

absent a valid court order to the contrary, they are entitled to disseminate information as they see fit.” (quoting Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 780 (1st Cir. 1988)).¹

Defendants propose the entry of an alternative Confidentiality Order (the “Defendants’ Order), which would strike a balance between these considerations and the parties’ shared interests in protecting Discovery Materials that are of a sensitive nature. (The Defendants’ Order is attached hereto as Exhibit B.)

BACKGROUND

The Plaintiffs’ Order and the Defendants’ Order are similar, but the parties disagree about how to handle a party’s proposal to use Discovery Materials that are of a confidential nature (“Confidential Information”) in other civil, criminal, or administrative proceedings.

Anticipating the possibility that some Confidential Information in these actions may be relevant to related litigation involving some or all of the same players, Defendants proposed terms that would address such scenarios with minimal administrative burdens and ample safeguards for the documents’ sensitivity. See Exhibit B at ¶ 2. If a party wishes to use Confidential Information in another civil, administrative, or criminal proceeding, the Defendants’ Order would require that party to seek consent from the party that produced it (the “Producing Party”). Id. at ¶ 2(a). If the Producing Party disagrees, the Defendants’ Order would put the onus on the Producing Party to seek an appropriate protective order to prevent the proposed use. Id. Only if a party wished to use Confidential Information in another proceeding without seeking advanced consent would the Defendants’ Order shift the burden to that party to seek relief from the Court. Id. at ¶ 2(b). These terms recognize the fact that the above-captioned

¹ Public Citizen pre-dated the December 2000 change to Fed. R. Civ. P. 5, which removed the requirement that discovery materials be filed with the Court (thus preventing some discovery materials from automatically being disclosed to the public), but Fed. R. Civ. P. 26(c)(1) still requires “good cause” for protective orders, implying “that in the absence of good cause the material should ordinarily be available.” 1 Daniel R. Coquillett et al., Moore’s Federal Practice § 5.34[1][a] (3d ed. 1997).

civil cases are only one facet of the wide-ranging litigation that Defendants are facing related to their alleged involvement with Plaintiffs' annuity contracts.

Plaintiffs seek to have it the other way. The Plaintiffs' Order would still require a party proposing to use Confidential Information in another proceeding to seek consent from the Producing Party. Exhibit A at ¶ 1. But if the Producing Party were to disagree, the Plaintiffs' Order would put the onus upon the other party to seek relief from the Court. Id.

Defendants have not consented to the Plaintiffs' Order for this reason. In the interests of efficiency and fairness, a Confidentiality Order should not require parties to seek relief from the Court if a Producing Party refuses to cooperate by allowing them to use Confidential Information in another civil, criminal, or administrative proceeding.

STANDARD OF REVIEW

Pursuant to Fed. R. Civ. P. 26(c)(1), courts may enter a protective order "for good cause." More specifically, Fed. R. Civ. P. 26(c)(1)(G) "authorizes the court to order that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." 6 Daniel R. Coquillett et al., Moore's Federal Practice § 26.105[8][a] (3d ed. 1997).

A plain reading of the language of Rule 26(c) demonstrates that the party seeking a protective order has the burden of showing that good cause exists for the issuance of that order. It is equally apparent that the obverse also is true, i.e., if good cause is not shown, the discovery materials in question should not receive judicial protection

Mangosoft, Inc. v. Oracle Corp., Civil No. 02-cv-545-SM, 2005 U.S. Dist. LEXIS 19644, *5-*6 (quoting Public Citizen, 858 F.2d at 789). Trial judges have "broad discretion in ruling on pre-trial management issues," and the Court of Appeals reviews such decisions "for abuse of [their]

considerable discretion.” Braga v. Hodgson, 605 F.3d 58, 59 (1st Cir. 2010) (quoting Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 91 (1st Cir. 1991)).

ARGUMENT

Because a party seeking a protective order has the burden of showing that “good cause” exists for its issuance, it follows that any party seeking heightened protection for Confidential Information under the terms of a Confidentiality Order should bear responsibility for requesting it from the Court. See Mangosoft, Inc., 2005 U.S. Dist. LEXIS 19644 at *5-*6 (placing burden on movant to show that good cause exists).

The Defendants’ Order would offer ample protections for Confidential Information, and it would be unreasonable to require parties to jump through additional hoops simply because they seek to use Confidential information in another proceeding. For example, under the Defendants’ Order, parties would still be required to file any Confidential Information with the Court under seal. Exhibit B at ¶ 10. Its only difference from the Plaintiffs’ Order is that it seeks to avoid the waste of resources that would result if parties were forced to engage in motion practice every time they wanted to use Confidential Information in a different proceeding.²

Parties should not have to run to Court or duplicate discovery simply because they need to use a certain piece of Confidential Information in another case. Cf. Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1131 (9th Cir. 2003) (“Allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery.”).

² Given their adverse stances, Defendants sincerely doubt that Plaintiffs would freely consent to Defendants’ use of Plaintiffs’ Confidential Information in parallel proceedings.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion for Entry of a Confidentiality Order. Defendants are unopposed, however, to the entry of an alternative Confidentiality Order (such as the Defendants' Order) that would provide similar protections yet place the burden upon Producing Parties to seek relief from the Court when they oppose another party's proposed use of Confidential Information in another civil, criminal, or administrative proceeding.

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CERTIFICATION

I hereby certify that on December 16, 2010, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF system.

/s/ Robert G. Flanders, Jr.