

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

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

**[PROPOSED]
PROTECTIVE ORDER GOVERNING DESIGNATION AND DISCLOSURE OF
CONFIDENTIAL INFORMATION**

In the interests of (i) ensuring an efficient and prompt resolution of this Action; (ii) facilitating discovery by the Parties litigating this Action; and (iii) protecting the Parties' and non-Parties' confidential information from improper disclosure or use, and pursuant to Fed. R. Civ. P. 26(c)(7), the Court enters the following Protective Order.

A. DEFINITIONS

1. As used herein:

(a) "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), or any document, transcript or other material containing such information;

(b) "disclosed" means shown, divulged, revealed, produced, described, transmitted or otherwise communicated, in whole or in part;

(c) "document" is defined as the term is used in Fed. R. Civ. P. 34(a);

(d) “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.

(e) “Investigation” means the Department of Justice’s pre-Complaint inquiry into the matters at issue in this Action;

(f) “Defendant” means the National Association of Realtors®;

(g) “Party” or “Parties” means Plaintiff and/or Defendant in this Action;

(h) “Protected Person” means any person or entity who has produced information or testified during the Investigation either voluntarily or in response to a Civil Investigative Demand from the Department of Justice, or who produces any information or testifies in this Action voluntarily or in response to a discovery request or subpoena; and

(i) “this Action” means the above-captioned action pending in this Court, including any pretrial, trial, post-trial or appellate proceedings.

B. DESIGNATION OF CONFIDENTIAL INFORMATION

2. **Designation of Confidential Information by a Party.** A Party may designate as “Highly Confidential” any information disclosed in this Action by the Party or by any other person or entity, but only to the extent that such information constitutes Highly Confidential Information as defined in Paragraph 1(d) of this Order. Such designations constitute a representation to the Court that such Party and counsel in good faith believe that the information so designated constitutes Highly Confidential Information as defined in Paragraph 1(d) of this Order. A party may designate as “Confidential” any information (other than that which it has

designated Highly Confidential) disclosed in this Action by the Party or by any other person or entity, but only to the extent that such information constitutes Confidential Information as defined in Paragraph 1(b) of this Order.

3. **Designation of Confidential Information by a Non-Party.** A Protected Person may designate as “Highly Confidential” any information it has disclosed in connection with the Investigation, or hereafter discloses in this Action, but only to the extent that such information constitutes Highly Confidential Information as defined in Paragraph 1(d) of this Order. A Protected Person may designate as “Confidential” any information (other than that which it has designated Highly Confidential) it has disclosed in connection with the Investigation, or hereafter discloses in this Action, but only to the extent that such information constitutes Confidential Information as defined in Paragraph 1(b) of this Order. Such designations constitute a representation to the Court that such Protected Person (and counsel, if any) in good faith believes that the information designated “Highly Confidential” or “Confidential” constitutes Highly Confidential Information or Confidential Information as defined in Paragraph 1(d) and 1(b) of this Order.

4. **Consent to Jurisdiction.** By invoking this Order and designating any information as “Highly Confidential” or “Confidential” hereunder, a Protected Person consents to the jurisdiction of the United States District Court of the Northern District of Illinois solely for the purpose of enforcing the terms of this Protective Order and waives any right the Protected Person may otherwise have to object to the jurisdiction of this Court with respect to a challenge to any designation under this Order.

5. **Third-Party Materials from Pre-Complaint Investigation.** Designation of investigative deposition transcripts and documents obtained by Plaintiff during the Investigation is governed under this Order as follows:

(a) **Depositions.** Within 5 business days after the Court's entry of this Order, the Department of Justice shall provide a copy of this Order to each deponent (or, if represented by counsel, deponent's counsel) whose deposition it took during the Investigation. Within 10 business days of receipt of this Order, any deponent or deponent's counsel may designate as "Highly Confidential" or "Confidential," in compliance with Paragraphs 2 and 3 of this Order, any portion of the transcript, by page and line, and exhibits produced by the deponent or the deponent's employer and shall transmit any such designations to both Plaintiff's counsel and Defendant's counsel. Any portion of the transcript or exhibits not so designated pursuant to this provision will not be treated as "Highly Confidential" or "Confidential" under this Order, notwithstanding any prior designation.

