UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, STATE OF NEW YORK, STATE OF WASHINGTON, STATE OF CALIFORNIA, STATE OF ILLINOIS, COMMONWEALTH OF MASSACHUSETTS, STATE OF OHIO, AND COMMONWEALTH OF PENNSYLVANIA, Plaintiffs, v. AT&T INC., T-MOBILE USA, INC., AND DEUTSCHE TELEKOM AG, Defendants.	Civil Action No. 1:11-cv-01560-ESH Hon. Ellen S. Huvelle

MEMORANDUM OF LAW IN SUPPORT OF NON-PARTY GOOGLE INC.'S MOTION FOR ADDITIONAL RELIEF UNDER THE PROTECTIVE ORDER

Pursuant to Paragraph B.2 of the Stipulated Protective Order Concerning Confidentiality entered in the above-captioned action ("this Action") on September 15, 2011 (the "Protective Order") (Dkt. No. 24), non-party Protected Person Google Inc. ("Google") hereby seeks limited additional relief from the Court to protect confidential documents that Google produced to the United States Department of Justice (the "DOJ") in response to a Civil Investigative Demand. Specifically, Google requests that the Court modify:

1. Paragraph D.13(b) of the Protective Order to require the parties to notify a non-party like Google at least twenty-four (24) hours in advance of potential disclosure in open court of the non-party's documents or deposition testimony designated as Confidential Information that does not appear on an exhibit list or in deposition designations;[1]

2. Paragraph D.12 of the Protective Order to require the parties to notify a non-party like Google at least three (3) days in advance of (a) including that non-party's Confidential

[1] By making this motion, Google does not waive its right to contest any motion by the Defendants to permit their in-house counsel to access Google's confidential documents. See Protective Order ¶ C.9.

Information in a pleading, motion, exhibit, or other paper to be filed with the Court, and (b) a party's potential use of a non-party's Confidential Information at any pre-trial court proceeding; and

3. Paragraph C.9(g) of the Protective Order to require the parties to notify a non-party like Google at least five (5) days in advance of disclosing that non-party's Confidential Information to a retained expert.

Without such additional protection, Google and other non-parties could find their confidential information — such as Google's business plans related to Android — in the hands of competitors (or their competitors' consultants), or even in newspapers, without having had prior notice of its disclosure. That would not only harm non-parties like Google, but possibly also competition in various mobile markets. The risk of disclosure is particularly real given the substantial public attention and press coverage that this Action is already attracting.[2]

BACKGROUND[3]

During the course of its investigation into AT&T, Inc.'s ("AT&T") proposed acquisition of T-Mobile USA, Inc. ("T-Mobile"), in May of this year, the DOJ issued a Civil Investigative Demand to Google (the "CID"), directing Google to produce certain documents. In compliance with the CID, Google produced a substantial volume of documents of a highly confidential and competitively sensitive nature to the DOJ, such as internal product development and launch plans ("CID Materials"). See Decl. of John Janhunen in Support of Non-Party Google Inc.'s Mot. for Additional Relief Under the Protective Order ¶¶ 2-3 ("Janhunen Decl.") (Ex. F).

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[2] See, e.g., Cecilia Kang, AT&T, T-Mobile Score in U.S. Court, Wash. Post, Sept. 22, 2011, at A14 (Ex. A); Edward Wyatt, U.S. Files Lawsuit To Block Merger Of Phone Rivals, N.Y. Times, Sept. 1, 2011, at A1 (Ex. B).

[3] Citations to exhibits appended to the Declaration of John D. Harkrider in Support of Non-Party Google Inc.'s Motion for Additional Relief Under the Protective Order are of the form "Ex. __."

The DOJ filed suit challenging AT&T's proposed acquisition of T-Mobile on August 31, 2011. Google is not a party to this suit. The Protective Order was entered on September 15, 2011, and Google received a copy of it from the DOJ on September 16, 2011. Based on correspondence from the DOJ, Google understands that the DOJ intends to produce Google's CID Materials — and other non-parties' CID Materials — to the Defendants' outside counsel in this action in accordance with the Protective Order, so that the CID Materials might be shared with the parties' experts and used at a hearing or at trial. Given the confidential nature of its CID Materials, Google is concerned about (and objects to) disclosure of those materials in this Action.

