

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
Northern Division**

GREAT LAKES EXPLORATION GROUP LLC	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:04-CV-375
	)	
The Unidentified, Wrecked and (For Salvage- Right Purposes), Abandoned Sailing Vessel, etc.	)	HON. ROBERT HOLMES BELL
Defendant, et al.	)	

**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION TO ALTER OR AMEND  
PROTECTIVE ORDER**

Plaintiff Great Lakes Exploration respectfully files this Brief in Support of Its Motion to Alter or Amend the Court's Order Concerning Documents Filed Under Seal (the "Order"). Amendment of the Order would promote the just, speedy and inexpensive determination of this cause. *See* Fed. R. Civ. P. 1.<sup>1</sup> Plaintiff has proposed additional language in Exhibit 1 to this Brief.

**1. In the Event That The Court Desires That Plaintiff Produce to Intervenors Trade Secrets In Addition to the Location of The Shipwreck, The Court Should Amend the Order To Make Provision for Protection of All Trade Secrets And Confidential Information.**

As currently drafted, the Order does not provide any protection for Plaintiff's trade secrets and confidential information other than material disclosing "the precise location of the Defendant." Order Concerning Documents Filed Under Seal dated July 13, 2005 at 2 (permitting challenges of discovery material as filed under seal "on the basis that the

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<sup>1</sup> As discussed below, the extent of these adjustments depends on the Court's guidance as to how much trade secret information Plaintiff produce to Intervenors at the current stage of proceedings. If, as appears from the Court's Order, it is the Court's preference that such information be limited at the current stage to the precise location of the shipwreck and debris fields, then the needed adjustments are extremely limited. If the Court desires a broader production of trade secret information, then the needed adjustments would be more extensive.

material designated does not disclose the precise location of the Defendant”). As the date of this Motion, the Court has not directed that Plaintiff disclose any information to Intervenor, other than the precise location of the shipwreck and debris fields. Should the Court desire that Plaintiff produce any other trade secret information, the Court should amend the Order to allow for such disclosure.

The admiralty courts have recognized a broad range of trade secrets in the exploration of historic shipwrecks-- in addition to location. The range of trade secrets includes, for example:

(1) the location of a particular object; (2) the characteristics of a particular site (e.g., depth, sedimentation, state of degradation, chemical composition and physical structures); (3) technology used including technology for location and recovery of objects; (4) specific operation plans; (5) organizational structures, including utilization of expertise; (6) information about the identity of investors in particular projects; and (7) general know-how.

*E.g. Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, etc., et al.*, 87-363-N, *Order on Confidentiality* (E. D. Va. 6/30/89).<sup>2</sup>

Accordingly, should the Court determine that it would be preferable for Plaintiff to provide information to Intervenor at the current stage of proceedings other than location, the Order should be amended to include language protecting such information. Plaintiff has suggested language at Insert #1 of Exhibit 1.

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<sup>2</sup> The overwhelming majority of common law jurisdictions, including the State of Michigan, apply an even broader definition of trade secrets. *See e.g. Hayes-Albion v. Kuberski*, 421 Mich. 170, 181, 185 (Mich., 1984) (quoting Restatement of Torts, § 757, cmt. b (1939) (“A trade secret may consist of 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. . . .Information may qualify as a trade secret although others possess it.” *Id* at 185. *See generally* Rebuttal Affidavit of S. Libert dated July 13, 2005.

## **2. The Court Should Amend the Order To Avoid A Governmental Taking of Plaintiff's Trade Secrets.**

It is black letter law that trade secrets are property rights. “Of course the United States Supreme Court has long recognized that trade secrets are property subject to the Takings Clause of the Fifth Amendment.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003, 104 S.Ct. 2862, 2873 (1984). As such, trade secrets may not be taken by federal, state or other government entities without (1) an adjudication consistent with due process of law and (2) payment of just compensation.

As currently drafted, the Order does not restrict Intervenor's use of Plaintiff's trade secrets to the pending litigation. Instead, the Order permits Intervenor to use the information for purposes wholly unrelated to this litigation, including for any purpose “to administer Michigan law,” and a variety of other uses. Order at 3. In addition, as currently drafted, the Order might be read to allow disclosure of Plaintiff's trade secrets if it were done for the benefit of “the Intervenor and the Attorney General,” *id.* at 4; the Order would also seem to allow the Attorney General and counsel for Intervenor to retain such information even after termination of this proceeding, and use it “to administer Michigan law.” *See* Order at 3, 4.

Finally, the Order would allow Intervenor to publicly “disseminate such information, documents and materials as the Plaintiff discloses to third parties.” *Id.* at 5. As a result, Plaintiff would appear to be at some risk of losing trade secret protection should it desire to retain expert witnesses or other consultants (regardless of whether they were bound by attorney work product privilege, non-disclosure agreements or other protections).

Accordingly, the Court should amend the Order in order to avoid a governmental taking. Plaintiff has suggested language to be inserted at Insert #2, Exhibit 1; in addition, the Court should delete the following sentence at page 3, 1<sup>st</sup> partial paragraph: “Intervenors may also use such documents and materials and any information derived from there to administer Michigan law, so as to protect the subject vessel or submerged objects, according to Michigan law, if they determine that their use is necessary for them to do so.”

**3. If It Does Not Rule That Intervenors Are Bound By Their Previous Representations That the Defendant Is a “Barn Timber,” The Court Should Amend the Order To Prevent Fraudulent Claims of “Independent Development.”**

Finally, the Court should amend the Order to eliminate the possibility of protracted litigation and expense over possible claims by Intervenors in the future that they have developed Plaintiff’s trade secrets “independently.” Plaintiff respectfully submits that Intervenors are bound by their prior representations that the Defendant is not a shipwreck, but a “barn timber,” as well as their denials that the Defendant is the *Griffin* in response to Plaintiff’s discovery.

Should the Court not be inclined to make such a finding at the current stage of proceedings, it should impose stringent safeguards against a fraud. Such safeguards would not prejudice any party; rather, they would help avoid the need for future wasteful litigation over the issue by leaving no doubt as to later allegations, should they be asserted, of “independent development” of such trade secrets.<sup>3</sup> Plaintiff has suggested language at Insert #3 at Exhibit 1.

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<sup>3</sup> As noted during the oral argument in this matter on May 10, 2005, Intervenors have already publicly disclosed information that had previously been placed under seal by the Court. *Compare* Order on Sealing dated February 2, 2005 (sealing Affidavits of Scott J. Demel and Steven Libert) *with* Interv Reply dated

**CONCLUSION**

The Court should alter or amend the Protective Order.

Respectfully submitted,  
GREAT LAKES EXPLORATION GROUP LLC

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**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of July, 2005, a copy of the foregoing was served by electronic mail upon all counsel of record.

//s// Richard T. Robol  
Of Counsel

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May 2, 2005 at 7 n. 7 (discussing Affidavit filed under seal pursuant to Court Order, including Plaintiff's identification of Defendant as the *Griffin*). See also *id.* at Exhibit 1 at 2, 4 (Affidavit of Wayne Lusardi releasing information filed under seal pursuant to Court Order). As of the date of this Motion to Alter or Amend, Intervenor's filing continues to be in violation of the Court's seal. As of this date, no sanctions have been entered despite these violations. Plaintiff is extremely troubled by the thought not only that these violations of the February 2, 2005 Order on Sealing might continue to go unsanctioned, but also that future violations of the Protective Order might similarly go unsanctioned. These circumstances make stringent safeguards to avoid a fraud on the Court and on the Plaintiff all the more important.