(b) **Documents.** Within 5 business days after the Court's entry of this Order, the Department of Justice shall provide a copy of this Order to each Protected Person (or, if represented by counsel, the Protected Person's counsel) who produced such documents during the Investigation. Within 10 business days of receipt of this Order, any Protected Person or its counsel may designate as "Highly Confidential" or "Confidential," in compliance with Paragraphs 2 and 3 of this Order, any document or portion of a document produced to the Department of Justice by providing both Plaintiff's counsel and Defendant's counsel with page numbers or other means of easily identifying the designated documents. Any documents produced by Protected Persons that are not so designated pursuant to this provision will not be

treated as “Highly Confidential” or “Confidential” under this Order, notwithstanding any prior designation.

6. **Discovery Materials in this Action.** Designation of deposition transcripts and documents produced in this Action after this Order is entered is governed as follows:

(a) **Depositions.** All transcripts of depositions taken in this Action will be treated as “Highly Confidential” in their entirety for a 10 business days after the date a full and complete copy of the transcript has been made available to the deponent (or, if applicable, deponent’s counsel). During the deposition or at any time during the 10-business-day period, any Party, deponent, or deponent’s counsel may designate as “Highly Confidential” or “Confidential,” in accordance with Paragraphs 2 and 3 of this Order, any portion of the transcript, by page and line, and any deposition exhibits produced by the deponent or the deponent’s employer. Such designations must be provided to Plaintiff’s and Defendant’s counsel to be deemed effective. Any portion of the transcript or exhibits not so designated pursuant to this provision will not be treated as “Highly Confidential” or “Confidential” under this Order, notwithstanding any prior designation.

(b) **Documents.** A Party or Protected Person who designates as “Highly Confidential” or “Confidential” any document produced in this Action must stamp or label each page of each such document with the designation “Highly Confidential” or “Confidential” (as appropriate). If the entire document does not constitute Highly Confidential or Confidential Information, the Party or Protected Person must stamp or label only those pages that contain Highly Confidential or Confidential Information. Any documents produced by Protected

Persons that are not so designated pursuant to this provision will not be treated as “Highly Confidential” or “Confidential” under this Order, notwithstanding any prior designation.

(c) The Parties must retain copies of all documents containing confidential information which are provided in discovery under this Order.

7. **Subsequent Designation.** If a Party or Protected Person inadvertently fails to designate any information as “Highly Confidential” or “Confidential” pursuant to Paragraphs 5 and/or 6, it may later so designate by notifying the receiving Parties in writing. The receiving Parties shall take reasonable steps to see that the information is thereafter treated in accordance with the designation. No person or Party, however, shall incur any liability hereunder with respect to disclosure that occurred prior to receipt of written notice of a belated designation.

C. CHALLENGE TO DESIGNATION

8. **Information from Public and Other Rightful Sources.** Designation of documents or information as “Highly Confidential” or “Confidential” shall not be effective as to information obtained from the public domain or from sources (other than the Protected Person) who were rightfully in possession of the information, regardless of whether such information is also contained in materials designated as “Highly Confidential” or “Confidential” pursuant to this Order.

9. **Challenge to Designation.** Any Party may challenge a “Highly Confidential” or “Confidential” designation at any time. A failure of any Party to challenge expressly a designation of “Highly Confidential” or “Confidential” shall not constitute a waiver of the right to assert at any subsequent time that the material designated does not constitute Highly

Confidential Information or Confidential Information or is not an appropriate designation for any reason.

10. **Procedures for Challenge.** Any Party that disagrees with the designation of any information as “Highly Confidential” or “Confidential” may notify the opposing Party and the designating Protected Person (if applicable) of such disagreement in writing. The designating Party or Protected Person shall then have 10 business days from receipt of the notification to move the Court for an order upholding the designation. The burden of proving that the designation is proper under Rule 26(c)(7) shall be upon the designating Party or Protected Person. The designated information shall be treated as “Highly Confidential” or “Confidential” (as originally designated) under this Order until the Court rules on the designating Party’s timely filed motion. If the designating Party or Protected Person fails to move the Court in accordance with this Paragraph, or if the Court finds the designation of “Highly Confidential” or “Confidential” to have been inappropriate, the challenged designation shall be considered rescinded. The Parties thereafter shall not be required to treat the information as “Highly Confidential” or “Confidential” under this Order.