Google produced documents to the DOJ under compulsory process and is therefore a (non-party) Protected Person, as defined in Paragraph A.1(j) of the Protective Order. As such, the Protective Order permits Google to seek additional relief from the Court if it determines that the Protective Order does not adequately protect Google's CID Materials. See Protective Order ¶ B.2. As is set forth below, Google has determined that the Protective Order indeed does not adequately protect its CID Materials against disclosure.

ARGUMENT

I. THE PROTECTIVE ORDER SHOULD BE MODIFIED TO REQUIRE PRIOR NOTICE TO A NON-PARTY OF POTENTIAL DISCLOSURE IN OPEN COURT OR ON THE PUBLIC RECORD

A. Under the Protective Order Google's Confidential Information May Be Disclosed in Open Court or on the Public Record Without Prior Notice to Google

The Protective Order provides that, if the parties identify a non-party's Confidential Information on their pre-trial exhibit lists or in deposition designations for use on the public record, the parties must provide the non-party seven days advance notice so as to afford it the opportunity to object to public disclosure of the CID Materials *before* such disclosure is made.

See Protective Order ¶ D.13(a). That procedure gives a non-party like Google adequate time to object to disclosure of its CID Materials in open court.

Paragraph D.13(b) of the Protective Order, however, does *not* require the parties to give Google, or any other non-party, prior notice of potential use of their CID Materials in open court during trial where the parties have omitted those materials from their exhibit lists or deposition designations. In particular, that Paragraph provides:

> "(b) Absent a ruling by the Court to the contrary, documents or deposition testimony designated as Confidential Information by a Party or non-party that do not appear on an exhibit list or in deposition designations, that are admitted into evidence at trial, will be disclosed on the public record, and any examination relating to such information will likewise be disclosed on the public record, after compliance with the following process:
>
> > (i) A Party must alert the Court before doing so that it intends to use Confidential Information of a Party or non-party and that that Party or non-party is not on notice.
> >
> > (ii) At that time, the Court will determine whether to seal the courtroom while such Confidential Information is being discussed.
> >
> > (iii) Within one day after the Party uses that Confidential Information, that Party shall ensure that a non-party that designated the material receives a written notice of same. The Party will inform the non-party that, absent objection, that Confidential Information will be disclosed on the public record.
> >
> > (ii) If the Party or non-party continues to object to public disclosure of the information at trial, the Party or non-party must, within seven days after receipt of written notice, file a motion for additional protection."

Nor does any Paragraph in the Protective Order require the parties to give Google, or any other non-party, notice before potential disclosure of its confidential documents on the public record or at any other courtroom proceedings prior to trial, such as hearings on discovery disputes or a potential summary judgment hearing. While Paragraph D.12 of the Protective Order requires the parties to file under seal any pleading, motion, exhibit or other paper that

contains a non-party's Confidential Information, that Paragraph does not require the parties to give a non-party prior notice of inclusion of its Confidential Information in such court filings, nor of any court hearings prompted by such filings during which the Confidential Information might be discussed.

This means that, unless the Court seals the courtroom on its own motion, Google's and other non-parties' confidential information might be disclosed in open court at a hearing or at trial, and thus in the presence of many persons beyond those listed in Paragraph C.9 of the Protective Order, including the press, without Google or the other non-parties having had an opportunity to object in advance to such disclosure. Similarly, if the Court denies a Party's motion to seal a pleading containing a non-party's confidential information, that non-party's confidential information might be disclosed on the public record without prior notice to the non-party. Google respectfully submits that the procedures under Paragraphs D.12 and D.13(b) of the Protective Order therefore do not adequately protect its interests.

B. Non-Parties Should Have an Opportunity To Object *Before* Disclosure on the Public Record or in Open Court of Their Confidential Information

As this Court has recognized, the public's right of access to court proceedings "is far from absolute." State of New York v. Microsoft Corp., No. 98-cv-1233, 2002 WL 818073, at *1 (D.D.C. Apr. 29, 2002) (Ex. C). When faced with the decision whether or not to restrict public access to court documents, courts in the D.C. Circuit must consider a number of different factors in addition to the public's need for access, including, among other interests, whether a party has objected to disclosure and the strength of the property and privacy interests at stake. See id. at *2. See also United States v. Hubbard, 650 F.2d 293, 317-22 (D.C. Cir. 1980). The procedures contemplated by Paragraphs D.12 and D.13(b) of the Protective Order do not enable the Court adequately to consider these factors because they do not permit non-parties like Google even to

state their objections prior to disclosure in open court, much less explain to the Court why disclosure to the public would harm them.

