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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY

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Presiding Judge

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Re: Merck Sharp & Dohme Corp. v. Township of Readington
Docket No. 004383-2016

Dear Counsel:

This letter constitutes the court's opinion with respect to plaintiff's cross-motion for entry of a Protective Order limiting dissemination of an unconsummated agreement for the sale of plaintiff's real property and the terms of that agreement. Defendant requested production of the sales agreement during discovery. For the reasons stated more fully below, the cross-motion is granted.

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I. Findings of Fact and Procedural History

The following findings of fact are based on the submissions of the parties with respect to plaintiff's cross-motion.

Plaintiff Merck Sharp & Dohme Corp. ("Merck") is a global health care company that markets and delivers prescription medicines, vaccines, biological therapies, and animal health products. Merck owns six parcels of real property in defendant Readington Township, Hunterdon County (the "subject property"). The parcels are designated by the township as Block 9, Lot 2, and Block 4, Lots 4.01, 48, 49, 99 and 100. The subject property, along with a number of other parcels that are not at issue here, served until recently as Merck's global headquarters. The subject property supports a three-story, hexagonal-shaped, six-wing building with 1,747,632 square feet of office space and two subterranean parking garages, a 25,200-square-foot learning center for children, a separate three-story, 220,000-square-foot office building, two stand-alone, double-deck parking garages, a one-story, 67,035-square-foot central utility plant, and a number of gatehouses. The subject property consists of approximately 100 acres. The overall headquarters property, inclusive of surrounding farmland not part of this appeal, amounts to approximately 1,000 acres.

For tax year 2016, the combined assessment on the six parcels at issue here is $124,810,000. The Chapter 123 average ratio for Readington Township for tax year 2016 is .8424. The implied equalized assessed value of the subject property for tax year 2016, therefore, is $148,160,019 ($124,810,000 ÷ .8424 = $148,160,019). The subject property has the highest combined assessment in Hunterdon County.

On March 21, 2016, plaintiff filed a Complaint challenging the assessments on the subject property for tax year 2016.

During the course of discovery, defendant propounded on plaintiff standard form Interrogatories, including Interrogatory No. 13, which provides;

> State whether the property has been offered for sale during the year of appeal or the preceding two years. If so, state: (a) when the property has been offered for sale; (b) the name and address of any brokers with whom the property has been listed; (c) the terms of any offers, either written or oral, that were received (attach copies of any written offers); and (d) whether the property was advertised in newspapers, brochures or otherwise and, if so, attach copies hereto.

and Interrogatory No. 16, which provides:

> State whether any contract of sale has been executed during the year of appeal or the preceding two years for any interest in the subject property. If so, state the names and addresses of the parties to each contract, describe the interest being sold, state the amount of consideration to be paid for the property and the terms for payment of that amount. Attach a copy of any such contract.

On June 8, 2016, the municipality, having received no response to its Interrogatories, moved pursuant to R. 4:23-5(a)(1) to dismiss the Complaint without prejudice due to plaintiff's failure to produce discovery.

On June 29, 2016, plaintiff provided certified answers to the municipality's discovery requests. In response to Interrogatory No. 13, plaintiff replied:

> Yes. See marketing brochure previously provided for information sought in this interrogatory. Property offered for sale week of October 7, 2013. Broker was Cushman & Wakefield of New Jersey, Inc., One Meadowlands Plaza, 7th Floor, East Rutherford, NJ 07073.

In response to Interrogatory No. 16, plaintiff replied:

> Yes. A contract of sale to a third party was executed during the three year period in question. However, unless a satisfactory protective order can be agreed upon, the Plaintiff objects to the production of the contract of sale. The contract and its terms cannot be produced by the Plaintiff due to a confidentiality provision in the agreement.

Defendant was not satisfied with the sufficiency of several aspects of plaintiff's responses, including plaintiff's refusal to produce the agreement for the sale of the subject property. As a result, on July 5, 2016, the court converted defendant's motion to dismiss the Complaint without prejudice to a motion to compel more specific answers to discovery. See Zimmerman v. United Servs. Auto Assoc., 260 N.J. Super. 368 (App. Div. 1992). Defendant's motion to compel more specific responses will be addressed in a separate opinion.

