UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMGEN, INC.

Plaintiff,

v. **CIVIL ACTION No.: 05-CV-12237-WGY**

F. HOFFMANN-LA ROCHE LTD, ROCHE DIAGNOSTICS GmbH, and HOFFMANN-LA ROCHE INC.,

Defendants.

MEMORANDUM IN SUPPORT OF DAVITA'S ASSENTED-TO MOTION FOR LEAVE TO FILE UNDER SEAL DOCUMENTS CONTAINING DAVITA'S TRADE SECRETS THAT WERE SUBMITTED BY ROCHE

Non-Party DaVita Inc. ("DaVita"), pursuant to Federal Rule of Civil Procedure 26(c)(7), Local Rule 7.2, and the protective order in this case, submits this Memorandum and accompanying Declaration in support of its Assented-To Motion for Leave to File Under Seal Documents Containing Non-Party DaVita's Trade Secrets That Were Submitted by Roche.

The confidential information DaVita seeks to have protected from public disclosure reflects the substance of ongoing and highly sensitive negotiations between Amgen and DaVita regarding the price of Epogen™ to be supplied by Amgen USA ("Amgen") for its use in providing dialysis services, and discloses certain terms of the supply agreement between them. Specifically, DaVita seeks to have filed under seal the information contained in lines 13-20 of page 61 and lines 9-10 and 24-25 of page 64 of deposition testimony submitted by Roche as Exhibit 73 (hereafter, the "Kogod Testimony" or "Testimony"). DaVita also seeks the sealing of Roche Exhibit 210, which is a document that was produced by DaVita pursuant to a subpoena issued by Roche and that bears the Bates number DVA-ROCHE0000338. These documents are

among the exhibits that were submitted to the court for *in camera* review by Roche on June 29, 2007, which are identified in the Declaration of David Cousineau also filed on that day (Docket # 589).

As set forth in the accompanying Declaration of Dennis Kogod, DaVita's Group President for the Western Operating Group (the "Kogod Declaration"), DaVita considers this information extremely confidential and has protected it from public disclosure as a trade secret. The continued secrecy of this information is critical and disclosure in the public record would unfairly cause financial and competitive damage to DaVita, a non-party. Under these circumstances, the Court is empowered by the federal rules and Massachusetts law to limit disclosure of the information. The Court should exercise its power to do so by ordering that the designated testimony and Exhibit be filed under seal.

I. Background

DaVita is not a party to this action.

DaVita operates more than 1,300 outpatient dialysis clinics in the U.S., and also provides acute inpatient dialysis services in approximately 770 hospitals. As part of its business, DaVita is a customer of Amgen and purchases substantial volumes of Epogen™ from Amgen for use in treating patients. Amgen is the sole manufacturer of Epogen™. DaVita's purchases of Epogen™ total several hundred million dollars annually, and the terms, including price, discount and rebate terms, under which Amgen supplies DaVita with Epogen™ significantly bear on DaVita's operating performance.

The terms under which DaVita purchases Epogen™ are governed by the Epogen™ Freestanding Dialysis Center Agreement that was executed by the two entities on February 6, 2006 (the "Davita Epogen Agreement"). The DaVita Epogen Agreement sets forth the price at which DaVita currently purchases Epogen™ from Amgen and reflects certain discounts and

rebates available to DaVita. The terms of the DaVita Epogen Agreement are subject to a strict confidentiality agreement between Amgen and DaVita, and these terms are redacted from public filings. (Kogod Declaration at ¶ 12.)

Since August 2006, Amgen and DaVita have participated in protracted discussions regarding a prospective new supply agreement for Epogen™. (*Id.* at ¶ 3.) The substance of these negotiations is not publicly disseminated and, indeed, the substance of the negotiations is known only by a small number of upper-level DaVita employees. (*Id.* at ¶ 12.)

II. The Information Sought to Be Protected

The Kogod Testimony that has been submitted by Roche in support of its opposition is highly confidential. They contain questions and answers relating to ongoing negotiations between Amgen and DaVita regarding future purchases of Epogen™ by DaVita, and identify the specific Epogen™ pricing provision that was under consideration by Amgen and DaVita during the time in question. The deposition testimony also describes discussions between Amgen and DaVita regarding the operation of the current DaVita Epogen Agreement, including a reference to a specific price term. Exhibit 210 is a "term sheet" that sets forth a detailed pricing proposal presented by DaVita to Amgen in the course of the ongoing negotiations.

III. The Court Must Weigh the Public's Right to the Information Against the Harm to DaVita.

Although there is a presumptive common law and First Amendment right of public access to material filed in connection with judicial proceedings, the right of access to such judicial records is "not absolute." *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987).