Disclosure on the public record or in open court of non-parties' confidential information, such as product development or launch plans, has the potential of causing them substantial competitive harm, even if such disclosure does not make the papers. See, e.g., Nat'l Commy. Reinvestment Coalition v. Nat'l Credit Union Admin., 290 F. Supp. 2d 124, 135 (D.D.C. 2003) ("Business and marketing plans by their nature usually contain information that would cause competitive harm if disclosed."). This is especially true for Google, because there will likely be various telecommunications industry participants in the courtroom at any significant hearing in this matter, including employees of AT&T and T-Mobile, with whom Google either competes or regularly negotiates business transactions at arm's length. Google's CID Materials include highly confidential business plans related to Android. (Janhunen Decl. ¶ 3.) Disclosure of such plans to competitors could not only harm Google, but likely also competition in mobile markets. Indeed, it is well-established that disclosure of competitively sensitive information to competitors can adversely affect competition because it may change competitors' incentives to compete and innovate. See, e.g., Fed. Trade Comm. & Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000) at 15 ("[T]he sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables.") (Ex. G).

A non-party's right under Paragraph D.13(b) to attempt to keep its disclosed confidential information from inclusion in the *trial transcript* is not an adequate remedy for two reasons. First, given the industry interest and press coverage of this Action, the damage likely will have

been done once confidential information is disclosed in open court. Second, the trial transcript is not the only way that non-parties' confidential information may become public: such information could be included in or attached to any pleading or motion and discussed at *any* hearing, not just at trial. Yet, the current Protective Order affords non-parties no opportunity to object to disclosure in a pleading, motion or exhibit other than trial exhibits, nor to disclosure in open court at a pre-trial hearing or in the transcripts of such a hearing.

Only Google is truly in the position to explain to the Court exactly why a document that it produced to the DOJ should be treated as confidential and what harm Google would suffer from disclosure in open court. Moreover, not only are the parties in this Action ill-positioned to explain the harms of disclosure to Google's business interests, but once they have decided they want to use Google's confidential information to advance their arguments at trial or at any other hearing, they in fact also lack the proper incentives to protect Google's interests. All of this is no doubt also true for other non-parties who, like Google, have produced confidential documents in response to a civil investigative demand or other compulsory process.

Google (and any other non-party in the same position) should therefore always have an opportunity to present its objections to disclosure of its confidential information (both on the public record and in open court) *before* such disclosure occurs, even if its confidential information has not been included in a trial exhibit list or in deposition designations. Only then will the Court be able to make an informed decision based on the Hubbard factors as to whether or not to seal or otherwise restrict access to the courtroom.

C. Paragraph D.13(b) Should Be Modified to Require 24-Hours Advance Notice of Potential Disclosure in Open Court

In light of the foregoing, Google requests that Paragraph D.13(b) of the Protective Order be modified to require the parties to give non-parties like Google at least twenty-four (24) hours

advance notice if they foresee that they might seek to use and disclose at trial any of Google's confidential information that has not been included in an exhibit list or in deposition designations.

Specifically, Google requests that the Court replace the existing Paragraph D.13(b) with a new Paragraph D.13(b), which would read as follows:

> "(b) Absent a ruling by the Court to the contrary, documents or deposition testimony designated as Confidential Information by a Party or non-party that does not appear on an exhibit list or in deposition designations, that are admitted into evidence at trial, will be disclosed on the public record, and any examination relating to such information will likewise be disclosed on the public record, after compliance with the following process:
>
> > (i) At least twenty-four (24) hours before any such Confidential Information of a Party or non-party might be used by a Party at trial, that Party shall ensure that the other Party or non-party that designated the material receives a written notice of such intended use, including the applicable document-production page numbers and/or page and line numbers of deposition testimony the Party intends to use. The Party will inform the other Party or non-party that, absent objection, that Confidential Information might be disclosed in open court and on the public record.
> >
> > (ii) If the Party or non-party that designated the material objects to potential public disclosure of all or part of the information at trial, that Party or non-party, and the notifying Party, shall attempt to resolve their differences by, for example, redacting Confidential Information. If no resolution is reached and the Party or non-party continues to object to potential public disclosure of the information at trial, the Party or non-party must, within twenty-four (24) hours of receipt of written notice, make a motion (orally or in writing) for an order granting in camera treatment or other additional protection of the Party's or non-party's Confidential Information."

