IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

American Airlines, Inc., Plaintiff, v. Travelport Limited, et al. Defendants.	)	Civil Action No.: 4:11-cv-0244-Y

COMBINED EMERGENCY MOTION TO MODIFY PROTECTIVE ORDER, AND MOTION FOR EXPEDITED TREATMENT, AND MEMORANDUM IN SUPPORT THEREOF

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I. PRELIMINARY STATEMENT

Plaintiff American Airlines, Inc. ("American") hereby files this Combined Emergency Motion to Modify the First Amended Stipulated Protective Order and Motion for Expedited Treatment (the "Motion"). American seeks to modify the Protective Order to make explicit what is already plainly implied in the Protective Order—i.e., that it does not restrict the disclosure or use of information *already known to, or independently obtained by*, a recipient of material designated under the Protective Order. It would be absurd for a recipient of information (such as a party's expert) to be required to keep confidential information that they already knew simply because a party produced that information and deemed it confidential under the Protective Order. American's proposed modification merely clarifies the existing terms of the Protective Order to prevent such an absurd result, and does not alter the substantive obligations of the parties or seek to de-designate any designated material. As importantly, the language in American's proposed amendment is very common in protective orders.

Indeed, American sought consent to modify the Protective Order from the Defendants promptly after American's testifying expert raised the concern that, unlike the protective order he had executed in the pending state court litigation brought by American against Sabre, the Protective Order did not explicitly exempt information already known to, or independently obtained by, a signatory. To date, Travelport has inexplicably refused consent. Yet, Travelport, and all of the Defendants, months ago produced documents under the state protective order which has language virtually identical to that which American is requesting to be added to the Protective Order.

In view of American's approaching July 25, 2012 expert designation deadline and Travelport's gamesmanship, American has been forced to file this Motion to ensure that its testifying expert can complete his work in time to meet this important deadline. Given that

American has established good cause for its clarifying amendment and request for expedited treatment, American respectfully requests that the Court grant the Motion at its earliest convenience.

II. RELEVANT FACTUAL BACKGROUND

On August 15, 2011, the Court entered the initial protective order in this case, the Stipulated Protective Order [Dkt. No. 130]. At Travelport's request, the Stipulated Protective Order was amended once, by agreement of all parties (including American), on March 12, 2012. (*See* Agreed Motion for Protective Order dated Mar. 9, 2012 [Dkt. No. 255].) On that occasion, Traveport did not want to disclose its economic expert under the protective order before its expert report was due, and American agreed to the modification.

Notably, the Protective Order as it currently stands contains the following language that implies, but does not explicitly state, that information independently obtained by an expert can be used and disclosed even if that information happens to be contained in material designated under the Protective Order:

> Persons having knowledge of Confidential Information *by virtue of the disclosure of such information by a Supplying Party in discovery in this Proceeding* shall use that Protected Information only in connection with the prosecution or appeal of the Proceeding, and shall neither use such Confidential Information for any other purpose nor disclose such Confidential Information to any person who is not identified in paragraph 7 of this Protective Order.

(Protective Order ¶ 9 (emphasis added); *see also* ¶ 14 (with identical language for material designated as Outside Attorneys' Eyes Only Information) (App. at 5-6, 8, Ex. 1).)

In a related state court case involving several of the same parties to this proceeding, styled *American Airlines v. Sabre Inc. et al*, No. 067-249214-10 (67th Dist. Ct., Tarrant County, Tex.) (the "State Case"), Sabre and American agreed to a protective order, later entered by the court. That protective order expressly provides that information known to or obtained

independently from a third-party is not subject to the strictures of the protective order.[1] Both American and Sabre are parties to the State Case and are the original signatories to the protective order in the State Case. (*See* Second Amended Confidentiality Stipulation and Protective Order ¶ 6(f)(iii) dated Apr. 25, 2012 (App. at 30, Ex. 2).) Further, Travelport and Orbitz have agreed that any documents that they produced in this proceeding "shall be deemed produced in response to American's subpoena in [the State Case]" and any documents designated as Confidential or Outside Attorneys' Eyes Only in this case "shall be treated as 'Highly Confidential' under the Protective Order in the [State Case]." (*See* Travelport Rule 11 Agreement dated Feb. 17, 2012 (App. at 37, Ex. 3); Orbitz Stipulation and Rule 11 Agreement dated Feb. 17, 2012 (App. at 42, Ex. 4).)

