

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

This matter is before the Court on Plaintiffs' Motion for Entry of a Protective Order (ECF No. 88), filed on July 6, 2017. Defendants filed their Opposition (ECF No. 96) on July 21, 2017, and Plaintiffs filed their Reply (ECF No. 98) on July 26, 2017. Plaintiff filed a Supplemental Brief (ECF No. 103) on August 9, 2017. The Court conducted a hearing in this matter on August 2, 2017.

BACKGROUND

Plaintiffs BGC Partners, Inc., G&E Acquisition Company, LLC and Real Estate of Nevada, LLC are the alleged successors to the rights of Grubb & Ellis Company which was a real estate brokerage company that had approximately 90 offices located in different states. Defendant Avison Young (Canada) is allegedly one of Canada's largest real estate brokerage firms. *Amended Complaint* (ECF No. 65), ¶ 1. Plaintiffs allege that Avison Young's chairman and chief executive officer, Mark Rose, was formerly the president of Grubb & Ellis in the United States. Plaintiffs allege that after Rose joined Avison Young, it, together with its U.S. affiliates, carried out a nationwide scheme to tortiously and illegally loot Grubb & Ellis's contract rights, related legal claims, commissions, personnel, offices, business, trade secrets and business opportunities. *Id.* at ¶¶ 1-2. Plaintiffs allege that in Nevada, Defendants induced a Grubb & Ellis affiliate to breach contracts in order to join Avison Young,

1 misappropriated Grubb & Ellis's trade secrets by using improper means, and committed larceny, and
2 induced and assisted larceny. *Id.* at ¶ 3. Plaintiffs further allege that Defendants' wrongful conduct was
3 part of the nationwide scheme to unlawfully acquire the business assets of Grubb & Ellis. *Id.* at ¶¶ 22-
4 55. Plaintiffs assert causes of action for tortious interference with contractual relationship, violation of
5 the Nevada RICO statute, breach of contract, tortious breach of the covenant of good faith and fair
6 dealing, conspiracy, theft of trade secrets, breach of fiduciary duty, conversion, and unjust enrichment.
7 *Id.* at 56-140.

8 Plaintiff initially filed suit against Avison Young (Canada) and Avison Young (USA), and their
9 state or local affiliates—Avison Young-New York, Avison Young-Nevada, Avison Young-Washington,
10 D.C., Avison Young-Chicago, Avison Young-New England, Avison Young-Atlanta, Avison Young-
11 Southern California, Avison Young-Pittsburgh, and Avison Young-Texas—in the New York state court.
12 *Id.* at ¶ 7. On December 15, 2014, the New York court dismissed Plaintiffs' claims against Avison
13 Young's state or local affiliates, other than Avison Young-New York, based on lack of personal
14 jurisdiction over those companies. *See BGC Partners, Inc., et al. v. Avison Young (Canada), et al.*, 5
15 N.Y.S.3d 327, 46 Misc.3d 1202 (N.Y.Sup.Ct. 2014). Plaintiffs thereafter filed lawsuits against Avison
16 Young (Canada), Avison Young (USA), and their respective affiliates in the Nevada, Illinois, South
17 Carolina, and District of Columbia courts. *See Motion for Protective Order* (ECF No. 88), *Exhibit A*,
18 *Plaintiffs' Proposed Protective Order—“Exhibit B”* (list of other actions); *Defendants' Opposition* (ECF
19 No. 96), *Exhibits 1-7* (copies of pleadings, orders and protective orders entered in other actions).

20 The parties in this case have agreed that discovery should be governed by a protective order
21 pursuant to which they or third parties will produce “Confidential Material” or “Highly Confidential
22 Material” subject to restrictions on the disclosure of such information to certain individuals in this
23 litigation. The parties disagree, however, as to whether “Confidential Material” or “Highly Confidential
24 Material” produced in this action may be shared with or used by the parties in the other actions.
25 Plaintiffs argue that such “sharing” should be permitted and propose that the following paragraph be
26 included in the protective order:

27 ...

28 ...