D. Paragraph D.12 Should Be Modified to Require Three Days Advance Notice of Potential Disclosure on the Public Record or in Open Court

Google furthermore requests that the Court modify Paragraph D.12 to require the parties to provide a non-party at least three (3) days advance notice before: (a) including any of the non-party's Confidential Information in a pleading, motion, exhibit, or any other paper to be filed

with the Court, and (b) a party's potential use of a non-party's Confidential Information during a pre-trial court proceeding.

Specifically, Google requests that the Court add to the existing Paragraph D.12 the following language under new subparts (a), (b) and (c):

> "(a) Notwithstanding the requirements under Paragraph 13 below, at least three (3) days before a Party includes any Confidential Information of a non-party in a pleading, motion, exhibit, or other paper to be filed with the Court, the Party seeking to file such material shall ensure that the non-party that designated the material receives written notice of the same, including the applicable document-production page numbers and/or page and line numbers of deposition testimony the Party intends to use, as well as the motion to seal that the Party intends to file with the pleading, motion, exhibit or other paper containing the non-party's Confidential Information. If the non-party is not satisfied with the Party's motion to seal, the non-party must, within three (3) days of receipt of written notice, file its own motion to seal the Confidential Information.
>
> (b) Notwithstanding the requirements under Paragraph 13 below, at least three (3) days before a Party might use Confidential Information of a non-party during any pre-trial court proceeding, that Party shall ensure that the non-party that designated the material receives written notice of such intended use, including the applicable document-production page numbers and/or page and line numbers of deposition testimony the Party intends to use. The Party will inform the non-party that, absent objection, that Confidential Information might be disclosed in open court and on the public record.
>
> (c) If the non-party that designated the material objects to potential public disclosure of all or part of the information during the pre-trial court proceeding, that non-party, and the notifying Party, shall attempt to resolve their differences by, for example, redacting Confidential Information. If no resolution is reached and the non-party continues to object to potential public disclosure of the information during the pre-trial proceeding, the non-party must, within three (3) days of receipt of written notice, make a motion (orally or in writing) for an order granting in camera treatment or other additional protection of the non-party's Confidential Information."

II. THE PROTECTIVE ORDER SHOULD BE MODIFIED TO REQUIRE FIVE DAYS PRIOR NOTICE OF DISCLOSURE OF A NON-PARTY'S CONFIDENTIAL INFORMATION TO EXPERTS

The Protective Order provides that materials designated by a party or non-party as Confidential Information may be disclosed to: (a) the Court, (b) DOJ attorneys, (c) defendants' outside counsel, (d) authors and recipients of the Information, (e) persons who have had prior access to the Information, and (f) the parties' experts. See Protective Order ¶ C.9. The Protective Order does not, however, require the parties to disclose to a non-party like Google which experts will gain access to its Confidential Information, much less afford it an opportunity to file a motion to prevent such disclosure where the non-party believes that disclosure to a particular expert will harm its commercial interests.

Like disclosure in open court, disclosure of a non-party's confidential information to the parties' experts has the potential of causing significant harm to the non-party and competition. See Amfac Resorts, L.L.C. v. United States Dept. of the Interior, 143 F. Supp. 2d 7, 14-15 (D.D.C. 2003). It could cause significant harm to Google and competition in mobile markets, for instance, if Google's confidential Android business plans were disclosed to an expert who happens to be employed by, is a consultant for, or otherwise regularly performs work for a significant competitor of Google in those markets. Non-parties like Google therefore should have an opportunity to object to disclosure of their confidential information to experts. See Bank of N.Y. v. Meridien BIAO Bank Tanzania Ltd., 171 F.R.D. 135, 143-45 (S.D.N.Y. 1997) (imposing pre-disclosure notice requirement). The Protective Order currently does not afford non-parties that opportunity. Indeed, the Protective Order does not even require the parties to inform non-parties of the identity of the experts who will have access to their confidential material.

To remedy this, Google requests that the Court require the parties to notify non-parties at least five (5) days before disclosing their documents to retained experts. That requirement should include an obligation on the parties to disclose the identity of their experts, as well as their experts' curriculum vitae listing their work history.