As an initial matter, to the extent that a court does not rely on materials in determining a litigant's substantive rights, the presumption of access does not apply. *Id.* at 408. Because the

information in lines 9-10 and 24-25 of page 64 of the Testimony are not germane to the subject matter of Amgen's motion or Roche's opposition, the Court should seal these lines of testimony as a matter of course.

With respect to the remaining Testimony and Exhibit 210, the Court is governed by Rule 26(c)(7) of the Federal Rules of Civil Procedure (the "Rule"). Under the Rule, a court may, upon motion of a person from whom discovery is sought and for good cause shown, make any order required to protect the movant from hardship, including ordering that "a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Fed. R. Civ. P. 26(c)(7). The protections afforded by Rule 26 are not limited to protective orders governing pre-trial discovery; rather, they have been applied to cases involving exhibits submitted in support of or in opposition to motions for summary judgment. *See In re Gabapentin Patent Lit.*, 312 F. Supp. 2d 653, 664, 666 (D.N.J. 2004); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.,*, 529 F. Supp. 866, 901 (E.D. Pa. 1981).

In determining whether to issue a protective order, a court should balance the harm to a movant against the relevance of and necessity of the information. *Multi-Core, Inc. v. Southern Water Treatment Co.*, 139 F.R.D. 262, 264 (D. Mass. 1991). Here, the harm to DaVita clearly outweighs the benefits of public access.

A. The Information Sought to Be Disclosed Is a Trade Secret That Is Entitled to Protection.

A well-settled exception to the public's right of access is the "protection of a party's interest in confidential commercial information, such as a trade secret, where there is a sufficient threat of irreparable harm." *In re Gabapentin Patent Lit.*, 312 F. Supp. at 664. Indeed, Rule 26(c)(7) explicitly names trade secrets as one type of information the disclosure of which can be limited by a protective order.

The information in the Kogod Testimony and Exhibit 210 constitutes a trade secret under Massachusetts law, which defines a "trade secret" as:

> anything tangible or intangible or electronically kept or stored, which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information, design, process, procedure, formula invention or improvement.

Mass. Gen. Laws Ch. 255, § 30(4). A trade secret includes "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 850 (1st Cir. 1985) (citing *E. Marble Prod. Corp. v. Roman Marble, Inc.*, 372 Mass. 835, 364 N.E.2d 799, 801 (1977)). The information at issue here is a "compilation of information" that gives DaVita an advantage over its competitors who do not have access to the information. (*See* Kogod Declaration at ¶¶ 10-11.) If DaVita's competitors become privy to this information, then DaVita would lose this advantage and suffer irreparable harm.

Applying a substantially similar statutory definition, at least one federal court has recognized that information concerning the existence, status and substance of business negotiations can constitute a trade secret. *Competitive Techs. v. Fujitsu Ltd.*, 286 F. Supp. 2d 1118, 1147 (N.D. Cal. 2003) (applying California definition of a trade secret and denying motion to dismiss counterclaim for misappropriation of trade secrets). Numerous other courts have granted trade secret status to information similar to that disclosed in the Kogod Testimony and Exhibit 210. *See, e.g., In re Gabapentin Patent Lit.*, 312 F. Supp. 2d at 664, 666 (upholding magistrate's decision to grant trade secret protection to, among other things, the identity of raw material suppliers on basis that if competitor knew a supplier's identity, it could outbid pharmaceutical manufacturer); *United Rug Auctioneers, Inc. v. Araslen*, No. CA033-347, 2003 WL 21527545 (Mass Super. Ct. Apr. 11, 2003) (finding pricing information and finances

confidential and trade secrets); *SI Handling Sys., Inc. v. Heisley*, 753 F.2d 1244, 1260 (3rd Cir. 1985) (noting that internal information related to pricing and profit margin "is not information that is readily obtainable by anyone in the industry" and thus "qualifies for trade secret protection"); *Corporate Relocation, Inc. v. Martin*, No. 3:06-CV-232-L, 2006 WL 4101944, at *15 (N.D. Tex. Sept. 12, 2006) (enjoining the disclosure of pricing information on trade secret grounds).

B. DaVita Has Taken Steps to Preserve the Confidentiality of the Information, and It Remains Confidential.

Moreover, the value of a trade secret is derived from its secrecy. *CVD, Inc.*, 769 F.2d at 850. A party seeking to protect certain information must be able to demonstrate that reasonable steps have been taken to keep the information secret. *Trent Partners & Assocs. v. Digital Equip. Corp.*, 120 F. Supp. 2d 84, 111 (D. Mass. 1999). Factors to be considered in determining whether given information is a trade secret include: (1) the extent to which the information is known outside of the owner's business; (2) the extent to which it is known by employees and others involved in the owner's business; (3) the extent of measures taken by the owner to guard the secrecy of the information; and (4) the value of the information to the owner and to his competitors. *SI Handling Sys.*, 753 F.2d at 1256.

