

Alan L. Sullivan (3152)
 Todd M. Shaughnessy (6651)
 Snell & Wilmer L.L.P.
 15 West South Temple, Suite 1200
 Beneficial Tower
 Salt Lake City, Utah 84101-1004
 Telephone: (801) 257-1900
 Facsimile: (801) 257-1800

Mark Lambert (Cal. Bar No. 197410)
 Mark Weinstein (Cal Bar No. 193043)
 Cooley Godward Kronish, LLP
 Five Palo Alto Square
 Palo Alto, California 94306-2109
 Telephone: (650) 843-5003

Attorneys for Plaintiff Public Engines, Inc.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

<p>PUBLIC ENGINES, INC., a Delaware corporation,</p> <p style="text-align: center;">Plaintiff,</p> <p>vs.</p> <p>REPORTSEE, INC., a Delaware corporation,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">JOINT MOTION FOR ENTRY OF PROTECTIVE ORDER</p> <p style="text-align: center;">Case No. 2:10-cv-317</p> <p style="text-align: center;">Judge Tena Campbell</p>
---	---

Plaintiff Public Engines, Inc. (“Public Engines”) and Defendant ReportSee, Inc. (“ReportSee”) (collectively, the “Parties”), by and through their counsel of record, hereby jointly move the Court for entry of a protective order.

The Parties will exchange confidential information during the course of the litigation and believe that it is in their mutual best interest to limit the use and dissemination of that confidential information. The Parties have conferred at length about the appropriate form of

Protective Order and are in agreement about all aspects of the proposed Protective Order with one exception. The Parties disagree about whether an “Attorneys’ Eyes Only” designation is necessary and appropriate. Public Engines does not believe an Attorneys’ Eyes Only designation is necessary or appropriate, for the reasons explained in Part 1 below, and requests that the Court enter the Protective Order attached as Exhibit A. ReportSee believes that an Attorneys’ Eyes Only designation is appropriate, for the reasons explained in Part 2 below, and requests that the Court enter the Protective Order attached as Exhibit B. A redline showing the differences between the two versions is attached as Exhibit C.

1. Public Engines’ Position

An Attorneys’ Eyes Only designation keeps information out of the hands of the parties themselves, who have the most at stake in this litigation. It interferes both with a party’s ability to meaningfully assist its counsel in preparing the case, and counsel’s ability to advise his or her clients of potentially important information bearing on the merits of their claims and defenses. It therefore must be reserved for only the most important and deserving of circumstances. Public Engines respectfully submits that the Parties should not be allowed, up front, to make blanket designations of Attorneys’ Eyes Only. That is particularly true here because the Protective Order proposed by ReportSee contains no concrete limits on when such a designation may properly be made. Instead, it merely states that “[d]esignations of ‘Attorneys Eyes Only’ shall be used judiciously and limited to information that merits greater protection than information designated as ‘Confidential.’” Such a broad standard is subject to abuse, despite the best efforts of counsel. Knowing they can use this designation to keep information out of the hands of their adversaries, Parties will insist that information be so classified. And when one side does it, the other side will

at some level feel compelled to respond in kind. This over-designation likely will result in disputes that will have to be presented to the Court for resolution.

Public Engines submits that a single, “Confidential” designation should be sufficient for all or virtually all of the discovery materials in the case. We acknowledge, however, that special circumstances may arise in the course of discovery, and our proposed Protective Order allows for such circumstances. If such circumstances arise, counsel for the Parties must meet and confer in good faith to try and agree upon additional protections that are appropriate for the particular information at issue, thereby giving the Parties flexibility to address this in a variety of different ways that are tailored to the particular information at issue. If the parties cannot agree, the producing party can ask the Court to impose additional limits on disclosure. Doing so will, we believe, limit the Court’s involvement in such matters; require the Parties to seek this protection only when it is truly necessary; and enable the Parties to better assist counsel. Consequently, Public Engines moves the Court to adopt its version of the Protective Order, which is attached as Exhibit A.

2. ReportSee’s Position

Defendant ReportSee seeks inclusion in the protective order of a provision by which a producing party can designate a information as “Attorneys Eyes Only.” Defendant seeks this provision to limit access to trade secrets and other highly sensitive proprietary information disclosed by a party during discovery to counsel for the other party and to prevent the disclosure to employees, officers and directors of the other party. Plaintiff opposes the inclusion of an “Attorneys Eyes Only” provision in the protective order.

Here, the Complaint alleges that Plaintiff and Defendant are direct competitors in the field of crime report data. One of the requests for production propounded by Plaintiff (Request

No. 1) seeks documents which identify Defendant's "sources" of Defendant's crime report data: "All documents that identify or refer to the sources of the crime report data that appears on YOUR website." Defendant had a total of 106,000 documents in the database through which it had to search for documents relevant to Plaintiff's document requests. In a week Defendant produced about 21,000 as responsive to one or more of Plaintiff's requests for production and, of those, about 3,500 have been designated by Defendant as "Attorneys Eyes Only." Defendant only used the "Attorneys Eyes Only" designation on documents that were identified as responsive to the request for Defendant's "sources" of information. Thus, in this case there is a present need to address the issue of whether an "Attorneys Eyes Only" designation should be included in the protective order sought by the parties.