In preparing for the federal expert report deadline, American recently realized that its expert, Monty Myers, had not yet executed the Protective Order.[2] When Mr. Myers reviewed the Protective Order, he became concerned that it did not contain the same clarifying language as the state protective order. Therefore, on June 18, 2012, American promptly proposed a revision to the Protective Order to the Defendants that contained an express provision that was substantively similar to the state protective order's language. (*See* Email from Y. Garcia dated June 18, 2012 (App. at 47, Ex. 6).) On June 25, 2012 and July 2, 2012, Travelport informed American that it

[1] "Certain Information Not Subject to Scope of Order: The restrictions of this Protective Order shall not apply to information which . . . (b) was or is acquired from a third party possessing such information and having no obligation of confidentiality to the designating party, or (c) the receiving party can establish that the information is in its rightful and lawful possession at the time of disclosure or is developed independently by the receiving party without the use of Confidential Information." (Second Amended Confidentiality Stipulation and Protective Order ¶ 6(f)(iii) dated Apr. 25, 2012 (App. at 30, Ex. 2).)

[2] Mr. Myers also had not recognized that an issue existed under the Protective Order because he had been focused on the state court litigation, had executed the state protective order last year and had understood that the materials he had reviewed were covered by the state protective order. Although Mr. Myers inadvertently had been provided access to a small number of documents that have not yet been deemed produced in the State Case, he is not accessing those documents further until this issue is resolved. Of course, neither Mr. Myers nor anyone assisting him has disseminated any party's Confidential or Outside Attorneys' Eyes Only information to anyone who is not entitled to access such information under the express terms of the Protective Order.

opposed the proposed modification. (*See* Email from J. Pentz dated June 25, 2012 (App. at 45, Ex. 5); Email from C. Feeney dated July 2, 2012 (App. at 55, Ex. 10).)[3]

III. ARGUMENT AND AUTHORITIES

A. Relevant Standard for Modification of a Protective Order

A district court has the discretion to modify, alter, amend, or lift an existing protective order, especially in order to clarify the rights and obligations of those subject to the order. *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir. 1993) ("a protective order . . . is always subject to the inherent power of the district court to relate or terminate the order"); *see, e.g., Superior Oil Co. v. Am. Petrofina Co. of Tex.*, 785 F.2d 130, 130 (5th Cir. 1986); *Bell ex rel. Bell v. Chrysler Corp.*, No. 3:99–CV–0139–M, 2002 WL 172643, at *1 (N.D. Tex. Feb. 1, 2002) ("Rather than speculate as to the intention of the parties in the presence of facially ambiguous language, the Court finds that, in this case, prudence counsels in favor of a modification of the Protective Order."). Moreover, the Protective Order explicitly provides that "upon motion and order of the Court the terms of this Protective Order may be amended, modified or vacated." (Protective Order ¶ 31 (App. at 16, Ex. 1.)

In determining whether to modify a protective order, courts generally consider four factors: "(1) the nature of the protective order, (2) the foreseeability, at the time of issuance of the order, of the modification requested, (3) the parties' reliance on the order; and most significantly (4) whether good cause exists for the modification." *Peoples v. Aldine Indep. Sch. Dist.*, No. 06-2818, 2008 WL 2571900, at *2 (S.D. Tex. June 19, 2008). Here, all of these factors support granting the Motion.

[3] American attempted to resolve this dispute without judicial involvement in communications to Travelport on June 20, 2012, June 27, 2012 and June 29, 2012. (*See* Email from S. Fusco dated June 20, 2012 (App. at 48, Ex. 7); Email from S. Fusco dated June 27, 2012 (App. at 50, Ex. 8); Email from S. Fusco dated June 29, 2012 (App. at 52, Ex. 9).)

B. The Nature of the Protective Order Favors Modification

First, the nature of the Protective Order weighs in favor of modification. When evaluating the nature of a protective order, courts consider "its scope and whether it was court imposed or stipulated to by the parties." *Peoples*, 2008 WL 2571900, at *2. Blanket protective orders, which require the parties to designate as protected sensitive information, are more susceptible to modification than narrowly defined protective orders that cover "a specific type of identified information." *Id.* Given that the Protective Order is not "narrowly defined" and does not cover "a specific type of identified information," this factor plainly favors the modification sought by American. *See id.* at *2 (holding that a protective order that was stipulated to by the parties, but was not limited to a specific type of information favored modification).