Specifically, Google requests that the Court replace the existing Paragraph C.9(g) with a new Paragraph C.9(g), which would read as follows:

> "(g) 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 or independent contractors to the extent necessary to assist the expert's work in this Action, may have access to materials designated as Confidential Information but only after compliance with the following process:
>
> > (i) Any Party seeking to disclose a non-party's Confidential Information to a testifying or consulting expert retained by that Party must, at least five (5) days prior to such disclosure, provide written notice to the non-party identifying the full name, employer and place of business of the expert, and including a current curriculum vitae of the expert listing the expert's professional experience for the last five (5) years.
> >
> > (ii) If the non-party who designated the material as Confidential Information makes a motion to the Court opposing disclosure of its Confidential Information to an expert within five (5) days after receiving the written notice provided for above, that Confidential Information shall not be disclosed by the Party to the testifying or consulting expert absent a written agreement with the designating non-party or an order of the Court requiring disclosure."

III. THE PROPOSED NOTICE REQUIREMENTS WILL NOT PREJUDICE THE PARTIES OR THE PUBLIC

Google understands that a notice requirement, if it calls for substantial advance notice, can be unduly disruptive to the parties' ability to present their case. That is why Google asks for only twenty-four hours notice before disclosure of a non-party's confidential information in open court during trial, for only three days' notice before disclosure in pre-trial filings and hearings, and for only five days' notice before disclosure to an expert. These are narrowly tailored

modifications of the Protective Order to ensure Google's and other non-parties' interests in maintaining the confidentiality of their information. They should impose minimal if any inconvenience to the parties, much less prejudice their ability to present their case. Under the current case schedule, the parties still have several months to prepare their case for trial, and so their counsel should be able to plan in advance which documents produced by Google they need to share with their experts and might use at trial or at any other hearing. Indeed, if anything, appropriate notice requirements will only give the parties greater incentives to plan their expert testimony and exhibit lists as carefully as possible and minimize surprise at trial.

Illustrative in this respect are the protective orders that Judge Bates and Judge Collyer of this Court entered in, respectively, FTC v. Arch Coal, Inc., No. 1:04-cv-00534-JDB, and FTC v. CCC Holdings, Inc., No. 1:08-cv-02043-RMC. Like this Action, both those cases involved merger challenges by the federal government under the Hart-Scott-Rodino Act, and in both cases the Protective Order required advance notice of open-court disclosure of confidential information without regard to whether the information had been placed on an exhibit list or in deposition designations:

> "If counsel for a defendant or any other party plans to introduce into evidence any document or transcript containing Confidential Material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted in camera treatment."

Protective Order ¶ 12, FTC v. Arch Coal, Inc., No. 1:04-cv-00534-JDB (D.D.C. Apr. 8, 2004) (Ex. D). See also Protective Order ¶ 11, FTC v. CCC Holdings, Inc., No. 1:08-cv-02043-RMC (D.D.C. Dec. 9, 2008) (same) (Ex. E). Likewise, in both cases the protective orders imposed restrictions on the disclosure of confidential information to experts well beyond what Google asks for here. Cf. Protective Order ¶ 7(e), Arch Coal (prohibiting disclosure to experts who were

"currently affiliated in any way with one of the defendants or with any other company or person producing or selling coal in the United States"); Protective Order ¶ 7(d), CCC Holdings (prohibiting disclosure to experts who were "affiliated in any way with a defendant or with any other company or person involved in the sale of computer software systems used by automobile repair shops and insurance companies to estimate collision repair costs and replacement values for cars driven in the United States"). There is no reason why the procedures used in those cases could not be used to like effect here.

CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court grant Google's motion for additional relief under the Protective Order as written above and in the accompanying Proposed Order.[4]

[4] Pursuant to Local Civil Rule 7(m), counsel for Google conferred in advance of filing this motion with counsel for the United States and for the defendants, but the parties could not reach agreement.