1 Except by the prior written consent of the producing party, or by order of
2 this Court, all materials or information produced by any party in this action
3 shall be used solely in the preparation for and conduct of this litigation
4 (including briefs, memoranda, correspondence, and other documents
5 relating thereto) and the cases listed in Exhibit B attached hereto, and shall
6 not be used or distributed for any other purpose. Except by the prior
7 written consent of a third party that has produced materials or information
8 in this case, or by order of this Court, all materials or information
9 produced by said third party in this action shall be used solely for the
10 purposes of this litigation and the cases listed in Exhibit B attached hereto,
11 and shall not be used or distributed for any other purpose.

12 *Motion for Protective Order (ECF No. 88), Exhibit A, ¶ 2.*

13 “Exhibit B” to Plaintiffs’ proposed protective order lists the following cases: (1) *BGC Partners, Inc., et al. v. Avison Young (Canada), Inc. et al*, No. 15-cv-426 (D.D.C.); (2) *BGC Partners, Inc., et al. v. Avison Young (Canada), Inc. et al*, Index No. 652669 2012 E (N.Y. Sup. Ct.); (3) *BGC Partners, Inc., et al. v. Avison Young (Canada), Inc. et al*, No. 2015-CP-10-2068 (S.C.L.); (4) *BGC Partners, Inc., et al. v. Avison Young (Canada), Inc. et al*, No. 2015 L 2186 (Ill.); and (5) *BGC Partners, Inc., et al. v. Avison Young (Canada), Inc. et al*, Civil Action No. 15-0001028 (D.C. Super. Ct.). *Id.*

14 Defendants oppose such a “sharing” provision, and instead propose the following Paragraph 2:

15 Except by the prior written consent of the producing party, or by order of
16 this Court, all materials or information produced by any party in this action
17 shall be used solely in the preparation for and conduct of this litigation
18 (including briefs, memoranda, correspondence, and other documents
19 relating thereto), and shall not be used or distributed for any other purpose.
20 Except by the prior written consent of a third party that has produced
21 materials or information in this case, or by order of this Court, all
22 materials or information produced by said third party in this action shall be
23 used solely for the purposes of this litigation, and shall not be used or
24 distributed for any other purpose.

25 *Motion for Protective Order (ECF No. 88), Exhibit B, ¶ 2.*

26 In addition, Defendants propose that the following sentence be added to the paragraphs of their
27 proposed protective order which identify the persons entitled to receive or view confidential information:

28 For the avoidance of doubt, consistent with Paragraph 2 above, documents
29 produced in this litigation, including those designated as Confidential
30 Material [or Highly Confidential Material], shall not be admissible in the
31 cases listed in Exhibit B, nor shall they be used for any other purpose with
32 regard to those cases unless separately produced in those actions.

33 *Motion for Protective Order (ECF No. 88), Exhibit B, ¶¶ 8, 9.*

34 Plaintiffs argue that their sharing provision is consistent with Ninth Circuit case law which

1 generally favors the sharing of relevant information in collateral litigation so long as its use is governed
2 by the same protections in the protective order entered in the action in which the information was
3 initially produced. Defendants argue, however, that the courts in the District of Columbia and New
4 York actions have entered stipulated protective orders which contain the same provisions set forth in
5 their proposed protective order. *Opposition* (ECF No. 96), *Exhibits 4 and 5*. The Illinois court also
6 adopted the provisions proposed by Defendants in the protective order entered in that case. *Id.*, *Exhibits*
7 *6 and 7*.¹ Defendants argue that this Court should not enter a protective order that “automatically”
8 authorizes the sharing of confidential information produced in this action with the parties in the related
9 cases.

10 **DISCUSSION**

11 In *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003), the court adopted a
12 procedure for deciding whether a protective order should be modified to permit the sharing of allegedly
13 confidential information in collateral litigation. The plaintiff in the Foltz action sued State Farm and
14 CMR, an entity which provided medical review services, alleging that they had conspired to defraud
15 plaintiff and other insureds of personal injury protection owed to them under their insurance policies.
16 During the discovery process, the district court entered “a blanket protective order designed to keep
17 secret all other ‘confidential information’ produced by the parties in discovery and/or filed with the
18 court, absent agreement or an order by the district court.” *Id.* at 1128. The defendants produced
19 allegedly confidential documents subject to the blanket protective order. The lawsuit was subsequently
20 settled and the court file was sealed. Thereafter, “The Private Intervenors” filed a motion to modify the
21 blanket protective order so that they could seek production of documents produced in the Foltz action
22 that were relevant to their claims against State Farm and CMR in collateral lawsuits.

