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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 PACIFIC MARINE PROPELLERS,
12 INC.,
13 Plaintiff,
14 v.
15 WARTSILA DEFENSE, INC., BRYAN
16 RUTTER, BOBBY HENINGER,
17 Defendants.
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19

Case No.: 17cv555 BEN (NLS)

**ORDER ON JOINT MOTION FOR
DETERMINATION OF DISCOVERY
DISPUTE NO. 4**

[ECF No. 46]

20 Before the Court is the parties' Joint Motion for Determination of Discovery
21 Dispute No. 4, whereby the parties request the Court's assistance in determining whether
22 Plaintiff's retained expert, Paul Moore, may be shown documents designated by
23 Defendants as "confidential" and/or "attorneys eyes only." ECF No. 46. Having
24 reviewed the briefing submitted and for the reasons set forth below, the Court finds that
25 Mr. Moore qualifies as an "independent" expert and may be shown confidential
26 documents needed for his testimony, provided that he signs and adheres to the
27 "AGREEMENT TO BE BOUND BY PROTECTIVE ORDER" form in the Protective
28 Order entered in this case (ECF No. 33).

1 **I. BACKGROUND**

2 Plaintiff Pacific Marine Propellers, Inc. (“PMP”) and Defendant Wartsila Defense,
3 Inc. (“Wartsila”) both are in the business of repairing marine propellers. ECF No. 19 ¶¶
4 6, 8. In its Second Amended Complaint, Plaintiff presents seven claims related to
5 Wartsila’s entry into the San Diego marine propeller repair market and its actions in
6 competing for government subcontracts. Relevant to the specific issues presented in the
7 instant motion is the following background information.

8 **A. Paul Moore**

9 On July 31, 2017, PMP identified Mr. Paul Moore in its Initial Disclosures as a
10 person who may potentially have knowledge of the underlying facts and events in this
11 case. Subsequently on September 19, 2017, PMP changed its position and notified
12 Wartsila that:

13 Mr. Paul Moore, identified in plaintiff’s initial Rule 26 disclosure at Paragraph
14 28, appears to have no percipient knowledge relative to matters at issue in this
15 case. Consequently, he has been engaged by counsel as a consulting expert
16 on behalf of the plaintiff, and will likely later be engaged as a testimonial
expert for trial. Mr. Moore may be contacted through plaintiff’s counsel.

17 ECF No. 46 at 2.

18 According to Mr. Moore’s CV, he retired from the Navy after 36 years of
19 service. ECF No. 46-2 at 2. During this time at the Navy, he was responsible for
20 “the life cycle management of all Navy submarine and surface ship propellers,
21 shafting and related equipment,” including “[t]echnical authority for all issues
22 relating to manufacture, repair and in-service.” *Id.* He was also an instructor for
23 propeller courses for the last 15 years. *Id.* He is currently employed as a Part-
24 time/On-call Marine Engineer at ECS Federal, LLC, where he “[s]upports the
25 National Oceanic and Atmospheric Administration’s (NOAA’s) Platform
26 Acquisition Division in all facets of vessel acquisition from preliminary design
27 through vessel delivery,” among other tasks for NOAA. *Id.*

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1 **B. Mr. Moore’s Communications with PMP**

2 Relevant to this motion, Mr. Moore had a prior relationship with PMP. As
3 pertinent background, on January 12, 2015, Derek Bateman from PMP sent a letter
4 to the Office of the Secretary of the Navy regarding the contract originally awarded
5 to PMP and later cancelled and given to Wartsila. ECF No. 46-8. The letter
6 accuses Wartsila of not having a Basic Ordering Agreement (“BOA”) to perform
7 work in San Diego and not being equipped to perform the work. *Id.* at 4. The
8 letter specifically states that Wartsila applied for a BOA but was rejected. *Id.* The
9 letter also alleges that Wartsila presented a letter signed by a Jeffrey Schumann
10 (“Schumann letter”) that qualifies Wartsila to conduct propeller repairs in San
11 Diego in connection to the Lake Erie contract, and that this letter is in contradiction
12 to the BOA rejection. *Id.* Mr. Bateman goes onto to call into question the
13 appropriateness of the Schumann letter and accuses Wartsila of deception in
14 connection with that letter and the contract bids. Mr. Moore’s communications
15 with PMP appear to be related to at least some of the issues raised in Mr.
16 Bateman’s letter.