Dated: September 26, 2011

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, STATE OF NEW YORK, STATE OF WASHINGTON, STATE OF CALIFORNIA, STATE OF ILLINOIS, COMMONWEALTH OF MASSACHUSETTS, STATE OF OHIO, AND COMMONWEALTH OF PENNSYLVANIA, Plaintiffs, v. AT&T INC., T-MOBILE USA, INC., AND DEUTSCHE TELEKOM AG, Defendants.	Civil Action No. 1:11-cv-01560-ESH Hon. Ellen S. Huvelle

[PROPOSED] ORDER

Upon review and consideration of Non-Party Google Inc.'s Motion for Additional Relief Under the Protective Order, it is this ____ day of _____, 2011, hereby

ORDERED that the motion is **GRANTED;** and it is further

ORDERED that Paragraph D.13(b) of the Protective Order in this action be modified to read as follows:

> "(b) Absent a ruling by the Court to the contrary, documents or deposition testimony designated as Confidential Information by a Party or non-party that does not appear on an exhibit list or in deposition designations, that are admitted into evidence at trial, will be disclosed on the public record, and any examination relating to such information will likewise be disclosed on the public record, after compliance with the following process:
>
> > (i) At least twenty-four (24) hours before any such Confidential Information of a Party or non-party might be used by a Party at trial, that Party shall ensure that the other Party or non-party that designated the material receives a written notice of such intended use, including the applicable document-production page numbers and/or page and line numbers of deposition testimony the Party intends to use. The Party will inform the other Party or non-party

that, absent objection, that Confidential Information might be disclosed in open court and on the public record.

(ii) If the Party or non-party that designated the material objects to potential public disclosure of all or part of the information at trial, that Party or non-party, and the notifying Party, shall attempt to resolve their differences by, for example, redacting Confidential Information. If no resolution is reached and the Party or non-party continues to object to potential public disclosure of the information at trial, the Party or non-party must, within twenty-four (24) hours of receipt of written notice, make a motion (orally or in writing) for an order granting in camera treatment or other additional protection of the Party's or non-party's Confidential Information."

ORDERED that the following subparts be added to Paragraph D.12 of the Protective Order in this action:

"(a) Notwithstanding the requirements under Paragraph 13 below, at least three (3) days before a Party includes any Confidential Information of a non-party in a pleading, motion, exhibit, or other paper to be filed with the Court, the Party seeking to file such material shall ensure that the non-party that designated the material receives written notice of the same, including the applicable document-production page numbers and/or page and line numbers of deposition testimony the Party intends to use, as well as the motion to seal that the Party intends to file with the pleading, motion, exhibit or other paper containing the non-party's Confidential Information. If the non-party is not satisfied with the Party's motion to seal, the non-party must, within three (3) days of receipt of written notice, file its own motion to seal the Confidential Information.

(b) Notwithstanding the requirements under Paragraph 13 below, at least three (3) days before a Party might use Confidential Information of a non-party during any pre-trial court proceeding, that Party shall ensure that the non-party that designated the material receives written notice of such intended use, including the applicable document-production page numbers and/or page and line numbers of deposition testimony the Party intends to use. The Party will inform the non-party that, absent objection, that Confidential Information might be disclosed in open court and on the public record.

(c) If the non-party that designated the material objects to potential public disclosure of all or part of the information during the pre-

trial court proceeding, that non-party, and the notifying Party, shall attempt to resolve their differences by, for example, redacting Confidential Information. If no resolution is reached and the non-party continues to object to potential public disclosure of the information during the pre-trial proceeding, the non-party must, within three (3) days of receipt of written notice, make a motion (orally or in writing) for an order granting in camera treatment or other additional protection of the non-party's Confidential Information."

ORDERED that Paragraph C.9(g) of the Protective Order in this action be modified to read as follows:

"(g) 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 or independent contractors to the extent necessary to assist the expert's work in this Action, may have access to materials designated as Confidential Information but only after compliance with the following process:

(i) Any Party seeking to disclose a non-party Protected Person's Confidential Information to a testifying or consulting expert retained by that Party must, at least five (5) days prior to such disclosure, provide written notice to the non-party identifying the full name, employer and place of business of the expert, and including a current curriculum vitae of the expert listing the expert's professional experience for the last five (5) years.

(ii) If the non-party who designated the material as Confidential Information makes a motion to the Court opposing disclosure of its Confidential Information to an expert within five (5) days after receiving the written notice provided for above, that Confidential Information shall not be disclosed by the Party to the testifying or consulting expert absent a written agreement with the designating non-party or an order of the Court requiring disclosure."

SO ORDERED.

_____
ELLEN SEGAL HUVELLE
United States District Judge