Here, DaVita keeps confidential the prices and terms of its current Epogen™ supply agreement and limits disclosure, even internally, of the nature and substance of its negotiations with Amgen with respect to any future supply agreements. (*See* Kogod Testimony at ¶ 12.) DaVita has taken many measures to keep this information out of the public domain and keep the information confidential. (*Id*. at ¶¶ 12, 13.) Prior to testifying about this information, Mr. Kogod sought and obtained assurances that the testimony would be designated as "Highly Confidential," which limited its disclosure to outside counsel for the parties to this matter. (*Id.* at

¶ 8.) These protective measures demonstrate that DaVita treats the information as one of its trade secrets.

C. DaVita Would Be Irreparably Harmed by the Disclosure of the Information.

Trade secret law is intended to maintain and promote standards of commercial ethics and fair dealing. *CVD, Inc.*, 769 F.2d at 850. If the information at issue was released into the public domain, DaVita expects it would be used by its competitors to unfairly gain an advantage by informing their negotiation positions with Amgen and instructing the formulation of pricing and other competitive strategies. The Court is fully empowered to keep such information under seal, where "court files might . . . become a vehicle for improper purposes." *Standard Fin. Mgmt. Corp.*, 830 F.2d at 410; *see also In re Gabapentin Patent Litig.*, 312 F. Supp. 2d at 666.

The harm to DaVita in these circumstances is arguably greater than that evidenced in any of the cases cites above. Here, DaVita relies completely on Amgen for its multi-million dollar supply of Epogen™, a product without which it simply cannot operate and provide dialysis services to thousands of patients. DaVita's ability to negotiate discounts with Amgen is central to its continued economic viability in the highly competitive dialysis services industry. Allowing information regarding the terms of DaVita's current supply agreement and negotiations for a prospective supply agreement to become available to DaVita's competitors will result in irreparable harm to a non-party. This is precisely the type of harm that the Rule was designed to prevent.

D. The Court Should Consider DaVita's Reliance on Prior Assurances of Confidentiality.

In determining whether to maintain the confidentiality of documents produced pursuant to a protective order, a court should consider "the reliance by the original parties on the confidentiality order." *Id.* Here, as discussed above, DaVita produced documents and witnesses

for deposition based on assurances that the information disclosed would be kept confidential and disseminated only to outside counsel representing the parties in this matter and that DaVita would have a right to move to seal the information. This Court can and should take into consideration DaVita's significant reliance on confidentiality in making its disclosures. This factor weighs in favor of granting DaVita's motion.

E. The Public Will Not Be Harmed, and In Fact Will Benefit, From the Court's Protection of the Information.

As explained above, the irreparable harm to an innocent non-party such as DaVita must be balanced against the public's interest in the specific information, which here is weak by comparison. In fact, there are important public interests that *favor* nondisclosure. As explained by the Court in *Zenith*,

> there can be no doubt that society in general is interested in the protection of trade secrets and other valuable commercial information. That interest is recognized, for example in Rule 26(c)(7)…and in the common law of business torts. These policies recognize a coincidence of private and public interests. [In addition,] orderly management of complex litigation is in the public interest. Enormous cases like this one cannot be fairly and expeditiously adjudicated unless parties are assured that their legitimate interests will be protected. Often those assurances cannot be given unless parties are permitted to rely on guarantees of confidentiality.

Zenith Radio Corp., 529 F. Supp. at 905. By granting DaVita's limited and judicious request for protection of genuine trade secrets, the Court can avoid doing irreparable harm to DaVita with negligible, and possibly even benign, effects on the public interest.

IV. Conclusion

For the foregoing reasons, DaVita respectfully requests that its assented-to motion to file under seal Exhibit 210 and lines 13-20 of page 61 and lines 9-10 and 24-25 of page 64 of the Kogod Testimony be granted.

Dated: July 6, 2007

DAVITA INC.

By: /s/ Christopher J. Petrini

Christopher J. Petrini (BBO# 556848)
Peter L. Mello (BBO# 659680)
Petrini & Associates, P.C.
The Meadows
161 Worchester Road, Suite 304
Framingham, MA 01701
Telephone: (508) 665-4310
Facsimile: (508) 665-4313

Christian T. Kemnitz
Michelle McGuinness
Katten Muchin Rosenman LLP
525 W. Monroe
Chicago, IL 60661
Telephone: (312) 902-5200
Facsimile: (312) 902-1061

Counsel for Non-Party DaVita Inc.

CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants.

/s/ Peter L. Mello
Peter L. Mello