Moreover, although the Protective Order was stipulated to by the parties, in this case the nature of the parties' agreement clearly supports modification. Indeed, American seeks only to make explicit that which is implicit in the Protective Order in paragraphs 9 and 14—that information obtained from designated material is subject to the Protective Order's strictures, but not information already known or otherwise independently obtained by a signatory to the Protective Order. The proposed modification is therefore not only consistent with the terms of the agreed provisions, it much more accurately reflects the spirit of that agreement. Therefore, this factor strongly favors modification.

C. The Proposed Modification Was Not Foreseeable

The second factor, foreseeability, also weighs in favor of modification. A protective order that stipulates that it may be modified by the Court, as this Protective Order does, weighs in favor of modification. *See Peoples*, 2008 WL 2571900, at *2 ("In this case, the protective order stipulates that 'the parties herein may petition the Court, for good cause, to request a modification.'. . . . This factor also weighs in favor of modification."). Here, the Protective

Order stipulates that "upon motion and order of the Court the terms of this Protective Order may be amended, modified or vacated." (Protective Order ¶ 31 (App. at 16, Ex. 1).) Moreover, in view of the existing provisions of the Protective Order (e.g., paragraphs 3,[4] 9, and 14), American did not foresee the concern of its testifying expert. Thus, in light of the existing language of the Protective Order, the foreseeability factor supports modification.

D. Defendants Cannot Establish Detrimental Reliance Because American Seeks Only to Clarify the Meaning of the Protective Order

The reliance factor likewise weighs heavily in favor of modification because American does not seek to de-designate any materials or change the substantive rights of the signatories. Rather, American seeks to make express that which is already implied by the terms of the Protective Order. Paragraphs 9 and 14 provide that, in substance, persons who have knowledge of material, or information contained therein, subject to the Protective Order *by virtue of the disclosure of such information* by a supplying party cannot use or disclose that material or information except as provided in the Protective Order. (*See* Protective Order ¶¶ 9, 14 (App. at 5-6, 8, Ex. 1).) The clear implication of this language is that a person should not be subject to enforcement of the Protective Order for use or disclosure of information when he learned of the information *other than* by virtue of a disclosure made pursuant to the Protective Order by, for example, independently developing or learning about that information. American's proposed modification simply makes this implication explicit, i.e., the terms of the Protective Order do not apply with regard to information: (i) acquired from a third-party with no obligation to the

[4] Paragraph 3 provides that: "Any Supplying Party shall have the right to identify and designate as 'Confidential' or 'Outside Attorneys' Eyes Only' any document or other materials it produces or provides (whether pursuant to court order, subpoena or by agreement), or any testimony given in this Proceeding, which testimony or discovery material is believed in good faith by that supplying party to constitute, reflect or disclose *its confidential, proprietary, or trade secret information, as those terms are understood under applicable state and federal law* ('Designated Material')." (Protective Order ¶ 3 (App. at 2, Ex. 1) (emphasis added).)

designating party; or (ii) already in a person's possession or developed independently by him without the use of Designated Material.

As a result, American's proposed modification does not seek to de-designate documents or information or remove the protection of the Protective Order as to anything that can be properly designated under its existing language; rather, it clarifies the limits of a Supplying Party's right to enforce the Protective Order as to the use or disclosure of information already known or independently developed or obtained by a recipient.

Indeed, no party could mistake the scope of the existing terms of the Protective Order to cover that situation. Under the Protective Order, Designated Material is defined as follows:

> Any Supplying Party shall have the right to identify and designate as Confidential or Outside Attorneys' Eyes Only *any document or other materials it produces* or provides (whether pursuant to court order, subpoena or by agreement), or any testimony given in this Proceeding, which testimony or discovery material is believed in good faith by that supplying party to constitute, reflect or disclose its confidential, proprietary, or trade secret information, *as those terms are understood under applicable state and federal law* (Designated Material).