On July 27, 2016, plaintiff cross-moved for entry of a Protective Order limiting dissemination of the sales agreement and its terms. The taxpayer does not seek to prohibit disclosure of the sales agreement to the municipality. It seeks only to prohibit dissemination of the sales agreement and its terms beyond the disclosure necessary for the township's defense of this appeal. The taxpayer's proposed Protective Order contemplates disclosure to the municipality's attorney, expert, consultants and representatives or agents of the municipality "who need to know the" terms of the sales agreement "in connection with any ongoing property tax appeal litigation and in those instances only to the extent justifiable by that need" and subject to certain terms and conditions concerning further dissemination and use. For instance, plaintiff seeks to prohibit dissemination of the information to persons or entities not involved in the instant litigation or for any use other than in this litigation.

Plaintiff's cross-motion is supported by a Certification of Richard J. Trent, the Associate Director of Global Real Estate Services for plaintiff's parent corporation, Merck & Co., Inc. According to Associate Director Trent, in March 2015, plaintiff entered into an agreement to sell the subject property to a third party. He certifies that a clause of the sales contract stated that each party "agree[d] not to communicate [its] terms . . . or the transactions contemplated . . . to any third party" without the consent of the other party. The clause also provides that a party may disclose

the terms of the contract without the consent of the other party, "as may be required by law or by any governmental authority or by regulatory or judicial process . . . provided that in such event the party making such required disclosure shall notify the other party of the required disclosure." Although plaintiff has not obtained consent to disclose the terms of the contract from the purchaser, it has notified the purchaser that disclosure may be required by this court.

The sales contract was amended eight times between July 20, 2015 and May 31, 2016. Each of the amendments incorporates the terms of the original sales agreement, including the confidentiality provisions. The agreement was terminated by the purchaser by letter dated June 28, 2016, approximately three months after the filing of the Complaint in this matter.

According to Mr. Trent,

> The agreement of sale and its associated documents . . . are not publically available and were/are delivered in confidence to Merck's consultants, appraisers, representatives or agents, only when necessary for business purposes, and only to those persons whose function within the organization requires the knowledge of that specific information in the course of their business. They were developed through a significant expenditure of time and capital by Merck, its employees, advisors and consultants . . . . Declining to protect these documents from disclosure and/or dissemination to persons or entities other than those directly involved in this litigation or for any purpose other than this litigation would abrogate the strict confidentiality Merck has established and materially harm its position.

He continued,

> Merck intends to re-market the Readington properties, inclusive of the subject properties, for sale or other disposition. It is essential to that process and for Merck's competitive position that prospective purchasers do not have knowledge of the terms of the agreement of sale or the associated documents, that is to say, terms to which Merck has already agreed, affording those prospective purchasers a competitive advantage during the negotiations. The Court can protect this interest – which is proprietary to Merck – by ordering that the information is not disclosed or disseminated to persons or

> entities other than those involved in this litigation or for any purposes other than this litigation.

The municipality opposes the motion. According to the township, the "need for transparency in tax appeal litigation is paramount as a matter of public policy, particularly in a case of this magnitude and public scrutiny." The municipality argues that "there is intense public interest in this tax appeal, the status of the property, the future plans for the property [and] any possible sale of the subject property." In support of this position, the municipality submitted press accounts of significant public attention to the proposed sale of the subject property. The township argues that any interest plaintiff has in maintaining the confidentiality of the sales agreement and its terms must yield to the public interest in disclosure of the information on which the governing body of the municipality might act in defending the assessment on the subject property or reaching a settlement in this matter.

In addition, the township argues that the sales agreement and its terms are not trade secrets or commercial information, as plaintiff is not in the business of selling real estate. According to the municipality, plaintiff's business of marketing and delivering prescription medicines, vaccines, biological therapies, and animal health products is not related to the sales agreement or its terms, the public dissemination of which will not put plaintiff at a commercial disadvantage with respect to its core business operations.

After submission of the parties' briefs, the court heard oral argument from counsel with respect to plaintiff's cross-motion.

