STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 11847

COMPUTER DESIGN & INTEGRATION, LLC and COMPUTER DESIGN & INTEGRATION SOUTHEAST, LLC,

Plaintiffs,

v.

DAVID A. BROWN, MARCUS JACOBY, and ROVE, LLC,

Defendants,

DAVID A. BROWN and MARCUS JACOBY,

Third-Party Plaintiffs,

v.

ERIC BAKKER and BRIAN T. REID, CPA,

Third-Party Defendants,

v.

COMPUTER DESIGN & INTEGRATION SOUTHEAST, LLC, derivatively through DAVID A. BROWN,

Derivative Plaintiff,

v.

ERIC BAKKER, BRIAN T. REID, CPA (individually), ACCOUNTING OFFICES OF BRIAN T. REID, CPA, and NIGRO & REID,

Derivative Third-Party

AMENDED ORDER ON BCR 10.9 CONFERENCE[1]

[1] This Amended Order on BCR 10.9 Conference corrects the statement in paragraph 13(b) to clarity that Rove is not required to file with the Court or on the public record its amended answer to Interrogatory 4, but Rove is required to *serve* an amended answer to Interrogatory 4.

Defendants.

1. **THIS MATTER** is before the Court pursuant to North Carolina Business Court Rule ("BCR") 10.9 in the above-captioned case.

2. Plaintiffs Computer Design & Integration, LLC ("CDI") and Computer Design & Integration Southeast, LLC ("CDISE") (collectively, "Plaintiffs") initiated this matter by e-mailing the Court a letter requesting a telephone conference pursuant to BCR 10.9 so that the Court could address a discovery dispute between the parties.

3. Plaintiffs object to Defendant Rove, LLC's ("Rove") designation of its answer to Interrogatory number 4 ("Interrogatory 4") of Plaintiffs' First Set of Interrogatories and Request for Production of Documents ("Interrogatories") as "Attorneys' Eyes Only" ("AEO") under the terms of the Consent Protective Order in this case ("CPO") (more broadly, the "AEO Dispute") and instead contend that the answer should be treated as "Confidential" under the CPO so that Plaintiffs' counsel may discuss the response with Plaintiffs in determining discovery and trial strategies.

4. Interrogatory 4 asks Rove to identify the amount of revenue received by Rove from specific customers identified in Rove's answers to Interrogatories 2 and 3. Plaintiffs argue that Plaintiffs' counsel must discuss with Plaintiffs the answer to Interrogatory 4, and, in particular, the specific revenue received from each identified Rove customer, to determine Plaintiffs' discovery and trial strategies.

5. In response, Rove argues that the answer to Interrogatory 4 would give Plaintiffs, each a competitor of Rove, insight into Rove's scope and scale of work with

specific customers, and, further, that Plaintiffs' need to participate on an informed basis in the selection of specific Rove customers for discovery does not outweigh Rove's right to designate the answer as AEO under the CPO.

6. After receiving and reviewing Defendant Rove's letters in response to Plaintiffs' BCR 10.9 Request, the Court asked the parties to provide the Court up to three cases supporting their position on the AEO Dispute and convened a telephone conference on March 14, 2017, at which all parties were represented by counsel.

7. Although the terms of the CPO are relevant to the resolution of the AEO Dispute—which arises under that very same order—the CPO is not determinative in light of the CPO's use of non-specific language to describe the information properly designated AEO.[2] *Compare Mainstreet Collection, Inc. v. Kirkland, Inc.*, 270 F.R.D. 238, 247 (E.D.N.C. 2010) (overruling plaintiff's objection to defendants' AEO designation of its sales information where the parties expressly agreed in their consent protective order that sales information would be designated as AEO) *with Global Materials Technologies, Inc. v. Dazheng Metal Fiber Co., Ltd., et al.*, 133 F. Supp.3d 1079, 1083–84 (N.D. Ill. 2015) (noting that AEO designation under a consent

[2] The Court notes that a more exacting standard will apply to the Court's assessment of whether documents filed with the Court, including those marked AEO, can be sealed or whether judicial documents or records, including those containing AEO material, can be sealed in light of the public's "general right to inspect and copy judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). *See Volumetrics Med. Imaging, LLC v. Toshiba Am. Med. Sys.*, No. 1:05CV955, 2011 U.S. Dist. LEXIS 149809, at *20-25 (M.D.N.C. Dec. 30, 2011) ("The mere fact that a document was subject to a blanket protective order does not relieve the parties or a court of the obligation to comply with the Fourth Circuit's otherwise applicable sealing regimen [as established in *Virginia Dep't of State Police v. The Washington Post*, 386 F.3d 567 (4th Cir. 2004)].")

protective order "should only be used on a relatively small and select number of documents where a genuine threat of competitive or other injury dictates such extreme measures" and removing AEO designation even though consent protective order permitted designation where "the disclosing party and its counsel believe in good faith that the material contains proprietary information") (citations and quotation marks omitted).[3]