11. **Other Limitations on the Scope of this Order.** Nothing in this Order shall be construed to affect the admissibility of any document, material or information at any trial or hearing. Any request for confidentiality, closure or sealing of any hearing or trial must be made to the judge then presiding.

D. DISCLOSURE OF CONFIDENTIAL INFORMATION

12. **Disclosure of Highly Confidential Information.** Except as otherwise authorized by this Order, information designated as “Highly Confidential” pursuant to this Order (and for

which designation has not been rescinded pursuant to Paragraph 10) may be disclosed only to the individuals set forth below and may be used by those individuals only in connection with this

Action:

(a) the Court and all persons assisting the Court in this Action, including law clerks, court reporters, and stenographic or clerical personnel;

(b) Department of Justice attorneys, employees, and independent contractors retained by the Department of Justice to assist in prosecution of this litigation;

(c) outside counsel acting for Defendant in this Action and that counsel's employees and independent contractors assisting such counsel in the defense of this litigation;

(d) authors, addressees, and recipients of particular information designated as "Highly Confidential" solely to the extent that the disclosing Party believes in good faith that the person has previously had lawful access to the particular information disclosed or to be disclosed;

(e) persons (and their counsel) whom counsel for the Parties believe in good faith to have, or have had, prior access to Highly Confidential Information, or who have been participants in a communication that is the subject of the Highly Confidential Information and from whom verification of or other information about that access or participation is sought, solely to the extent of disclosing such information to which they have or may have had access or that is the subject of the communication in which they have or may have participated; provided that, unless and until counsel confirms that any such persons have or have had access or were participants, only as much of the information may be disclosed as may be necessary to confirm the person's access or participation;

(f) testifying or consulting experts retained by a Party to assist in the prosecution or defense of this Action, including employees of the firm with which the expert or consultant is associated to the extent necessary to assist the expert's work in this Action, except if the expert or consultant is a direct competitor (or an employee of a direct competitor) in the real estate brokerage industry. If either Party seeks to make disclosure of Highly Confidential information to an expert or consultant who is a direct competitor (or an employee of a direct competitor), the Party shall notify the Protected Person who provided the information to determine if the Protected Person objects to the disclosure to the prospective expert or consultant. If that Party must move the Court for relief, such motion may refer to the proposed disclosure without naming the expert or consultant;

(g) two designated "in-house" attorneys for Defendant, as well as the designated inside counsel's necessary secretarial, clerical, administrative, or support staff.

13. **Disclosure of Confidential Information.** Except as otherwise authorized by this Order, information designated as "Confidential" pursuant to this Order (and for which designation has not been rescinded pursuant to Paragraph 10) may be disclosed only to the individuals set forth below and may be used by those individuals only in connection with this Action:

(a) the Court and all persons assisting the Court in this Action, including law clerks, court reporters, and stenographic or clerical personnel;

(b) Department of Justice attorneys, employees, and independent contractors retained by the Department of Justice to assist in prosecution of this litigation;

(c) outside counsel acting for Defendant in this Action and that counsel's employees and independent contractors assisting such counsel in the defense of this litigation;

(d) authors, addressees, and recipients of particular information designated as Confidential solely to the extent that the disclosing Party believes in good faith that the person has previously had lawful access to the particular information disclosed or to be disclosed;

(e) persons (and their counsel) whom counsel for the Parties believe in good faith to have, or have had, prior access to Confidential Information, or who have been participants in a communication that is the subject of the Confidential Information and from whom verification of or other information about that access or participation is sought, solely to the extent of disclosing such information to which they have or may have had access or that is the subject of the communication in which they have or may have participated; provided that, unless and until counsel confirms that any such persons have or have had access or were participants, only as much of the information may be disclosed as may be necessary to confirm the person's access or participation;

(f) testifying or consulting experts retained by a Party to assist in the prosecution or defense of this Action, including employees of the firm with which the expert or consultant is associated to the extent necessary to assist the expert's work in this Action;

(g) Defendant's General Counsel, as well as such counsel's secretarial, clerical, administrative or support staff; Defendant's Leadership Team, consisting of the President, President-Elect, First Vice President, Treasurer, Immediate Past President, Vice President and Liaison to Committees, and Vice President and Liaison to Government Affairs; Defendant's Executive Vice President; Defendant's employees Gar Anderson, Ralph W.