23 The court began by noting that a party asserting good cause for the entry of a protective order
24 pursuant to Fed.R.Civ.Pro. 26(c) has the burden, for each particular document it seeks to protect, of
25 showing that specific prejudice or harm will result if no protective order is granted. *Foltz*, 331 F.3d at
26

27 ¹As of the date the motion in this case was argued, the South Carolina court had not yet entered a
28 protective order.

1 1130 (citing *Phillips v. Gen. Motors*, 307 F.3d 1206, 1210-11 (9th Cir. 2002); *Beckman Indus., Inc. v.*
2 *Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992)). Under a blanket protective order, a party producing
3 documents is not initially required to show that the documents designated by it as confidential are
4 entitled to protection. Once the confidentiality designation is challenged by other parties in the lawsuit,
5 or by a third party who has standing to seek the documents, then the party asserting confidentiality must
6 make an actual showing of good cause for their continued protection. *Foltz*, 331 F.3d at 1131.

7 Turning to discovery by collateral litigants, the court stated that “[i]n addition to obtaining access
8 to material that should not have been placed under seal in the first instance, collateral litigants may be
9 entitled to modification of the original protective order permitting them access to properly covered
10 material, subject to the terms of that order.” *Id.* *Foltz* further states:

11 This court strongly favors access to discovery materials to meet the needs
12 of parties engaged in collateral litigation. *Beckman*, 966 F.2d at 475.
13 Allowing the fruits of one litigation to facilitate preparation in other cases
14 advances the interests of judicial economy by avoiding wasteful
15 duplication of discovery. *Id.*; *United Nuclear*, 905 F.2d at 1428 (quoting
16 and adopting the standard laid down by the Seventh Circuit in *Wilk*, 635
17 F.2d at 1299, “that where an appropriate modification of a protective order
18 can place private litigants in a position they would otherwise reach only
19 after repetition of another’s discovery, such modification can be denied
20 only where it would tangibly prejudice the substantial rights of the party
opposing modification.”); 8 Charles Alan Wright, Arthur R. Miller &
Richard L. Marcus, *Federal Practice and Procedure* § 2044.1 (2d ed.
1994). Where reasonable restrictions on collateral disclosure will continue
21 to protect an affected party’s legitimate interest in privacy, a collateral
22 litigant’s request to the issuing court to modify an otherwise proper
protective order so that collateral litigants are not precluded from
23 obtaining relevant material should generally be granted. *Beckman*, 966
F.2d at 475; *Olympic Refining Co. v Carter*, 332 F.2d 260, 265-6 (9th Cir.
1964).

24 331 F.3d at 1131-32.

25 A court, however, should not automatically grant a collateral litigant’s request for modification.
26 Instead, the collateral litigant must initially demonstrate the relevance of the protected discovery to the
27 collateral proceedings and its general discoverability therein. *Id.* at 1132. “Such relevance hinges ‘on
28 the degree of overlap in facts, parties, and issues between the suit covered by the protective order and the
collateral proceedings.’” *Id.* (citation to quoted law review article omitted). In clarifying the mechanics
of the relevance inquiry, *Foltz* states that “the court that entered the protective order should satisfy itself
that the protected discovery is sufficiently relevant to the collateral litigation that a substantial amount of

1 duplicative discovery will be avoided by modifying the protective order.” *Id.* at 1132. Because the
2 district court that issued the protective order “makes only a rough estimate of relevance, however, the
3 only issue it determines is whether the protective order will bar the collateral litigants from gaining
4 access to the discovery already conducted.” *Id.* at 1132-33. The court that issued the protective order
5 does not decide whether the collateral litigants will ultimately obtain the discovery materials. “[O]nce
6 the district court has modified its protective order, it must refrain from embroiling itself in the specific
7 discovery disputes applicable only to the collateral suits.” *Id.* at 1133. The disputes over the ultimate
8 discoverability of specific materials must be resolved by the collateral courts. “These procedures . . .
9 preserve the proper role of each of the courts involved: the court responsible for the original protective
10 order decides whether modifying the order will eliminate the potential for duplicative discovery. If the
11 protective order is modified, the collateral courts may freely control the discovery processes in the
12 controversies before them without running up against the protective order of another court.” *Id.* Besides
13 making a rough estimate of relevance, the court that issued the protective order must also weigh the
14 countervailing reliance interest of the party opposing modification of the protective order. That reliance
15 interest is not particularly strong, however, in the case of a blanket protective order where the court has
16 not made a good cause determination with respect to the protected status of any particular document. *Id.*