(Protective Order ¶ 3 (App. at 2, Ex. 1).) Fifth Circuit law makes clear that "information that is generally known or readily available by independent investigation is not secret for purposes of trade secrecy." *Tewari De-Ox Systems, Inc. v. Mountain States/Rosen, L.L.C.*, 637 F.3d 604, 612 (5th Cir. 2011); *see also H.E. Butt Grocery Co. v. Moody's Quality Meats*, 951 S.W.2d 33, 35 (Tex. App.—Corpus Christi 1997, writ denied) ("The word secret implies that the information is not generally known or readily available by independent investigation."). Further, the text of paragraphs 9 and 14 expressly restrict the use of information when it is obtained by virtue of a disclosure under the Protective Order, not from information otherwise known or independently obtained. (*See* Protective Order ¶ 9; *see also* Protective Order ¶ 14 (App. at 5-6, 8, Ex. 1) ("Persons having knowledge of Confidential Information *by virtue of the disclosure of such information by a Supplying Party in discovery in this Proceeding* shall use that Protected

Information only in connection with the prosecution or appeal of the Proceeding ….” (emphasis added).) Accordingly, no one would or should have expected the Protective Order to exclude information described in American’s proposed amendment and therefore a designating party under the Protective Order cannot establish detrimental reliance.

E. American Has Demonstrated Good Cause for Seeking its Proposed Modification

The fourth factor, good cause, clearly exists in this case and favors modification. Good cause for modifying a protective order requires “changed circumstances or new situations warranting modification of a protective order.” *Peoples*, 2008 WL 2571900, at *3 (internal quotations omitted). Here, American’s expert recently raised concerns regarding the absence of express language excluding information known or independently obtained, and that the Protective Order covers not only designated material, such as a document or deposition, but also any information contained in such designated material.[5] Thus, American’s expert is concerned that the Protective Order could be asserted to cover the mere use of information he already had or independently obtained from an independent source.

Moreover, American will incur considerable prejudice if the Motion is not granted on an expedited basis given its testifying expert’s reluctance to execute the existing Protective Order and in view of the fact that American’s expert disclosure deadline is July 25, 2012. In contrast, no party will incur cognizable prejudice if the amendment is approved. *See In re U.S Motion to Modify Sealing Orders*, No. 5:03–MC–2, 2004 WL 5584146, at *4 (E.D. Tex. June 8, 2004) (the court “has broad discretion in judging whether that injury outweighs the benefits of any possible modification”).

[5] For example paragraph 1 provides that the “Protective Order shall govern all documents, *the information contained therein*, and all other information produced” and paragraph 4 provides that “Designated Material as used herein includes without limitation documents [and] *information contained in documents*.” (Protective Order ¶¶ 1, 4 (App. at 1, 3, Ex. 1) (emphasis added).)

F. American's Modification Should be Granted Notwithstanding Travelport's Response to American's Request

Travelport has refused to consent to the amendment, even though it designated nearly its entire production in this litigation under the state protective order that contains essentially the same language American has proposed. It belatedly claims that American's proposed modification is suddenly "harmful[6]" and unnecessary in light of paragraphs 17 and 30. (*See* Email from J. Pentz dated June 25, 2012 (App. at 45, Ex. 5); Email from C. Feeney to S. Fusco dated July 2, 2012 (App. at 55, Ex. 10)). Neither paragraph, however, addresses the issue that will be cured if American's Motion is granted.

First, Paragraph 17 describes the procedure for challenging the designation of specific material.[7] This provision is no substitute for the proposed amendment. In the first instance, a person with independent knowledge of information in designated material is not aided by paragraph 17 particularly when the material was nonetheless properly designated (e.g., the supplying party in good faith believed that the information was confidential, or the designated material contains other information that is not independently known to the recipient). Moreover, the burden of invoking the procedures of paragraph 17 was not intended to apply to a person who

[6] Nor is Travelport's assertion (which it never raised when it designated all of its documents produced in this case in the state court litigation) that the proposed amendments are harmful correct. Contrary to Travelport's assertions (i.e., email from C. Feeney to S. Fusco dated July 2, 2012 (App. at 55, Ex. 10)), information acquired from a third party without a lawful right to obtain it (such as a "thief") would not be a party with no obligation to the designating party.