Holmen, Kevin J. Milligan, and Clifford D. Niersbach; and any other of Defendants' employees subsequently agreed to by Plaintiff and Defendant.

14. **Execution of Notice of Order.** Before any information designated as "Highly Confidential" may be disclosed to any person described in Paragraph 12(b), (c), (f), or (g) of this Order, or before any information designated as "Confidential" may be disclosed to any person described in Paragraph 13(b), (c), (f), or (g) of this Order, such person must first have read this Order and have executed the agreement included as Appendix A hereto. Counsel for the Party making the disclosure must retain the original of such executed agreement for a period of at least one year following the final resolution of this Action. No individual described in Paragraph 12 or 13 of this Order to whom information designated as "Highly Confidential" or "Confidential" is disclosed may disclose that Highly Confidential or Confidential Information to any other individual, except as provided in this Order.

15. **Other Permitted Uses of Designated Information.** Notwithstanding the provisions of this Order, nothing in this Order:

(a) limits a Party's or Protected Person's use or disclosure of its own information designated as "Highly Confidential" or "Confidential";

(b) prevents the Parties, subject to taking appropriate steps to preserve the further confidentiality of such information, from disclosing information designated as "Highly Confidential" or "Confidential" either (1) to another court of law; or (2) as may be required by law; or

(c) prevents Plaintiff from disclosing information designated as Highly Confidential or Confidential: (i) to duly-authorized representatives of the Executive Branch of

the United States Government; (ii) in the course of legal proceedings to which the United States is a party; (iii) for the purpose of securing compliance with any Final Judgment in this action; or (iv) for law enforcement purposes, as authorized by law. Except when used for law enforcement purposes or where prohibited by law or regulation, the Plaintiff will promptly inform the party or person who designated the information as “Highly Confidential” or “Confidential” at least 10 business days before disclosure is made if Plaintiff intends to make disclosure pursuant to this paragraph. When disclosing confidential information as authorized by this provision, Plaintiff shall seek to preserve confidentiality beyond the authorized disclosure.

16. **Notice of Other Permissible Disclosures.** The Party intending to make any disclosure pursuant to Paragraph 15 of this Order must give notice to that effect to the Party or Protected Person who designated as “Highly Confidential” or “Confidential” the information to be disclosed at least 10 business days prior to making any such disclosure.

E. USE OF CONFIDENTIAL INFORMATION IN LITIGATION

17. **Use of Designated Information in Court Filings.**

(a) **Submission to the Court.** Documents containing Highly Confidential Information or Confidential Information shall **NOT** be filed with the Clerk of Court. Documents requiring the Court’s review shall be submitted to chambers in camera in a sealed envelope bearing the caption of this case, case number, the title of the motion or response to which the submitted confidential information pertains, and the name and telephone number of counsel submitting the documents. The filing Party shall maintain the original documents intact for any further review. A redacted copy of the filing shall be filed with the Clerk of Court for the record.

(b) Petitioning the Court for Continued Protection of Confidential Information in Court Filings. Within 5 business days after the date of filing, the filing Party must provide notice to all Protected Persons who produced the information designated as “Highly Confidential” or “Confidential” that was contained in the filing. Upon receiving such notice, Protected Persons must attempt to resolve confidentiality issues with the Party filing such information, such as by redacting irrelevant Highly Confidential or Confidential Information or withdrawing a “Highly Confidential” or “Confidential” designation. If confidentiality designations remain unresolved, within 10 business days after the date of receipt of such notice, Protected Persons must file with the Court and serve on Plaintiff and Defendant, their objection to public disclosure of specified information they had designated as “Highly Confidential” or “Confidential.” If no objections to disclosure are filed with the Court within the time permitted, the filing Party must file with the Clerk of Court, within 5 business days following lapse of the period for filing objections, an unredacted version of the filing. If a Protected Person files with the Court timely objections to disclosure of its Highly Confidential or Confidential Information, following the Court’s review and order resolving all such objections, the Party that made the initial filing must, within 7 business days after receipt of the order, refile its papers, in compliance with the Court’s rulings on what information, if any, will continue to be protected from public disclosure.