17 This case is factually distinguishable from *Foltz* in that a collateral litigant is not seeking
18 modification of an existing protective order pursuant to which discovery has already been produced.
19 Instead, Plaintiffs request that the protective order to be entered in this case permit them to use
20 confidential information produced in this case subject to the protective order, in the related cases
21 pending in New York, Washington D.C., South Carolina and Illinois. Other courts have addressed
22 motions for protective orders that contain so-called “sharing provisions.” The circumstances of those
23 cases, however, are also different from those presented by this case.

24 In *Kelly v. Provident Life and Accident Ins. Co.*, 2008 WL 5132851 (S.D.Cal. Dec. 5, 2008), the
25 plaintiff and defendant agreed that a blanket protective order should be entered. The plaintiff requested
26 that the protective order include a provision that confidential material produced pursuant thereto could
27 be used “in any other similar litigation, which would include cases where a claim of breach of contract,
28 insurance bad faith, and/or rescission of a settlement agreement is made against [the defendant].” In

1 rejecting this provision, the court stated that plaintiff sought to circumvent all of the principles and
2 procedures set forth in *Foltz* by having “the ability to share confidential documents he obtains in this
3 case with collateral litigants without needing to seek to modify the protective order and obtain a
4 relevancy determination from the Court, and without requiring the collateral courts to resolve any
5 disputes which may arise with respect to discoverability of the materials in collateral cases. *Id.* at *2.
6 The court stated that such a procedure would interfere with its duty to undertake the relevancy inquiry
7 dictated by *Foltz*. “Moreover, not only have the collateral litigants not even been specifically identified,
8 but such litigants would, under Plaintiff’s proposal, not be required to make any showing of relevance.
9 This interferes with the requirement in *Foltz* that the *collateral litigant* demonstrate to the Court the
10 relevance of the protected discovery to the collateral proceeding.” *Id.* at *3.

11 In *Hoot Winc, LLC v. RSM McGladrey Fin. Process Outsourcing, LLC*, 2009 U.S. Dist. LEXIS
12 9261 (S.D.Cal. Feb.6, 2009), the plaintiff proposed that the blanket protective order include a provision
13 that would allow sharing of sensitive information with collateral litigants subject to the limitations that
14 (1) disclosure only be made to counsel in similar cases and (2) providing defendant with copies of
15 stipulations to abide by the protective order executed by the attorneys in similar litigation. The
16 defendant argued that there was no similar litigation pending and that such a provision would circumvent
17 the court’s duty to assess the relevance of the discovery sought as well as the similarity of the collateral
18 action at issue. In denying the sharing provision, the court stated that “[a]s in *Kelly*, Plaintiff in the
19 instant matter has identified no collateral litigation for the Court to consider in assessing the request for a
20 sharing provision. Without this crucial information, the Court is unable to employ the relevance and
21 balancing tests required by the Ninth Circuit in *Foltz* in order to sanction a protective order that
22 incorporates a sharing provision.” *Id.* at [*8].

23 In *Darby v. Safeco Ins. Co.*, 2012 WL 5512576 (D.Ariz. Nov. 14, 2012), the court, relying on
24 *Foltz* and *Kelly*, rejected a sharing provision that would have permitted plaintiff to share confidential
25 information with “[a]ttorneys representing a plaintiff, and the experts and consultants retained by a
26 plaintiff, in other cases against [defendant] involving claims of insurance law or ‘bad faith’ claims
27 handling by [defendant] or related subsidiaries.” *Id.* at *1. The court also cited *Long v. TRW Vehicle
28 Safety Systems, Inc.*, 2010 WL 1740831, at *1 (D.Ariz. April 29, 2012) which “noted that a ‘non-

1 sharing' protective order did not forever preclude the sharing of discovery since collateral litigants
2 seeking production of protected confidential information 'will simply have to go through the appropriate
3 steps to obtain the discovery as set forth in *Foltz*.'" Id. at *2. In *Beavers-Gabriel v. Medtronic, Inc.*,
4 2014 WL 7882099 (D. Haw. June 20, 2014), the plaintiff sued defendant for damages caused by an
5 allegedly defective medical device. Plaintiff requested that the protective order allow the parties to share
6 confidential discovery materials with litigants in other pending actions against the defendant stemming
7 from the same device. The court denied plaintiff's request, stating, like the courts in *Darby* and *Long*,
8 *supra*, that the collateral litigants could go through the appropriate steps to obtain such discovery as set
9 forth in *Foltz*. *Id.* at *2.