17 In response to an interrogatory regarding communications with “any person
18 concerning Wartsila’s participation in the San Diego propeller repair market,”
19 PMP disclosed the following:

20 Starting in about January 2015, Mr. Bateman had conversations by phone
21 about once a month with Mr. Paul Moore, after his retirement, concerning
22 Wartsila’s effort to enter the San Diego propeller market. In the course of
23 those conversations, Mr. Moore suggested a congressional inquiry
24 concerning the status of Wartsila’s San Diego operations as a “NavSea
25 Certified Propeller Repair Facility.” They also discussed the range of
26 Wartsila bid prices to the extent they were then known and the
27 reasonableness of those bids considering the man-hours involved. They also
28 discussed the NAVSUP protest and its denial. We have no records from
which precise dates or times can be ascertained; however it is fair to state
that the conversations were contemporaneous with the events discussed. Mr.
King also had several similar conversations with Mr. Moore and several
email exchanges that began about December 2014 and continued into 2015

1 concerning Wartsila and how to address the issues with the protest.

2 Mr. King has made phone calls and sent email to Mr. Moore, with whom he
3 had a long professional working relationship and now sees as a friend in
4 retirement. Mr. King wrote to Mr. Moore on May 13, 2015, and met with
5 him not long after while Mr. Moore was in San Diego for an unrelated
6 matter. Mr. King had expressed concerns to Mr. Moore about the technical
7 grinding to the edge of propellers being performed by Wartsila and
8 identified defects in the repairs that would potentially impair the
9 performance of the propeller blades to the detriment of the Navy. He
provided photographs to Mr. Moore for his opinion and feedback and sought
guidance on how to address the issue of government malfeasance in failing
to address the deficient performance by Wartsila.”

10 ECF NO. 46-10 at 15.

11 Documents and deposition testimony also substantiate the relationship.
12 Emails produced during discovery between James King and Mr. Moore show that
13 Mr. King emailed Mr. Moore about the Schumann letter on December 12, 2014.
14 ECF No. 46-9. Mr. Moore responded, giving advice about his interpretation of the
15 letter, whether it should have been issued in his opinion, and what he would do to
16 deal with the issue. *Id.*; ECF No. 46-7. Mr. Moore also indicated that he spoke to
17 James Schumann regarding the letter. *Id.* at 46-7 at 7. James King testified about
18 this email exchange with Mr. Moore during his deposition. ECF No. 46-6 at 7.
19 The emails submitted by the parties on this issue appear to span from December
20 12, 2014 to January 15, 2015. ECF No. 46-9.

21 **C. Protective Order**

22 On November 13, 2017, the Court entered a Protective Order in this case upon the
23 parties' joint motion. ECF No. 33. In relevant part, the Protective Order states:

24 9. Information designated “CONFIDENTIAL - FOR COUNSEL ONLY”
25 must be viewed only by counsel (as defined in paragraph 3) of the receiving
26 party, and by independent experts under the conditions set forth in this
27 Paragraph. The right of any independent expert to receive any Confidential
28 Information will be subject to the advance approval of such expert by the
producing party or by permission of the Court. The party seeking approval of
an independent expert must provide the producing party with the name and

1 curriculum vitae of the proposed independent expert, and an executed copy of
2 the form attached hereto as Exhibit A, in advance of providing any
3 Confidential Information of the producing party to the expert. Any objection
4 by the producing party to an independent expert receiving Confidential
5 Information must be made in writing within fourteen (14) days following
6 receipt of the identification of the proposed expert. Confidential Information
7 may be disclosed to an independent expert if the fourteen (14) day period has
8 passed and no objection has been made. The approval of independent experts
9 must not be unreasonably withheld.

10 10. Information designated “CONFIDENTIAL” must be viewed only by
11 counsel (as defined in paragraph 3) of the receiving party, by independent
12 experts (pursuant to the terms of paragraph 8), and by the additional
13 individuals listed below, provided each such individual has read this Order in
14 advance of disclosure and has agreed in writing to be bound by its terms: a.
15 Executives who are required to participate in policy decisions with reference
16 to this action; b. Technical personnel of the parties with whom Counsel for
17 the parties find it necessary to consult, in the discretion of such counsel, in
18 preparation for trial of this action; and c. Stenographic and clerical employees
19 associated with the individuals identified above.

20 *Id.* at 9-10.