18. Use of Designated Information at Trial. Information designated as “Highly Confidential” or “Confidential” that a Party submits as an exhibit or uses in cross examination at trial will generally be disclosed on the public record after compliance with the following process: Within 3 business days after submission of exhibit lists and deposition citations to the Court,

Plaintiff and Defendant must provide notice to Protected Persons of all exhibits and citations listed by that Party that include information the Protected Person has continued to designate as “Highly Confidential” or “Confidential.” Within 3 business days after receipt of such notice, the Protected Person must advise the Party listing the information designated as “Highly Confidential” or “Confidential” whether it objects to the potential public disclosure of that information at trial and, if it does, shall attempt to resolve objections by agreed upon redactions. Within 7 business days after receipt of such notice, if the Protected Person continues to object to potential public disclosure at trial of its information designated as “Highly Confidential” or “Confidential,” the Protected Person must file its objections with the Court seeking to limit disclosure of the information at trial in this action. At trial, parties may use for cross examination documents designated as “Highly Confidential” or “Confidential,” which were not identified on any parties’ exhibit list submitted prior to trial. Any such documents used at trial for cross examination of a witness that were initially produced by the witness or the witness’ employer will be presumptively non-confidential. Any such documents used at trial for cross examination of a witness that were initially produced by any other Protected Person will require at least 48 hours notice to the Protected Person, who can seek to object with the Court to public use of the document at trial.

19. Nothing in this Order shall prevent any Party or non-party (including interested members of the public) from petitioning the Court for reconsideration of a determination pursuant to Paragraphs 18 or 19 of this Order that Court filings or proceedings shall remain confidential.

F. PROCEDURES UPON TERMINATION OF LITIGATION

20. Within 90 days after termination of this Action (including the resolution of all appeals, if any), all persons having received information designated as “Highly Confidential” or “Confidential” must either make a good faith effort to return such material and all copies thereof to the Party or Protected Person (or the person’s counsel if represented by counsel) that produced it, or destroy all such material and certify that fact in writing to the Party or Protected Person. Counsel for Plaintiff and Defendant will be entitled to retain court papers, deposition and trial transcripts and exhibits, and work product, provided that Plaintiff’s employees and Defendant’s counsel and such counsel’s employees must not disclose the portions of court papers, deposition transcripts, exhibits, or work product containing information designated as “Highly Confidential” or “Confidential” to any person except pursuant to Court order or agreement with the Party or Protected Person that produced the information designated as “Highly Confidential” or “Confidential.” All Highly Confidential or Confidential materials returned to the Parties or their counsel by the Court likewise must be disposed of in accordance with this Paragraph. Nothing in this Paragraph, however, restricts the rights of the Parties under Paragraph 15 of this Order, or the rights of the Plaintiff to retain and use confidential materials for law enforcement purposes or as otherwise required by law.

G. RIGHT TO SEEK MODIFICATION

21. Nothing in this order prevents any Party or Protected Person from seeking modification of this order upon motion duly made pursuant to the Rules of this Court.

SO ORDERED:

Date: _____, 2006

United States District Court

**APPENDIX A
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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

AGREEMENT CONCERNING CONFIDENTIALITY

I, _____, am employed as _____ by _____.

I hereby certify that:

1. I have read the Protective Order entered in the above-captioned action, and understand its terms.
2. I agree to be bound by the terms of the Protective Order entered in the above-captioned action. I agree to use the information provided to me only for the purpose of this litigation.
3. I understand that my failure to abide by the terms of the Protective Order entered in the above-captioned action will subject me, without limitation, to civil and criminal penalties for contempt of Court.
4. I submit to the jurisdiction of the United States District Court for the Northern District of Illinois solely for the purpose of enforcing the terms of the Protective Order entered in

the above-captioned action and knowingly waive any right I may otherwise have to object to the jurisdiction of said Court.

5. I make this certificate this _____ day of _____, 2006 .

(SIGNATURE)