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

UTAH NEWSPAPER PROJECT, dba CITIZENS FOR TWO VOICES, Plaintiff, vs. DESERET NEWS PUBLISHING COMPANY and KEARNS-TRIBUNE, LLC, Defendants.	**DEFENDANTS' JOINT MOTION FOR PROTECTIVE ORDER AND SUPPORTING MEMORANDUM** Case No. 2:14-cv-00445-CW Judge Clark Waddoups Chief Magistrate Judge Brooke Wells

Pursuant to Federal Rule of Civil Procedure 26(c)(3), Kearns-Tribune, LLC and Deseret News Publishing Company (collectively, "Defendants"), by and through counsel, hereby submit this Joint Motion for Protective Order, and Supporting Memorandum.

This motion is made on the basis that this action involves confidential business matters, the public disclosure of which would seriously harm Defendants' interests. Defendants therefore submit this motion for Protective Order to safeguard the confidential information that may be disseminated in this suit.

A memorandum in support of this motion follows.

PROCEDURAL HISTORY

1. Under District of Utah Civil Rule 26-2(a), a standard protective order is effective as between the parties without motion and without entry in the docket of the specific case.

2. The parties deemed it appropriate to modify the standard protective order and entered into discussions regarding such modification.

3. On November 5, 2014, the Court conducted an initial pre-trial conference, wherein the parties discussed the entry of a modified protective order.

4. Following that hearing, on November 6, 2014, Chief Magistrate Judge Brooke Wells entered a minute order granting the parties a period of time in which to discuss resolution of their issues regarding the protective order. The order provides:

> The Court will decide any motion filed on these issues on an expedited basis. Therefore, plaintiff will be given five days from the date of the filing of defendants' motion in order to file a response. No reply brief will be allowed and the Court is likely to rule without any additional hearings on the matter but reserves the right to set a hearing should one be required.

5. Counsel for the parties have met and resolved all issues respecting modification of the standard protective order, with the exception of paragraph 4(g), with respect to which Defendants urged that any party could initially mark a document "confidential" if it contained confidential information, without the necessity of marking only the confidential portions of each discrete document. (*See* Defendants' proposed protective order, attached hereto as Exhibit A.) This would avoid the unnecessary delay and expense of marking selected portions of documents as confidential.

6. Plaintiff and Defendants have been unable to reach a consensus regarding that aspect of the proposed protective order.

7. Defendants agreed to substantial concessions, including a concession that even though the Plaintiff had no "employees," as that term is used in the Court's standard protective order, a select group of its members consisting of its board of directors could review confidential information. (*See* Exhibit A, ¶ 6(b)(4).)

8. Defendants also inserted a procedure allowing objections if for some reason there was a need to specify which selected portions of a discrete document were confidential. Specifically, paragraph 7(c) provides, in pertinent part:

> If the pleading filed by a party challenges the designation of a document, within 5 days of such a filing, the party that produced such PROTECTED INFORMATION shall send a letter to the court and counsel outlining its position on the confidentiality of such document(s) containing PROTECTED INFORMATION and showing good cause as to such designations regarding all or any part of each document. The non-producing party shall have the right to respond in five (5) days in support of the challenge. Any such documents found by the court not to contain PROTECTED INFORMATION shall be unsealed.

DISCUSSION

Under Federal Rule 26(c), the "court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including … requiring that … commercial information not be revealed or be revealed in only a specified way[.]" Fed. R. Civ. P. 26(c)(1)(G). The entry of a "blanket" protective order "place[s] upon the parties themselves, or others from whom discovery is sought, the initial burden of determining what information is entitled to protection." *Gillard v. Boulder Valley Sch. Dist. Re-2*, 196 F.R.D. 382, 386 (D.Colo. 2000). The Tenth Circuit has observed that blanket protective orders "allow the parties to make full disclosure in discovery without fear of public access to sensitive information and without the expense and delay of protracted disputes over every item of sensitive information, thereby promoting the overriding goal of the Federal Rules of Civil Procedure, 'to secure the just, speedy, and inexpensive determination of every action.'" *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (citing Fed. R. Civ. P. 1). Consequently, blanket protective orders are "becoming the standard practice in complex cases." *Id.* at 1427 (citing Manual for Complex Litigation, Second, § 21.431 (1985)).

Here, the parties do not dispute that a protective order is warranted. The parties also seem to embrace the principle that discovery should take place efficiently. What is at issue are modifications to the standard protective order that are designed to accomplish just that. Due to the substantial number of documents to be produced in this matter, Defendants seek a protective order that permits them to mark entire documents as confidential or "attorneys eyes only." Plaintiff has taken the position that Defendants should be required to conduct a page-by-page,

paragraph-by-paragraph, and sentence-by-sentence analysis of each document, and mark only the most sensitive portions confidential.[1]

As this Court is aware, disclosures mandated in discovery are not made to facilitate public dissemination; they are made for the sake of leading the parties to a just resolution of their claims. The United States Supreme Court has underscored that discovery is for the "sole purpose of assisting in the preparation and trial of litigated disputes." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984). And, as one Tenth Circuit district court has acknowledged, "[c]orporations are quicker to release their documents if they know the information will not be revealed in the *Wall Street Journal* or in the local paper's business section the next day." *S2 Automation LLC v. Micron Tech., Inc.*, 283 F.R.D. 671, 683 (D.N.M. 2012). Here, there is no dispute that Defendants' proposed protective order permits robust discovery for the parties to fairly litigate their claims. The only thing it would limit is improper *public* dissemination of confidential information.