21 **D. The Parties Dispute Disclosure of Confidential Information to Paul Moore**

22 Subsequently, PMP sent an email to Wartsila stating that it intended to show Mr.
23 Moore various documents that had been marked confidential. ECF No. 46 at 3. Wartsila
24 responded by asking for more information regarding Mr. Moore, including his area of
25 expertise and relevance to the issues in the case, an updated CV, his current activities for
26 PMP, and confirmation he had not already been shown Wartsila’s confidential
27 information. *Id.* at 3-4. On April 2, PMP sent some of the requested information to
28 Wartsila. PMP responded that Mr. Moore’s area of expertise was: “Mr. Moore has an
extensive experiential background and is a subject matter expert on the knowledge, skills
and abilities necessary to perform propeller repairs to U.S. Navy specifications. That
expertise extends to having knowledge of the amount of time necessary to perform each
aspect of a repair and the general amount of time required for each line-item specification
within an [Request for Quotation].” *Id.* at 4. Mr. Moore has also agreed to be bound to

1 not accept employment with NASSCO, BAE, and PMP for a number of years following
2 his testimony. *Id.* However, the parties continued to dispute whether Mr. Moore should
3 be shown Wartsila’s confidential information and were unable to reach a resolution. *Id.*
4 at 4-5.

5 **II. DISCUSSION**

6 Discovery Dispute No. 4 involves whether Mr. Moore can be shown Wartsila’s
7 confidential information under the Protective Order. Wartsila primary argument as to
8 why Mr. Moore should not be shown these documents is because he is not an
9 “independent” expert in light of his role and communications with PMP in challenging
10 Wartsila’s entry into the San Diego market. ECF No. 46 at 5.

11 In analyzing whether to approve an expert as “independent” under the terms of
12 a protective order, courts generally weigh the following factors: (1) the expert’s position
13 within the receiving party’s business as an officer, shareholder or employee; (2) the
14 extent of the expert’s regular employment or association with the receiving party; (3) the
15 expert’s “present involvement in the receiving party’s competitive decisions, including
16 participation in or advice related to research;” (4) “the potential for future involvement of
17 the expert in the receiving party’s competitive decisions;” and (5) if the expert is not
18 deemed independent, whether the expert is willing to “forego future involvement with the
19 receiving party.” *Ares-Serono, Inc. v. Organon Int’l B.V.*, 153 F.R.D. 4, 6-7 (D. Mass.
20 1993) (quoting *Digital Equip. Corp. v. Micro Tech., Inc.*, 142 F.R.D. 488, 491 (D. Colo.
21 1992)); *see also Streck, Inc. v. Research & Diagnostic Sys., Inc.*, 250 F.R.D. 426, 433 (D.
22 Neb. 2008) (reciting same factors); *AG Fur Atherische Ole v. Gucci Am., Inc.*, No.
23 04CIV.280(GBD)(THK), 2006 WL 838996, at *2-3 (S.D.N.Y. Mar. 28, 2006) (same).
24 The burden is on the party opposing disclosure to show why the risk of disclosure of its
25 confidential information outweighs the risk of harm to the other party’s ability to
26 prosecute its case. *Isis Pharm., Inc. v. Santaris Pharma A/S Corp.*, No. 11cv2214-GPC
27 (KSC), 2013 WL 3367575, at *3 (S.D. Cal. July 5, 2013).

28 The primary concern addressed by these factors centers around the worry that the

1 confidential information will be used to harm the party whose confidential information is
2 being divulged or to place that party at a competitive disadvantage. *Ares-Serono*, 153
3 F.R.D. at 6 (finding expert independent where “she no longer participates in [plaintiff’s]
4 competitive decisions); *Streck*, 250 F.R.D. at 433 (noting that expert’s role was to make
5 product compatible with another product “rather than to improve [plaintiff’s] products for
6 the general competitive market”); *see also Isis Pharm.*, 2013 WL 3367575, at *3 (“When
7 a party is concerned with about the competitive misuse of confidential information and a
8 protective order appears to be insufficient protection, the court must balance the risk of
9 disclosure to competitors against the risk of damaging the claims or defenses of the party
10 seeking access.”) (quoting *Santella v. Grizzly Indus., Inc.*, No. 12mc00131-SI, 2012 WL
11 5399970, at *4 (D. Or. Nov. 5, 2012)). In addition, the temporal focus of this inquiry is
12 on the present relationship between the expert and the party, not the past relationship.
13 *Compare Ares-Serono*, 153 F.R.D. at 6 (noting that expert is a former employee and
14 “[h]er contact with Serono in the future appears tenuous at best”) and *Streck*, 250 F.R.D.
15 at 433 (noting that expert was no longer working with plaintiff’s employees”) with
16 *Digital Equip. Corp*, 142 F.R.D. at 492 (expert “has been retained by [defendant] on an
17 ongoing basis” and this “continuing nexus to an important aspect of [defendant’s]
18 business” disqualifies him as serving as an independent expert).

