

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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NEAL PETERSON,	:	Civil No. 3:09cv-644
	:	
Plaintiff,	:	DECEMBER 7, 2010
	:	
v.	:	
	:	
MTD PRODUCTS, INC. AND	:	
SEARS, ROEBUCK & CO.,	:	
	:	
Defendants.	:	

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MTD PRODUCTS, INC.’S REPLY
TO PLAINTIFF’S OBJECTIONS TO MOTION TO SEAL
and
MOTION TO SEAL DOCUMENTS PROVIDED IN SUPPORT OF PLAINTIFF’S
OBJECTIONS TO DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT
and
MOTION TO SHOW CAUSE

The Defendant, MTD Products, Inc. (“MTD”) respectfully submits its Reply to the Objections of Plaintiff, Neal Peterson (“Peterson”) to Motion to Seal the documents surrounding MTD’s motion for summary judgment and also move to seal Peterson’s Objections to Defendants’ Motions for Summary Judgment. And, since Plaintiff has violated this Court’s August 21, 2009 Order regarding confidentiality, MTD asks this Court to set a hearing wherein Plaintiff should be required to show cause why he did not comply.

I. FACTUAL BACKGROUND

On June 23, 2009, the brought a product liability action against MTD and Sears, Roebuck & Co. (“Sears”) pursuant to Connecticut General Statutes §52-572m, *et seq.* Plaintiff claims that on December 12, 2007, he was inflating the

tires on the snow thrower when the “wheel rim suddenly and without warning exploded.” Amended Complaint, ¶4. Plaintiff claims that the wheel rim was defectively designed and manufactured and that MTD and Sears acted in reckless disregard for the safety of the plaintiff and seek compensatory and punitive damages.

On October 14, 2010, MTD and Sears filed Motions for Summary Judgment.[Doc. 58, 59]. In support of those motions, MTD attached materials that it had previously designated as confidential pursuant to a protective order this Court entered on August 21, 2009. [Doc. 22] This Court entered that Order after Plaintiff refused to execute a confidentiality agreement, and held:

The Defendants shall provide the requested information, but the Defendants’ assessment of confidentiality shall be respected. The Plaintiff shall maintain the confidentiality of the documents until and unless there is a contrary order by the Court.

On November 22, 2010, Plaintiff filed objections to the Motions for Summary Judgment of the Defendants, and also filed numerous exhibits. [Doc. 66-69] Included in these exhibits are, for example, sensitive information concerning warranty claims, interoffice e-mails concerning MTD’s quality control process, and deposition excerpts taken and sealed in another matter concerning all of these topics. [Doc. 68-69]

Since Plaintiff’s exhibits were designated by MTD as confidential, and are in fact confidential, MTD respectfully requests that they be sealed. And, since Plaintiff published them on the Court’s online docket available to the public

despite this Court's August 21, 2009 order to the contrary, MTD seeks an Order to Show Cause why Plaintiff did not comply with the confidentiality order in this matter.

III. LEGAL ARGUMENT

I. This Court's August 21, 2009 Protective Order must be enforced.

While Plaintiff apparently does not agree that MTD's materials warrant confidentiality, this Court has already ruled that they do. Again, on August 21, 2009, the Court ruled that "Defendants' assessment of confidentiality shall be respected. The Plaintiff shall maintain the confidentiality of the documents until and unless there is a contrary order by the Court." Plaintiff did not maintain the confidentiality of Defendants' materials. No other order has been entered by this Court regarding confidentiality.

MTD's right to privacy is well entrenched into the judicial system. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-36, (1984). It is appropriate for courts to order confidentiality to prevent the infliction of unnecessary or serious pain on parties. *Id.* This requires the Court to undertake a balancing test, one which should incorporate consideration of the overarching purpose of the discovery process: "[d]iscovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titillate the public." *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982); see also *Richard L. Marcus, Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 57 (1983) ("The speculative possibility that in some cases the public would benefit from

dissemination of information garnered through discovery hardly warrants the conversion of the process into an investigatory tool for inquisitive litigants.”)