Nor can Plaintiff argue that any right of public access requires a line-by-line designation of confidentiality. That right does not apply to discovery materials that have never been filed with any court and are therefore not judicial records. *See Grundberg v. Upjohn Co.*, 140 F.R.D. 459, 466 (D. Utah 1991) ("[T]here is no public right of access to evidence obtained in the discovery process prior to use in public hearings or trials."); *Bond v. Utreras*, 585 F.3d 1061 (7th

[1] At paragraph 4(g) in the attached protective order, Plaintiff would add the following two sentences: "The parties shall designate only that part of a document or deposition that is CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, rather than the entire document or deposition. For example, if a party claims that a document contains pricing information that is CONFIDENTIAL – ATTORNEYS EYES ONLY, the party will designate only that part of the document setting forth the specific pricing information as ATTORNEYS EYES ONLY, rather than the entire document."

Cir. 2009) ("Generally speaking, the public has no constitutional, statutory (rule-based), or common-law right of access to unfiled discovery."); *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665 (9th Cir. 2010) (no right of access to "`private materials unearthed during discovery,' as such documents are not part of the judicial records") (citation omitted).

Courts also acknowledge the burden of requiring parties to sift through voluminous documents to designate specific portions or paragraphs as confidential. *See id.* at 686 (permitting parties to designate entire documents as confidential, noting that "[s]ometimes it is better and more simple just to designate a[n] [entire] document as confidential to facilitate speedy production of discovery" and that the alternative of requiring the parties to designate portions of documents as confidential "could increase the cost of production dramatically and make production more time consuming"); *Procaps S.A. v. Patheon Inc.*, No. 12-24356-CIV, 2013 WL 4773433, at *6 (S.D. Fla. Sept. 4, 2013) (noting the "practical burdens (i.e., inordinate time and expense) associated with a page-by-page or section-by-section designation" of confidentiality); *Containment Technologies Grp., Inc. v. Am. Soc. of Health Sys. Pharmacists*, No. 1:07-CV-997 (DFH)(TAB), 2008 WL 454310, at *4 (S.D. Ind. Oct. 10, 2008) ("[R]equiring counsel to scour each document in a massive electronic discovery production to parcel out which portions of which document should properly be designated as confidential undoubtedly adds additional burdens and expenses to litigation.").

Here, the *Salt Lake Tribune* and the *Deseret News* have already invested considerable time and expense in reviewing and producing to the Department of Justice approximately half a million pages of documents (or approximately 250 banker boxes of documents), carefully screening such records for purposes of relevance and privilege. Defendants do not know what

subset of these documents Plaintiff may request and what documents Defendants will produce, but the volume of documents to be reviewed and produced will doubtless be very large. Plaintiff's proposed protective order would require Defendants to re-review these complex and voluminous materials in an overly detailed and burdensome fashion. This would be an extraordinary and needless delay and expense.

Defendants' proposed protective order provides everything necessary to the proper use of discovery. And, if Plaintiff has any specific objection to a specific document being marked confidential, or seeks an explanation for such designation, the parties have set forth a procedure by which that issue can be readily resolved. (*See* Exhibit A, ¶ 7(c).)[2]

The Court should also note that in the course of negotiating a modified protective order, Defendants agreed to substantial concessions, including a concession by Defendants that even though the Plaintiff had no "employees," a select group of its members consisting of its board of directors could review confidential information. In the spirit of this and other concessions, Defendants seek a reasonable modification in the interest of efficiency and the reduction of

[2] In the pretrial conference, counsel for Plaintiff seemed to suggest that there would be a burden shifting in the review of documents. To that effect counsel argued that the Plaintiff would be required to determine what portion of a document was or was not confidential. This is not true. To the extent that the Plaintiff wishes to use any documents in pleadings the procedure is set forth whereby it may file under seal, or if time permits, contact the Defendants who will specify the discrete confidential information in any specific document. *See Bartholomees v. Signator Investors, Inc.*, No. 03-2081-GTV, 2003 WL 22843174, at *2 (D. Kan. Nov. 25, 2003) (explaining that following entry of blanket protective order, "the party seeking the protection bears the burden of proof to justify retaining a designation of confidentiality. Notably, the burden of proving confidentiality never shifts from the party asserting that claim – only the burden of raising that issue."); *Grundberg v. Upjohn Co.*, 137 F.R.D. 372, 389 n.21 (D. Utah 1991) (same).

unnecessary expense, and respectfully ask the Court for an order entering its proposed modified Protective Order.

CONCLUSION

For the reasons set forth herein, Defendants' motion for protective order should be GRANTED.

DATED this 4th day of December, 2014.

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