19 With these guiding principles in mind, the Court finds that Mr. Moore qualifies as
20 an “independent” expert. The emails and testimony establishes that Mr. Moore had a
21 relationship with individuals at PMP during the timeframe of late 2014 through early
22 2015. As Wartsila argues, this evidence may well be interpreted as showing that Mr.
23 Moore aided PMP in challenging Wartsila’s entry into the San Diego propeller repair
24 market and may be partisan to PMP.¹

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27 ¹ While the Court understands the basis for Wartsila’s concerns, this opinion is limited to whether Mr.
28 Moore qualifies as an “independent” expert under the relevant law and does not foreclose Wartsila from
challenging Mr. Moore’s expert role in other ways, such as in a future *Daubert* motion or by attacking
his opinions based on their perceived bias.

1 However, the test to determine if an expert is “independent” focuses on the present
2 and future involvement of Mr. Moore with PMP. The scope of the relationship as
3 evidenced by the testimony and documents occurred about two years prior to the filing of
4 this lawsuit, as Wartsila even acknowledges. Wartsila does not present any evidence to
5 show that Mr. Moore acts as an officer or employee of PMP currently, has any regular
6 association with PMP, or has any role in PMP’s current competitive decisions or may
7 have involvement in such decisions in the future. As Mr. Moore’s CV shows, he is
8 currently employed on a part-time basis to consult with NOAA’s vessel acquisition.

9 Wartsila’s argument that Mr. Moore will use its confidential information to its
10 detriment is based on speculation that the past relationship necessarily means a current or
11 future relationship. Wartsila expresses concern that its confidential information,
12 including bids, bid estimates, and related materials, will be divulged to its competitor
13 PMP. However, Wartsila fails to establish that divulging such information to Mr.
14 Moore—provided that he has signed the “AGREEMENT TO BE BOUND BY
15 PROTECTIVE ORDER” form which exposes him to sanctions for contempt of court—
16 would result in that the information being divulged to PMP. Moreover, Mr. Moore has
17 already agreed that he is willing to forego employment with PMP. *Ares-Serono*, 153
18 F.R.D. at 6 (fifth factor being if the expert is willing to “forego future involvement with
19 the receiving party”); *Digital Equip. Corp.*, 142 F.R.D. at 492 (expert can become
20 “independent” if he “relinquishes his non-litigation consulting activities for Micro and
21 agrees not to perform such non-litigation related consulting work for Micro in the
22 future”).

23 Wartsila also argues that, regardless of whether Mr. Moore is independent or not,
24 he does not need the confidential information to form an opinion regarding the amount of
25 time required to perform a repair or task that would appear in a Request for Quotation—
26 the only specific topics on which PMP has disclosed that Mr. Moore will opine. PMP
27 states that the data that it intends to share with Mr. Moore is primarily bids and bid
28 estimates and related materials from bids made for propeller work in San Diego during

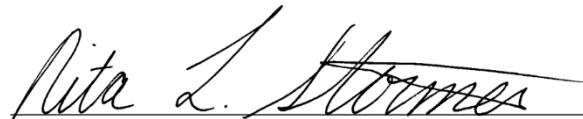
1 the period of 2014-2016. ECF No. 46 at 11. The Court finds it reasonable that an expert
2 who may opine on the amount of time required to perform a task related to propeller
3 repair may need to see bid or bid estimates in the relevant time frame, from the relevant
4 market in San Diego. It would also not be unreasonable that such an expert may also
5 opine on the related topic of whether certain bids or bid estimates are reasonable or not.
6 And, as the Court discussed above, any potential harm to Wartsila is minimized by Mr.
7 Moore signing the agreement to bound and his agreement to not work for PMP in the
8 future.²

9 **III. CONCLUSION**

10 For the foregoing reasons, the Court finds that Mr. Moore qualifies as an
11 “independent” expert and may be shown confidential documents needed for his
12 testimony, provided that he signs and adheres to the “AGREEMENT TO BE BOUND
13 BY PROTECTIVE ORDER” form.

14 **IT IS SO ORDERED.**

15 Dated: May 3, 2018



16
17 Hon. Nita L. Stormes
18 United States Magistrate Judge

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26 ² The parties also dispute the circumstances under which a party needs to approve of the opposing
27 party’s expert before he can be shown confidential information under Paragraph 9 of their Protective
28 Order. ECF No. 46 at 5-6, 12-13. In this instance, however, Mr. Moore was already disclosed to
Wartsila who objected (under the procedure outlined in Paragraph 9) and the Court rules in this motion
that he qualifies as an “independent” expert. Thus, the Court need not address this specific argument.