

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

LOCKHEED MARTIN CORPORATION,

Plaintiff,

-vs-

Case No. 6:03-cv-796-Orl-28KRS

**THE BOEING COMPANY, McDONNELL
DOUGLAS CORPORATION, BOEING
LAUNCH SERVICES, INC., WILLIAM
ERSKINE, KENNETH BRANCH, and
LARRY SATCHELL,**

Defendants.

ORDER

This cause came on for consideration after several oral arguments on Plaintiff, Lockheed Martin's, Motion for Amendment of the Protective Order and to Allow for the Re-designation of Non-competition Sensitive Data. Doc. No. 307. For the reasons set forth below, it is ORDERED that the motion is GRANTED in part and DENIED in part. It is further ORDERED that the Protective Order for Confidentiality, doc. no. 188, previously entered in this case, is hereby VACATED. An Amended Protective Order for Confidentiality will be issued.

On March 26, 2004, I entered a Protective Order for Confidentiality. Doc. No. 188 (the "Original Protective Order"). This order provided, in part, that certain in-house counsel and others whose responsibilities included competitive decisionmaking on behalf of Plaintiff Lockheed Martin Corporation (Lockheed) or Defendant The Boeing Company (Boeing) could not view "Protected Litigation Information" produced during discovery. *Id.*

¶ 9(b). Lockheed now asks that this protective order be revised, and for the Court to create a two-tier system of disclosure under which in-house counsel and others could view all but a limited category of competitively sensitive information. Boeing opposes the motion, arguing that the Original Protective Order was the result of extensive negotiation between the parties and, as such, the terms of the order should not now be revisited.

Doc. No. 331.

I will consider, first, whether there is a legal basis for modifying the Original Protective Order. If there is, I will next address whether a revised protective order is appropriate and, if so, under what terms.

A. The Original Protective Order is Overbroad As Applied.

Protective orders must be precisely drawn. *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 356 (11th Cir. 1987). The problem underlying the present motion is that the Original Protective Order, as applied, is overbroad. Due to the volume of materials produced in discovery, counsel for Lockheed candidly acknowledged that they have designated much of the information produced in discovery as “Protected Litigation Information” to avoid public disclosure of the information. Doc. No. 473 at 5. At a hearing at which Boeing was required to produce evidence in support of its designation of “Protected Litigation Information,” I found that only some portions, but not all, of the documents at issue were entitled to confidential treatment. Doc. No. 537. Further, there have been instances in which counsel were able to agree, after conferring, that documents originally designated “Protected Litigation Information” could be publicly filed with the Court. See, e.g., Doc. Nos. 468, 598. Because the breadth of the Original

Protective Order has permitted such overbroad designations, it must be more narrowly drawn. *Cf. Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999).¹

Moreover, the parties have not established that all of the designated "Protected Litigation Information" must be withheld from in-house counsel and others who participate in competitive decisionmaking on behalf of their employer. While the Original Protective Order provides a procedure to request leave to disclose designated information to these individuals, doc. no. 188 at 14 ¶ 24, it does not provide for Court review if leave to disclose is not granted. There must be a procedure to permit Court review of such designations so that the designation is not improperly used simply to prevent a party from consulting with individuals whose knowledge and advice would assist in the litigation.

¹ In the course of reviewing a motion to seal, the United States Court of Appeals for the Seventh Circuit commented on the scope of a protective order issued by the district court, as follows:

The order is not limited to trade secrets, or even to documents "believed to contain trade secrets," which anyway is too broad both because "believed" is a fudge and because a document that contains trade secrets may also contain material that is not a trade secret, in which case all that would be required to protect a party's interest in trade secrecy would be redaction of portions of the document. Also much too broad is "other confidential . . . information," not further specified The order is so loose that it amounts . . . to giving each party carte blanche to decide what portions of the record shall be kept secret. Such an order is invalid.

178 F.3d at 945.

For all of these reasons, I conclude that the Original Protective Order is not precisely drawn. Accordingly, it has been vacated.