In a business like that in which Plaintiff and Defendant are engaged, competitors are always seeking an "edge" in sources of information. Many of the sources of information in a business such as Plaintiff and Defendant are in are not known by competing businesses. This truth of this assertion is demonstrated by the simple fact that Plaintiff's Request No. 1 seeks the sources of the crime report data on Defendant's website. If Plaintiff knew the sources of Defendant's crime report data there would simply be no need for the information covered by Request No. 1. Hence, the identify of the sources of Defendant's crime report data is a trade secret or proprietary business information worthy of protection from unnecessary disclosure.

The decision to issue a protective order rests within the sound discretion of the trial court. *Wang v. Hsu*, 919 F.2d 130 (10th Cir. 1990). Such protection is warranted upon a showing of good cause to "protect a party of person from annoyance, embarrassment, oppression, or undue burden or expense." Such protection can include an order "that a trade

secret or other confidential research, development, or commercial information not be revealed or be revealed in only a designated way.” Fed. R. Civ. P. 26(c) and (c)(7).

“Trade secrets evidence necessarily involves the most intimate details of a competitor’s business. Technical, customer and financial data must be protected from unnecessary disclosure.” *Gaymar Industries, Inc. v. Cloud Nine, LLC*, 2007 U.S. Dist. LEXIS 12086 *11 (D. Utah., February 20, 2007). Attorneys Eyes Only protection “ is usually employed to protect against business harm that would result from disclosure of sensitive documents to a competitor.” *Martinez v. City of Ogden*, 2009 U.S. Dist. LEXIS 12270 at *8 (D. Utah, February 17, 2009). An “Attorneys Eyes Only” provision was added to the protective order in *Martinez*. Other district courts in the Tenth Circuit have also entered protective orders with “Attorneys Eyes Only” provisions to protect trade secrets and other proprietary information from disclosure to direct competitors. *Netquote, Inc. v. Byrd*, 2007 U.S. District LEXIS 62292 (D. Colo. August 23, 2007); *Learjet Inc. v. MPC Products Corporation*, 2007 U.S. Dist. LEXIS 58451 (D. Kan., August 8, 2007); *A Major Difference, Inc. v. Wellspring Products, LLC*, 243 F.R.D. 415 D. Colo. 2006), *A/R Roofing, L.L.C. v. Certainteed Corp.*, 2005 U.S. Dist. LEXIS 31145 (D. Kan. Dec. 5, 2005); *Transonic Systems, Inc. v. Non-Invasive Med. Tech*, 192 F.R.D. 710 (D. Utah 2000).

This Court need look no further than the facts described above to determine that the inclusion of an “Attorneys Eyes Only” designation procedure is appropriate in the instant case. The parties are direct competitors. Plaintiff has already propounded a discovery requests that seek trade secrets from Defendant: the sources of Defendant’s crime report data. About 3,500 documents in the possession of Defendant are responsive to this request.

The harm that can be expected to result from the disclosure of the sources of Defendant's crime report data to Defendant's direct competitor is readily apparent. The burden on the parties of such an "Attorneys Eyes Only" provision is not particularly great, when balanced against the obvious harm of disclosure of trade secrets to a direct competitor. A party obtaining information subject to an "Attorneys Eyes Only" restriction can still have its counsel and experts review and analyze the data. If a party believes that a disclosing party has been "overdesignating" information as "Attorneys Eyes Only," it can discuss the matter with the designating party and, if necessary seek relief from the Court. A party designating information as "Attorneys Eyes Only" ultimately would bear the burden of justifying that designation, which is additional protection against "overdesignation." Hence, this Court should include the "Attorneys Eyes Only" provision requested by Defendant in order to "protect against business harm that would result from disclosure of sensitive documents to a competitor." *Martinez v. City of Ogden*, 2009 U.S. Dist. LEXIS 12270 at *8.

CONCLUSION

Based on the foregoing, the Parties respectfully request that the Court select between one of the two forms of Protective Order appended hereto, and have it entered as the Order of the Court.

Dated this 29th day of April, 2010

BOWIE & JENSEN, LLC

/s/ Joshua A. Glikin
Joshua A. Glikin
Attorney for ReportSee, Inc.
(Signed with Permission)

Dated this 29th day of April, 2010

Snell & Wilmer L.L.P.

/s/ Todd M. Shaughnessy

Alan L. Sullivan
Todd. M. Shaughnessy
Attorneys for Defendant
Public Engines, Inc.

Certificate of Service

I certify that on the 29th day of April, 2010, a true and correct copy of the Stipulated Motion for Entry of Discovery Plan and Scheduling Order has been served on the following through ECF:

Walter E. Diercks
wdiercks@rwdhc.com

Joshua A. Glikin
glikin@bowie-jensen.com

Jeffrey J. Hunt
jhunt@parrbrown.com

David C. Reymann
dreymann@parrbrown.com

/s/ Todd M. Shaughnessy