the order appointing the Special Master (ECF No. 53).

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EXHIBIT B

**UNITED STATES DISTRICT COURT
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Plaintiffs,

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Submitted to the Special Master,
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UNITED STATES OF AMERICA, et al.,

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AETNA INC. and HUMANA INC.,

Defendants.

Case No. 1:16-cv-1494 (JDB)
Submitted to the Special Master,
The Hon. Richard A. Levie (Ret.)

**PLAINTIFFS' RESPONSE TO
UNITEDHEALTH GROUP'S MOTION TO AMEND THE PROTECTIVE ORDERS**

Plaintiffs hereby oppose the motion by UnitedHealth Group Incorporated (“United”) to amend the Protective Orders in the above-captioned cases. Plaintiffs take the confidentiality of third-party materials seriously, but United’s proposed modifications are unnecessary to protect United’s confidential information, and they would significantly burden all parties to these actions.

I. UNITED BEARS THE BURDEN OF SHOWING GOOD CAUSE WITH RESPECT TO ITS PROPOSED MODIFICATIONS.

As Special Master Report and Recommendation No. 1 recognized, “[t]he party which seeks to modify a protective order . . . bears the burden of showing that good cause exists to justify the desired change.” Slip Op. at 8, Dkt. No. 93 (Sept. 5, 2016) (citing *Infineon Tech. A.G. v. Green Power Tech, Ltd.*, 247 F.R.D. 1, 2 (D.D.C. 2005)). As discussed below, United is

unable to meet its burden with respect to any of its proposed modifications to the Protective Order.

II. INVESTIGATIVE MATERIALS ALREADY PRODUCED TO PLAINTIFFS SHOULD BE AVAILABLE FOR USE IN BOTH CASES

United proposes to amend the Protective Orders to permit “a non-party Protected Person [to] designate as beyond the scope of permissible discovery, including portions of individual documents, Confidential Information submitted by the non-party Protected Person to the Plaintiff during its investigation.” Under United’s proposed Protective Order, if a Protected Person objected to the production of documents on the basis of relevancy, Plaintiffs could not produce the materials to Defendants absent agreement between United and the Parties or a Court order.

United cites no precedent for this unusual and unnecessary request. The current Protective Order safeguards Confidential Information from unauthorized disclosure—particularly in this case, where in-house counsel will not receive Confidential Information. Moreover, United’s motion could result in the parties needing to resolve a host of disagreements concerning which documents are relevant, further burdening an already rushed discovery process.

If, however, the Court is receptive to United’s concerns, Plaintiffs request that:

- The change only apply to United. Amending the Protective Order at this point could be read to give Protected Persons a retroactive right to ask for the return of Confidential Information that Plaintiffs have already produced to Defendants. Such an order could create widespread confusion and raise time-consuming issues with many Protected Parties.
- United, rather than Plaintiffs, should make separate productions to Defendants. United’s motion contemplates that United would undertake this burden. *See* United Mot. at 4.
- Any Order should specify a process by which the Special Master can quickly resolve challenges to United’s relevancy determinations.

III. UNITED’S PROPOSED SECTION E(5) WOULD UNJUSTIFIABLY BURDEN EXPERTS, VENDORS, AND CONSULTANTS

United proposes adding a new Section E(5) to the Protective Order, which would impose a two-year moratorium on experts’, vendors’, and consultants’ working in the health insurance industry.¹ But protective Orders routinely grant outside counsel, vendors, and consultants access to confidential information without the requirements that United seeks. *See, e.g.*, Protective Order Governing Confidential Material at 3-4, *FTC v. Sysco Corp.*, 1:15-cv-00256 (filed Feb. 23, 2015) (Exhibit A). Further, United’s proposed two-year prohibition on experts’, consultants’, and vendors’ working in the health insurance industry—a term for which United cites no precedent—threatens to burden the service providers in this case by limiting the future engagements they can undertake, irrespective of the risk of misuse of Confidential Information.

Experts, consultants, and vendors obtain confidential information in the ordinary course of providing services, and their use of that information with respect to future clients is limited by legal obligations. Those obligations include Section E(4) of the Protective Order, which requires Confidential Information to be used “solely for the prosecution and defense of this Action and not for any business, commercial, and competitive purpose.” United has made no showing that the unusual burden that it seeks to impose on services providers in this case is necessary or appropriate.

¹ Plaintiffs do not object to United’s proposed changes to E(1)(c)-(f), which essentially would require that experts, vendors, trial consultants, defendants’ outside counsel and related employees not currently be involved in any Defendants’ competitive decision making.

IV. UNITED’S PROPOSED ADDITIONAL SAFEGUARDS WOULD IMPOSE A SUBSTANTIAL BURDEN AND PROVIDE NO ADDITIONAL PROTECTION FOR CONFIDENTIAL INFORMATION

Lastly, United proposes that the Parties provide Protected Persons with “a list of the individuals who accessed Confidential Information during these proceedings” and a certification that Confidential Information has been destroyed. Complying with such a provision here would create an enormous administrative burden, given the large number of Protected Persons and individuals working on this matter. The people working on this matter who potentially have access to Confidential Information include teams of people at the Department of Justice, Defendants’ outside counsel, 17 States and the District of Columbia, and multiple vendors and consultants. United has made no showing that is sufficient to justify this unnecessary burden.

* * * *

For the reasons stated herein, United’s motion to amend the Protective Orders should be denied.

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