10 This case is distinguishable from the foregoing cases in several respects. First, Plaintiffs'
11 proposed sharing provision is limited to sharing confidential information produced in this action with the
12 parties in four other lawsuits currently pending in New York, South Carolina, Illinois and the District of
13 Columbia. (It is the Court's understanding that the two cases in the District of Columbia are the same
14 case.) Second, the Plaintiffs BGC Partners, Inc. and G&E Acquisition Company, LLC are plaintiffs in
15 the other cases. Defendants Avison Young (Canada) and Avison Young (USA) are also defendants in
16 those cases. *See Defendants' Opposition* (ECF No. 96), *Exhibit 1* (New York Court's Decision/Order),
17 *Exhibit 2* (District of Columbia complaint); and *Exhibit 3* (Illinois first amended complaint). The Court
18 has not been provided with any pleadings from the South Carolina lawsuit, but it is reasonable to believe
19 that these parties are also parties in that case. There are other parties in each of the lawsuits who are
20 local affiliates of or otherwise connected to the common Plaintiffs and Defendants. Third, it appears that
21 at least some of the attorneys for the Plaintiffs and Defendants are involved in all of the cases. Fourth,
22 all of the cases arise out of the same alleged "nationwide" scheme or conspiracy, although each case
23 involves alleged breaches of contract, or unlawful acts that occurred in the jurisdiction in which the
24 action has been brought.

25 Because of the involvement of the same parties and attorneys in all of the cases, it is not feasible
26 to prevent confidential information produced in this case from being possessed and known by the same
27 parties and attorneys in the related cases. Because the cases arise out of the same alleged national
28 scheme, there is a substantial likelihood that confidential material produced in any of the cases will be

1 relevant to the claims or defenses in the other pending cases. It is, of course, possible that certain
2 confidential information produced in this case will have no relevance to the claims or defenses in the
3 other pending cases and therefore should not be admitted into evidence in those cases. That
4 determination can and should be made by the courts in the other cases.

5 Defendants argue that document discovery in some of the other cases is now complete, and that
6 Plaintiffs should not be permitted to use confidential documents disclosed in this lawsuit after the
7 deadline for document production in the other cases. The fact that a confidential document was initially
8 produced in this case, does not relieve a party of its duty to disclose or produce the confidential
9 documents, subject to the protective order, in the other cases in compliance with the disclosure and
10 discovery rules and orders of those courts. If, as Defendants contend, they will be prejudiced by the
11 Plaintiffs' late disclosure of confidential documents or information initially produced in this case, they
12 can seek and obtain appropriate relief from the court presiding in the action in which the prejudice
13 allegedly occurs.

14 **CONCLUSION**

15 Based on the foregoing, this Court will not preclude the parties from using relevant confidential
16 information, produced subject to a protective order in this action, in the related cases pending in New
17 York, the District of Columbia, Illinois and South Carolina. Such use shall be subject to the protective
18 order entered in this action which prohibits the disclosure of protected confidential materials to persons
19 other than those authorized to receive the information in this action or in the related cases. The courts in
20 the related cases must ultimately decide whether confidential information produced in this action is
21 relevant and admissible in regard to the claims and defenses in those cases. The other courts must also

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1 decide whether confidential information produced in this action should be barred from use in those cases
2 based on late disclosure or based on any other laws, rules or court orders governing discovery and
3 admissibility of evidence in those case. Accordingly,

4 **IT IS HEREBY ORDERED** that Plaintiffs' Motion for Entry of a Protective Order (ECF No.
5 88) is **granted** in accordance with the foregoing provisions of this order. The parties shall, within
6 fourteen (14) days of the filing of this order, submit a revised stipulated protective order that complies
7 with the provisions of this order governing use of confidential information produced in this action in the
8 other pending cases between the same parties.

9 DATED this 11th day of August, 2017.

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12 GEORGE FOLEY, JR.
13 United States Magistrate Judge
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