[7] Paragraph 17 provides that "[a]ny party (the "Objecting Party") may challenge the propriety of the designation (or re-designation) of specific material as "Confidential" or "Outside Attorneys' Eyes Only" by serving a written objection that identifies the particular material being challenged (by Bates number or other reasonable description or identification), and provides the basis for the challenge. The Supplying Party or its counsel shall thereafter respond to the objection in writing within five (5) business days of its receipt of such written objection by either (i) agreeing to remove the designation, or (ii) stating the reasons why the designation was made. If the Objecting Party and the Supplying Party are subsequently unable to agree upon the terms and conditions of disclosure for the material(s) at issue, the Objecting Party may file a motion with the Court in order to resolve the disputed designation. Pending the resolution of the disputed designation, the material(s) at issue shall continue to be treated in accordance with the Supplying Party's designation of the material unless and until differing treatment is directed pursuant to order of the Court." (Protective Order ¶ 17 (App. at 10-11, Ex. 1.)

used information obtained other than by virtue the disclosed material, as paragraphs 9 and 14 strongly imply.

Of course, nothing in the proposed amendment would prevent the Supplying Party from challenging the use or disclosure of confidential information by a recipient, but the recipient should not have the burden in the first instance of seeking the Court's permission before it can use its own independent knowledge not obtained by virtue of any party's Designated Material. (*See* Protective Order ¶ 9; *see also* Protective Order ¶ 14 (App. at 5-6, 8, Ex. 1) ("Persons having knowledge of Confidential Information *by virtue of the disclosure of such information by a Supplying Party in discovery in this Proceeding* shall use that Protected Information only in connection with the prosecution or appeal of the Proceeding . . . ." (emphasis added).) Indeed, Travelport has not disputed that the strictures of the existing Protective Order (i.e., as provided for in paragraphs 9 and 14) only apply to information obtained by a recipient by virtue of having received designated material, and implicitly do not apply to information obtained independently as described in the proposed amendment.

Second, as to paragraph 30, it states, in relevant part, that "[n]othing contained in this Protective Order shall preclude any party from using its own Confidential Information or Outside Attorneys' Eyes Only Information in any manner it sees fit, without prior consent of any party or the Court." (Protective Order ¶ 30 (App. at 15, Ex. 1).) Paragraph 30 applies to documents or materials that have been designated as "Confidential Information"—not information that is from a source independent from this case. Further, it addresses only a "party's" right to use its Confidential Information in any manner it sees fit, but does not provide the same protections to other signatories, such as an expert, to the Protective Order.

For all of these reasons, American respectfully requests that Court exercise its discretion to modify Paragraph 10 of the First Amended Stipulated Protective Order [Dkt. No. 267] by adding provisions (d) and (e) below, placed in italics, such that Paragraph 10 would read as follows:

> 10. Nothing shall prevent disclosure of Confidential Information beyond the terms of this Protective Order (a) if the Supplying Party (or its counsel) consents in writing to such disclosure, (b) if a Supplying Party knowingly discloses its own Confidential Information in a public or non-redacted pleading filed in the Court's public record or in a publication disseminated to the general public, (c) if the Court, after reasonable written notice to counsel for all the parties, and after an opportunity to be heard by counsel for the Supplying Party, orders such disclosure, *(d) if the Confidential Information was or is acquired from a third party possessing such information and having no obligation of confidentiality to the designating party, or (e) if the Receiving Party can establish that the Confidential Information is in its rightful and lawful possession at the time of disclosure or is developed independently by the Receiving Party without the use of Confidential Information.*

IV. CONCLUSION AND REQUESTED RELIEF

American respectfully requests that the Court enter the proposed order included as Exhibit A to this Motion. For the convenience of the Court, Exhibit B to this Motion contains a redline comparison of the First Amended Stipulated Protective Order and the proposed Second Amended Stipulated Protective Order.

Further, in light of the fact that Plaintiff's Expert Report deadline is July 25, 2012, American requests the following expedited briefing schedule with respect to this Motion: (i)

Defendants' responsive briefing should be due on July 9, 2012 and (ii) American's reply briefing should be due on July 11, 2012. American further respectfully requests any such additional relief to which it is justly entitled.

Dated: July 2, 2012

Respectfully submitted,

s/ Yolanda Cornejo Garcia
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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing document via the Court's CM/ECF system pursuant to the Court's Local Rule 5.1(d) this 2nd day of July, 2012.

s/ Yolanda Cornejo Garcia
Yolanda Cornejo Garcia

CERTIFICATE OF CONFERENCE

As reflected in the above Motion and the attached correspondence, counsel for American conferred with counsel for Defendants in good faith to resolve the issues in this Motion. Travelport refused to agree to American's proposed modifications and Sabre and Orbitz never responded to American's three attempts to confer with them, thus necessitating this Motion.

s/ Yolanda Cornejo Garcia
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