B. Good Cause Exists To Support An Amended Protective Order.

Before entering any protective order, the Court must find that good cause warrants the entry of the order with respect to each category of documents or information sought to be included in the order. *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 355-57 (11th Cir. 1987). In this case, Lockheed and Boeing are direct competitors. They contend that each of them has trade secrets that, if revealed to a competitor, would provide a competitive advantage to the competitor. Further, information has been obtained through discovery from the United States Air Force, some of which may be entitled to confidential treatment under statutes or regulations. Additionally, the parties submit that they have contractual obligations requiring that certain information that may be sought in discovery be kept confidential. All of these considerations, taken in the context of the case as a whole, persuade me that good cause exists to issue an order limiting the disclosure of trade secrets or other confidential research, development or commercial information produced in discovery and the disclosure of information protected by statute, regulation, contract or court order. Accordingly, I conclude that a narrower, and more precisely drawn protective order, should be issued.

C. Scope of the Amended Protective Order.

During many hearings I have asked counsel to articulate with more specificity the categories of documents that they contend require protection in this case. After much argument and research, I am able to identify three categories of information that warrant

protection in this case, as discussed below.² The parties will, of course, retain the ability to seek protection of documents not within these categories by filing a motion for a protective order directed to specific documents or groups of documents.

The first category of information entitled to protection encompasses trade secrets or other confidential research, development, or other commercial information that has economic value from not being generally known, and that has been the subject of reasonable efforts aimed at secrecy, and the disclosure of which is likely to result in a clearly defined and very serious injury to the designating party. The third element of the test is drawn from case law that consistently holds that trade secrets and other confidential business information are not entitled to protection unless disclosure would result in a specified harm. *See, e.g., Blanchard and Co. v. Barrick Gold Corp.*, No. 02-3721, 2004 WL 737485, at *4-5 (E.D. La. April 5, 2004); *Kaiser Aluminum & Chem. Corp. v. Phosphate Eng'g and Constr. Co.*, 153 F.R.D. 686, 688 (M.D. Fla. 1994); *Duracell, Inc. v. SW Consultants, Inc.*, 126 F.R.D. 576, 578 (N.D. Ga. 1989); *Empire of Carolina, Inc. v. Mackle*, 108 F.R.D. 323, 326 (S.D. Fla. 1985). Further, the requirement of a showing of harm is designed to prevent the parties from designating information that is too stale to be of current commercial value, or information about which the designating party can only articulate a speculative belief that the information might, someday and somehow, be damaging if it were revealed. *See, e.g., Alexander Hous. LLC v. Int'l Bhd. of Elec. Workers*, No. 04 C 1650, 2004 WL 1718654, at *3 (N.D.

² The amended protective order will require that information within these categories be labeled "Confidential Protected Litigation Information."

III. July 29, 2004); *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980).

The second and third categories of information entitled to protection encompass information that must be kept confidential pursuant to a statute, regulation, contract or court order. The scope of the information within this category should be readily definable from review of the underlying statute, regulation, contract or court order.

The next issue is whether there is good cause to preclude in-house counsel and others engaged in competitive decisionmaking for the parties from viewing information within these protected categories. In an oft-cited case on this issue, the Federal Circuit Court of Appeals concluded that there may be circumstances in which certain sensitive information should not be disclosed to an in-house attorney involved in competitive decisionmaking. *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984). In subsequent cases addressing the issue, courts have looked to “whether in-house counsel is involved in competitive decision making such that the attorney ‘would have a difficult time compartmentalizing his knowledge.’” *United States v. Dentsply Int’l Inc.*, 187 F.R.D. 152, 159-60 (D. Del. 1999) (quoting *Motorola, Inc. v. Interdigital Technology Corp.*, Civ. A. No. 93-488-LON, 1994 U.S. Dist. LEXIS 207A (D. Del. Dec. 19, 1994)); see also *Blanchard and Co.*, 2004 WL 737485, at * 8-10, and cases cited therein.

Because competitions between Lockheed and Boeing to win rocket launches underlie this lawsuit, and because those competitions will continue for many years, good cause exists to believe that trade secrets or other confidential research, development, or

other commercial information produced in discovery may contain competitively sensitive information the disclosure of which to individuals involved in competitive decisionmaking could intentionally, or inadvertently, give the receiving individual a competitive advantage. Case law includes sales and marketing plans, financial forecasts, margin, pricing, design, cost and customer information among the types of information that, in the proper circumstance, may not be disclosed to individuals engaged in competitive decisionmaking. See, e.g., *U.S. Steel Corp.*, 730 F.2d at 1468 n.3; *Dentsply Int'l, Inc.*, 187 F.R.D. at 161-62.