8. Where, as here, the terms of a consent protective order do not specifically address the information sought to be designated AEO, the court must assess whether good cause exists for the AEO designation and balance the need for protection against the harm caused by denying a party the opportunity to see the AEO-designated material. *See generally, e.g., Global Materials Technologies, Inc.*, 133 F. Supp.3d at 1084 (denying AEO designation of documents after weighing the risks of disclosure to designating party against opposing parties' need to view the information in order to litigate its claims); *Hyundai Motor Am. v. Clear with Computers, LLC*, No. 6:098 CV 302, 2009 U.S. Dist. LEXIS 132160, at *11 (E.D. Tex. May 11, 2009) (weighing plaintiff's "risk of harm if its confidential documents [marked AEO] are inadvertently used against it [by defendant competitor]" against defendant's "prejudice if [defendant] is excluded [from reviewing plaintiff's confidential documents]").

9. The CPO here provides that "[a] party and any non-party witness may designate as 'Attorneys' Eyes Only' any Discovery Materials he, she, or it reasonably

[3] Our Supreme Court has held that "[d]ecisions under the federal rules are . . . pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules." *Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989).

and in good faith believes to contain highly sensitive or financial information or a trade secret." (Consent Protective Order 2.) Because the consent protective order does not expressly address whether revenue from customers would be designated as AEO and Plaintiffs object to the AEO designation, the Court must assess whether Rove has shown good cause for the designation and balance Plaintiffs' need for broader disclosure against the harm to Rove of disclosure to Plaintiffs. *See, e.g., Scranton Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 190 F.Supp. 3d 419, 439 (M.D.Pa. 2016) ("Once a[n AEO] designation has been challenged, the party seeking to uphold the designation must demonstrate 'good cause.'"); *Phillips v. GMC*, 307 F.3d 1206, 1210–11 (9th Cir. 2002) ("For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted.").

10. Based on its review of the submissions and arguments of counsel, the Court concludes that Rove has shown that disclosure to Plaintiffs of the specific revenue earned from individual customers could be used improperly by Plaintiffs, each a current competitor, because the *specific revenue* received from each identified customer may reveal the prices charged for specific projects performed by Rove and cause Rove competitive injury. *See, e.g.*, *Cabell v. Zorro Prods.*, 294 F.R.D. 604, 610 (W.D. Wash. 2013) (upholding AEO designation of sensitive business information over defendant competitor's objection); *Kaseberg v. Conaco*, No. 15-cv-01637, 2016 U.S. Dist. LEXIS 97581, at *38–39 (S.D. Cal. July 26, 2016) (holding non-public financial information properly designated as AEO).

11. Nevertheless, the Court further concludes that Rove has failed to show why the disclosure of the *relative revenue* received from the identified customers would result in a clearly defined injury to Rove. *See, e.g.*, *Shingara v. Skiles*, 420 F.3d 301, 306 (3d Cir. 2005) (holding that the producing party must demonstrate to the trial court's satisfaction that de-designation "will result in a clearly defined, specific and serious injury"). In particular, based on its review of the record, it appears to the Court that disclosure to Plaintiffs of the rank order and broad revenue range for each of the seventeen specific customers Rove has already disclosed to Plaintiffs does not implicate the substantial competitive harm that would result from the disclosure to Plaintiffs of the specific revenue received from such customers.

12. Similarly, the Court concludes that, although Plaintiffs have established that disclosure of revenue information to Plaintiffs is reasonable and appropriate to assist Plaintiffs and their counsel in shaping Plaintiffs' discovery and litigation strategies, Plaintiffs have not offered a compelling justification to support Plaintiffs' review of the specific revenue numbers for each identified customer or why disclosure of relative revenue among the identified customers is insufficient to afford Plaintiffs the information necessary to litigate their claims.

13. **WHEREFORE,** based on the Court's review of the materials submitted by the parties and the arguments of counsel at the BCR 10.9 conference, and after weighing the risk to Rove of disclosure against Plaintiffs' need for disclosure, the Court, in the exercise of its discretion and based on the current record before the Court, **CONCLUDES** and **ORDERS** as follows:

a. Rove's answer to Interrogatory 4, which indicates the specific revenue for each identified customer, shall remain designated as AEO;

b. Rove shall serve an amended answer to Interrogatory 4 ("Amended Answer"), designated as "Confidential" under the CPO, as follows:

   i. Rove shall (A) present the individual customers identified in Rove's current answer to Interrogatory 4 in three groups: (a) customers from which Rove received more than $500,000 in revenue, (b) customers from which Rove received more than $100,000 but less than $500,000 in revenue, and (c) customers from which Rove received less than $100,000 in revenue, and (B) list the individual customers in each group in revenue rank order, from the customer responsible for the highest revenue first to the customer responsible for the lowest revenue last.

   ii. Rove's Amended Answer shall not state the specific revenue earned from each individual customer; and

   iii. Rove shall serve its Amended Answer on Plaintiffs no later than March 29, 2017.

SO ORDERED, this the 23rd day of March, 2017.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Special Superior Court Judge
for Complex Business Cases