II. Conclusions of Law

There shall be a substantial liberality in the granting of discovery in New Jersey courts. Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 215-216 (App. Div. 1987). A party

may seek production of all information "relevant to the subject matter involved in the pending action" or which "appears reasonably calculated to lead to the discovery of admissible evidence," R. 4:10-2(a); In re: Liquidation of Integrity Ins. Co., 165 N.J. 75, 82 (2000). This court has the discretion to determine the scope and manner of permissible discovery between the parties. Payton v. New Jersey Turnpike Auth., 148 N.J. 524, 559 (1997). The court has "discretion to take whatever steps are necessary to protect [a party's] confidential documents, while still permitting [the other party] the right of discovery." Alk Assocs., Inc. v. Multimodal Applied Sys., Inc., 276 N.J. Super. 310, 316 (App. Div. 1994)(quoting Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 329 (Ch. Div. 1981)).

It is quite clear that the contract for the sale of the subject property is relevant to the subject matter of this action and its production is reasonably likely to lead to the discovery of admissible evidence. The central issue before the court is the true market value of the subject property on October 1, 2015. The agreement for the sale of the subject property was executed in March 2015, shortly before the relevant valuation date, and amended eight times on various dates from July 20, 2015 to May 31, 2016. One amendment was executed on September 25, 2015, just a few days before the relevant valuation date.

The contract, which contains a sales price negotiated by market participants, surely contains information relevant to the true market value of the subject property. As explained by the Appellate Division in Township of Little Egg Harbor v. Bonsangue, 316 N.J. Super. 271, 281 (App. Div. 1998),

> The use of unconsummated contracts for valuation purposes is recognized in New Jersey. "[I]n the absence of a completed sale, evidence of the price agreed upon in a binding contract of sale for property between the owner and a purchaser, both acting in good faith, would be of substantial significance in arriving at the fair

> market value of such property." City of East Orange v. Crawford, 78 N.J. Super. 239, 244, 188 A.2d 219 (Law Div. 1963).

Plaintiff does not dispute that the sales agreement falls within the scope of permissible discovery and does not seek to prevent its disclosure. The taxpayer merely seeks a Protective Order limiting the dissemination and use of the sales agreement and its terms.

Pursuant to R. 4:10-3, the court may, "for good cause shown," enter an Order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including" that "a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way . . . ."

The municipality argues that the sales agreement is not plaintiff's trade secret or commercial information because plaintiff is not engaged in the business of selling real estate. Rule 4:10-3 does not contain a definition of "trade secret" or "commercial information." New Jersey law provides guidance. The New Jersey Trade Secrets Act defines "trade secrets" as

> Information, held by one or more people, without regard to form, including a formula, pattern, business data compilation, program, device, method, technique, design, diagram, drawing, invention, plan, procedure, prototype or process, that:
>
> (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value form its disclosure or use; and
>
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
>
> [N.J.S.A. 56:15-2.]

Notably, the Open Public Records Act ("OPRA"), which is not applicable to the courts, also protects from public disclosure "trade secrets and proprietary commercial or financial information" in the possession of government agencies. N.J.S.A. 47:1A-1.1. The Appellate

Division, when interpreting OPRA, considered several factors when determining whether information constitutes a trade secret under that statute:

> Those considerations include the extent to which the information is known outside the owner's business, the extent to which it is known by employees of the owner, the measures taken to guard the secrecy of the information, the value of the information to the owner and competitors, the effort expended to develop the information, and the ease or difficulty by which the information can be duplicated.
>
> [Communications Workers of Am. v. Rousseau, 417 N.J. Super. 341, 361 (App. Div. 2010)(citing Hammock by Hammock v. Hoffmann-LaRoche, 142 N.J. 356, 384 (1995)).]

The Appellate Division noted that trade secrets can include "'any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford a potential economic advantage over others.'" Id. at 361 (quoting Restatement (Third), Unfair Competition §39). "A trade secret may also include pricing and marketing techniques." Id. at 361 (citing Trump's Castle Assocs. v. Tallone, 275 N.J. Super. 159, 162 (App. Div. 1994)). The court also held that "[c]ommercial information relates to commerce or business." Id. at 356.