In the Original Protective Order, such “competitively sensitive information” was defined broadly to include “without limitation, information relating to existing and contemplated business, marketing and financial information such as business plans and methods, marketing information, cost estimates, actual costs, forecasts, sources of supply, contemplated product lines, proposed business alliances, budgets, bid and proposal information, bid analysis, government requests, or government accounting requirements.” Doc. No. 188 at 2-3. For the reasons discussed above, this designation is too broad. It would include, for instance, public bid requests issued by government agencies and publicly available accounting requirements. Moreover, because the definition was not limited to information the designating party treated as confidential, it could also include information that was not treated as confidential by the designating party.

I conclude, therefore, that “competitively sensitive information” that may not be disclosed to individuals involved in competitive decisionmaking encompasses

information that has economic value from not being generally known, and that has been the subject of reasonable efforts aimed at secrecy, and the disclosure of which is likely to result in a clearly defined and very serious injury to the designating party by providing a competitor with information that would give it a competitive advantage in ongoing or reasonably foreseeable competitions. As such, “competitively sensitive information” is a “highly confidential” subset of the category of information protected because it is a trade secret or other confidential research, development, or other commercial information, in which the injury is the competitive advantage release of the information would provide to an individual participating in competitive decisionmaking.³ This should ensure that such “highly confidential” information will both be treated as confidential by the designating party and be of sufficient currency that its disclosure would likely result in a clearly defined and specific harm to the designating party.⁴

The amended protective order will also include a procedure through which a party may challenge the designation of information if it believes that the information is not

³ The amended protective order will require that this subset of “highly sensitive information” be labeled “Restricted Confidential Protected Litigation Information.”

⁴ Boeing argued during hearings before the Court that all information protected as a trade secret or other confidential research, development, or other commercial information would, necessarily, also be competitively sensitive. Whether a trade secret or other confidential research, development, or other commercial information is, or is not, competitively sensitive is a decision that can only be made based upon the specific factual showing supporting the designation given to the document. Under the amended protective order, Boeing will have the option to designate documents as it, in good faith, deems appropriate, recognizing that if its designation is challenged, it will have to present to the Court *prima facie* evidence in support of its designation.

competitively sensitive or if it contends that the information is not entitled to confidential treatment under any category of protection discussed above.

D. Disclosure of Information Previously Designated "Protected Litigation Information."

Because thousands, if not millions, of pages of documents and items of information have been previously designated "Protected Litigation Information" under the Original Protective Order, a procedure must be developed to allow the litigation to continue without the need to review and redesignate all such documents. Because the Original Protective Order provided that "Protected Litigation Information" could not be disclosed to individuals engaged in competitive decisionmaking, the amended protective order will require that previously designated documents be treated as Restricted Confidential Litigation Information until such time as a party believes, in good faith, that review and redesignation of the information is necessary for purposes of the litigation.

E. Procedural Issues.

During the hearings on protective order issues, many other procedural requirements for dealing with confidential information in the litigation have been discussed. These include the need for counsel to designate only those portions of documents as confidential, rather than designating entire documents. Recognizing that such selective designation is time intensive, and that it has not always previously been done when designating "Protected Litigation Information," it is reasonable to permit the parties to make the specific designations when they wish to submit the document to the Court for consideration or otherwise wish to use such information in papers submitted to

the Court. Therefore, the amended protective order will contain a procedure for specific designation of documents before relying upon them in Court submissions.

By implementing this procedure, the issuance of an amended protective order should in no way impede the progress of the litigation, or impair the parties' abilities to complete discovery within the current schedule established by the Court. This procedure shall not be cited or relied upon, however, as Court approval of designation of all documents produced in discovery as Confidential Protected Litigation Information or Restricted Confidential Protected Litigation. Rather, counsel shall in good faith attempt to designate documents properly at the time of production, recognizing that such designation will be deemed by the Court to be counsel's certification, under Fed. R. Civ. P. 26(g)(2), that the designation is consistent with the law, and that it was not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

DONE and **ORDERED** in Orlando, Florida on January 26, 2005.

Karla R. Spaulding

KARLA R. SPAULDING
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties