U.S. Department of Justice

Civil Division

May 9, 2019

The Honorable David T. Schultz
United States Magistrate Judge
United States District Court
9E U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415
Schultz_chambers@mnd.uscourts.gov

Re: **Wilwal v. Nielsen**, 17-cv-2835 (DWF/DTS)

Dear Judge Schultz,

On December 7, 2018, the parties submitted, with the Rule 26(f) Report and Proposed Scheduling Order, a proposed Protective Order. Although the parties have reached agreement on most of the order, the parties have been unable to resolve a dispute with regard to Section 5 of the Proposed Order. Pursuant to the Court's instructions during the conference on March 12, 2019, both parties submit this joint letter to present the dispute for the Court to resolve.

Both parties agree that a Protective Order is necessary. The United States drafted the initial version of the Proposed Order. Plaintiffs objected to the language proposed by the United States as paragraphs 5(h) and (i), and suggested alternate language, as set forth below.

A. Defendants' Proposed Language

Defendants propose the following language as paragraphs 5(h) and (i):

> h) Nothing in this Protective Order supersedes existing independent statutory, law enforcement, national security, or regulatory obligations imposed on a Party, and this

> Protective Order does not prohibit or absolve the Parties from complying with such other obligations.
>
> (i) Nothing in this Protective Order shall prevent or in any way limit or impair the right of the United States to disclose to any state or federal agencies or departments, or any division or office of any such agency or department, information or materials provided in this Action, including those designated as Protected Material under this Order, that relate to a potential violation of law or regulation, or relating to any matter within that agency's jurisdiction. Nor shall anything contained in this Order prevent or in any way limit or impair the use of any information provided in this Action, including Protected Material, by an agency in any lawfully permitted proceeding relating to a potential violation of law or regulation, or relating to any matter within that agency's jurisdiction. Disclosure of information or materials provided in this Action, including those designated as Protected Material under this Order, is permitted within the meaning of this paragraph, provided that the agency shall be advised of the terms of this Protective Order and maintain the confidentiality of the Protected Material in a manner consistent with the terms of this Order.

Defendants' proposed language ensures that government attorneys would be able to provide certain information to other departments or agencies without running afoul of the Protective Order, should the need arise. Similar language has been upheld by several courts, each of which recognized the unique role of federal agencies as litigants and authorized the government to disclose confidential information to other government agencies that indicated violations of law and/or regulation. *See Bayer-Onyx v. United States*, No. CIV.A. 08-693, 2010 WL 2925019, at *1 (W.D. Pa. July 20, 2010) (entering a protective order that included language proposed by the United States that "would allow Confidential Information to be passed by the Department of Justice or Internal Revenue Service . . . 'to other Federal agencies and departments if the information indicates a violation or potential violation of law--criminal, civil, or regulatory in nature'"); *United States v. Nw. Airlines Corp.*, No. 98-CV-74611-DT, 1999 WL 34973961, at *8 (E.D. Mich. May 21, 1999) (entering a protective order, over the objections of

defendant, that permitted the Department of Justice to "disclose material designated as Confidential or Highly Confidential to employees of the Executive Branch outside the Department of Justice, and [to] use such information for any valid law enforcement purpose"); *S.E.C. v. AA Capital Partners, Inc.*, No. 06-51049, 2009 WL 3735880, at *3 (E.D. Mich. Nov. 3, 2009) (Noting that, without similar language, "[i]f the documents requested in this subpoena are relevant to a criminal investigation, the proposed protective order would stymie the SEC in providing that information to the appropriate law enforcement agencies.").

Defendants' language will only permit the disclosure of information to another agency or department if counsel believes that the information is related to a potential violation of law or regulation, or another matter within the jurisdiction of the receiving agency. Such disclosures are consistent with Justice Department attorneys' ethical and regulatory obligation to report "waste, fraud, abuse and corruption to appropriate authorities." 5 C.F.R. § 2635.101(b)(11); *see also* Exec. Order No. 12,674, 54 Fed. Reg. 15,159 (Apr. 12, 1989), *as modified by* Exec. Order No. 12,731, 55 Fed. Reg. 42,547 (Oct. 17, 1990).

Further, the Protective Order makes clear that the receiving agency could use this information only in furtherance of a lawfully permitted procedure relating to a violation of law or regulation, or matter within the agency's jurisdiction. Although Plaintiffs argue that Defendants' proposed language is vague, in fact, this language is more precise than Plaintiffs' proposed language. Namely, Defendants' proposed language specifies when information may be turned over, and how it may be used in the future. Plaintiffs' proposed language, in contrast, invites future disputes, in this litigation or elsewhere, over whether information was shared and used correctly.

Finally, Defendants' proposed language ensures the continued confidentiality of any information turned over to another department or agency. Defendants' Paragraph (i) mandates that the disclosing attorney must advise the receiving agency of the terms of the protective order. The receiving agency, in turn, must maintain the confidentiality described by the order. Plaintiffs' proposed language, in contrast, does not address this issue in any way, and would arguably permit greater latitude.

B. Plaintiffs' Proposed Language

Plaintiffs propose the following language as paragraph 5(h):

> This Protective Order does not restrict the disclosure or use of any information or documents lawfully obtained by the producing or receiving party through means or sources outside of this litigation, nor does it restrict or absolve any party from complying with any statutory or regulatory obligations imposed on a party, including civil or criminal law enforcement activities or to further applicable legal obligations relating to the use of information, including, but not limited to, obligations under the Privacy Act. See 5 U.S.C. § 552a.

Plaintiffs' proposed language makes clear that the protective order does not restrict any party from complying with existing statutory or regulatory obligations related to the use and sharing of information. Defendants' proposal, however, goes far beyond that, using ambiguous language to carve out of the order's protections an expansive "right of the United States to disclose to any state or federal agencies or departments, or any division or office of any such agency or department, information or materials provided in this Action . . . ." Defendants' proposed language neither identifies the scope of that purported "right" nor explains its basis in the law. The proposal refers to "law enforcement [or] national security . . . obligations" that are not defined in the protective order and that appear to go beyond any obligations imposed by statute or regulation. The proposal also would permit Defendants to share information designated

as confidential protected material with virtually any government agency in the United States "relating to any matter within that agency's jurisdiction."

These carve-outs would upend the purpose and intent of the protective order, which is to ensure that information properly designated as protected material is maintained as confidential. In effect, Defendants' proposal would make adherence to the protective order not a matter of its plain terms, but a matter of Defendants' discretion.

The cases Defendants cite do not support their blanket invocation of law enforcement and national security "obligations," nor did the courts in those cases permit confidential information to be shared as broadly as Defendants propose. Rather, those courts limited disclosure to federal entities strictly for law enforcement purposes. *See United States v. Nw. Airlines Corp.*, 98-CV-74611-DT, 1999 WL 34973961 (W.D. Pa. May 21, 1999) (permitting disclosure to "other Federal agencies" if the information "indicates a violation or potential violation of law"); *United States v. Nw. Airlines Corp.*, 98-CV-74611-DT, 1999 WL 34973961 *8 (E.D. Mich. May 21, 1999) (limiting disclosure to "employees of the Executive Branch" for "valid law enforcement purpose" pursuant to specified antitrust laws). The third case Defendants cite, *S.E.C. v. AA Capital Partners, Inc.*, 06-51049, 2009 WL 3735880 (E.D. Mich. Nov. 3, 2009), is not instructive here. That case involved a challenge to a federal subpoena to a nonparty in a Securities and Exchange Commission enforcement action; it did not involve a negotiated protective order governing confidential information produced in civil discovery.

Defendants seek to justify their proposed sweeping exceptions to the terms of the order by reference to 5 C.F.R. § 2635.101(b)(11), but that provision merely states that federal employees "shall disclose waste, fraud, abuse, and corruption to appropriate authorities." It neither directly nor indirectly supports the language Defendants have proposed, nor do

Defendants identify any authority suggesting that that regulation, or the executive orders they cite, extend beyond the conduct of government employees to encompass information obtained from private civil litigants.

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