Guided by these definitions, the court is satisfied that the sales agreement and its terms are information, the dissemination of which may be limited by the court. While the sales agreement and its terms might not technically be "trade secrets," given that they do not directly relate to the business operations of the taxpayer, the court finds that they quite plainly are commercial information. The negotiated purchase price, contingencies, and other terms of the sales agreement reflect confidential business practices, judgments and strategies with respect to plaintiff's contemplated sale of a significant business asset.

Plaintiff has taken meaningful steps to safeguard the confidentiality of the sales agreement and its terms. The most prominent evidence of plaintiff's efforts to protect the contract and its

terms from dissemination is the confidentiality provision of the contract, which demonstrates that plaintiff and the potential purchaser place great emphasis on keeping information relating to the sales agreement confidential.

Plaintiff's efforts at maintaining the confidentiality of the sales agreement and its terms is not surprising. As is the case with all real estate purchases, there is a possibility that the transaction contemplated in a sales agreement ultimately will not take place. In such circumstances, the seller in many instances will return to the marketplace in an attempt to find a new purchaser. This is precisely what transpired here. Public disclosure of the sales agreement and its terms would put plaintiff at a distinct disadvantage when negotiating a new purchase price and terms for the subject property.

The court acknowledges that plaintiff filed this action and elected to put the true market value of its property in contest in a public forum. A taxpayer cannot file suit alleging that its property is assessed at above its true market value and subsequently claim that a contract which it executed for the sale of that property near the relevant valuation date cannot be produced in discovery because it contains a sales price considered confidential. This is likely why plaintiff does not seek to block the disclosure of the sales agreement and its terms to the municipality.

There is, however, no justification for denying plaintiff's request that the sales agreement and its terms not be disseminated beyond those who need to know its terms in order for the municipality to mount a defense to plaintiff's claims and, possibly, to reach an amicable resolution of this matter. The amount of the assessments at issue and the intensity of the public interest in this matter do not outweigh plaintiff's interest in protecting its commercial information. The court cannot treat an assessment of $150 differently than an assessment of $150 million when it concerns the confidentiality of taxpayer's commercial information. All of the tax appeals before this court

concern the public fisc and all are significant to the property owner and the court, whether the assessment involved is the largest in its county or the smallest in the State. The court has no doubt that Readington Township's elected officials and all property owners in the municipality have significant stakes in the outcome of this matter. Those stakes, however, do not warrant putting the taxpayer at a competitive disadvantage in the real estate marketplace as it seeks a new purchaser for the subject property. A balance can be struck by the court crafting appropriate limitations on the dissemination of information disclosed in discovery. Dixon v. Rutgers, the State Univ. of N.J., 110 N.J. 432, 456-59 (1988).[1]

The court has reviewed the proposed Protective Order submitted by the taxpayer. Disclosure of the sales agreement and its terms may be made to the employees, consultants, appraisers, representatives or agents of defendant who need to know the confidential information in the sale agreement in connection with this appeal to the extent justifiable with that need. Anyone to whom the information is distributed must agree to comply with the terms of the Protection Order with respect to further dissemination of the information. The proposed Protective Order expressly permits the confidential information to be incorporated in an appraisal report by an expert retained by the municipality. The terms of the proposed Protective Order are entirely reasonable and

[1] The court is not persuaded by defendant's arguments relating to R. 1:38-1, et seq., which provides that certain records of the judiciary are subject to public disclosure. Rule 1:38-2(b)(2) excludes from "court records" subject to public disclosure "unfiled discovery materials in any action." Because the sales agreement has not been filed with the court R. 1:38-1, et seq. does not apply. The fact that the Supreme Court Committee whose recommendations resulted in the adoption of R. 1:38-1, et seq., highlighted the public interest in assuring the fairness of the process by which local property taxes are assessed is inapposite here. If the sales agreement, or an expert appraisal report referencing its terms, is filed with the court, R. 1:38-1, et seq. might well permit public disclosure of the information sought to be protected by plaintiff. We are, however, not yet at that bridge, which we shall cross should the need arise.

appropriate. Plaintiff's cross-motion is, therefore, granted. A Protective Order will be filed along with this letter opinion.

/s/Hon. Patrick DeAlmeida, P.J.T.C.