Fed Rule 26(c), Subsection 7, provides a non-exhaustive list of eight types of protective orders that courts may issue. See Fed. R. Civ. P. Rule 26(c)(1)-(c)(8). And, “a court is not limited to the eight specified types of orders [it] may be as inventive as the necessities of a particular case require in order to achieve the benign purposes of the rule.” 8 Wright & Miller at § 2036; see also *Ann L. v. X Corp.*, 133 F.R.D. 433, 435 (W.D.N.Y. 1990) (“an order of suppression is a permissible remedy under the ‘catch all clause’ of Fed. R. Civ. P. 26(c)”). As one court elaborated:

Subsection (7) of Rule 26(c) provides for the issuance of a protective order requiring “that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.” This “open-ended series of terms . . . need not be limited to ‘true’ trade secrets.” 8 Wright & Miller at § 2043. “Documents falling into categories commonly sealed are those containing trade secrets, confidential research and development information, marketing plans, revenue information, pricing information, and the like.” *Cumberland Packing Corp. v. Monsanto Co.*, 184 F.R.D. 504, 506 (E.D.N.Y. 1999). Examples of protective orders covering commercial documents include: *Sullivan Mktg. v. Valassis Commc’ns*, 1994 U.S. Dist. LEXIS 5824 (S.D.N.Y.1994) (granting protective order to defendant publisher that

restricted access to sensitive business contracts, proposals and negotiations); *Moore U.S.A., Inc. & Toppan Forms Co., Ltd. v. Standard Register Co.*, 2000 U.S. Dist. LEXIS 9137 (W.D.N.Y. 2000) (protecting documents containing trade secrets and confidential research and development information); *Vesta Corset Co. v. Carmen Founds.*, 1999 U.S. Dist. LEXIS 124, at *5 (S.D.N.Y.1999) (refusing disclosure of confidential commercial information such as “pricing, profits, costs, overhead, manufacturing specifications, customer lists, price structure, and dealings with a common customer”); *DDS, Inc. v. Lucas Aero. Power Transmission Corp.*, 182 F.R.D. 1 (N.D.N.Y. 1998) (protecting trade secrets of manufacturing process and customer lists, and breakdown of annual sales figures).

Zyprexa Litig., 474 F. Supp. 2d 385, 416 (E.D.N.Y. 2007).

- II. MTD’s documents produced during discovery were properly designated as confidential.

Plaintiff argues that its conduct should be condoned since the materials that MTD produced were not worthy of protection in the first place. Plaintiff argues that MTD’s documents only “pertain to defective plastic rims... that have been discontinued.” See Objection to Motion to Seal Summary Judgment Papers at 6. This assertion is not true.

The touchstone of the court’s power under Federal Rule 26 is the requirement of “good cause.” See 8 Wright & Miller at § 2035. To determine whether good cause exists, courts balance “the need for information against the

injury that might result if uncontrolled disclosure is compelled.” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. Pa. 1994). Here, that test clearly tips in MTD’s favor.

The materials that MTD produced include e-mails between MTD employees regarding product development, production, shipping, design and inventory of wheel rim parts. Others contain MTD’s pricing information regarding the rims. These documents are worthy of protection. See e.g. *Brittain v. The Stroh Brewery Co.*, 136 F.R.D. at 415-17 (granting a protective order to protect Stroh’s distributor information); see also *Vesta Corset Co. v. Carmen Founds.*, 1999 U.S. Dist. LEXIS 124, at *5 (S.D.N.Y.1999) (refusing disclosure of confidential commercial information such as “pricing, profits, costs, overhead, manufacturing specifications, customer lists, price structure, and dealings with a common customer”).

Other documents that MTD produced concern dealings with their principle customers. MTD’s relationship with entities like, Sears, Home Depot, U.S.A., and Menards, Inc. and dozens of other retailers, are commercially valuable and, thus, worthy of protection. *In re S(3) Ltd.*, 242 B.R. 872, 878 (Bankr. E.D. Va. 1999); see also *Vesta Corset Co.*, at *5 (refusing disclosure of confidential commercial information such as “dealings with a common customer”).

Other MTD documents contain confidential self-critical analysis which are privileged. See *Hickman v. Whirlpool Corp.*, 186 F.R.D. 362, 364 (N.D. Ohio 1999); see also *Cardenas*, 230 F.R.D. at 638. For example, some of the litigation materials contain email chains between MTD engineers, such as Ron Krisko and

several other MTD employees regarding internal testing results and protocols concerning the snow-thrower. Other documents contain service reports containing the results of that testing. Other documents contains similar communications between MTD Training and Service Representative Ed Maslach, Dwayne Cassidy (MTD's Product Quality department), and others about dealing with MTD's customers. These documents, which show MTD evaluating its own conduct and formulating policy, are clearly privileged. See *Hickman*, 186 F.R.D. at 364; see also *Cardenas*, 230 F.R.D. at 638.¹

These are but a sampling of the thousands of documents that MTD provided to Plaintiff in this matter, and which MTD appropriately designated as confidential.

III. MTD's economic concerns are not the only issue.

Plaintiff also argues, erroneously, that MTD is without a remedy "[t]o the extent that MTD wishes to seal these summary judgment papers for reasons other than a concern about economic harm from revealing proprietary trade secrets to its competitors." See Plaintiff's Objections to Motion to Seal Summary Judgment papers at 6.

But, that is not the standard. for example, in *Scott v. Monsanto*, the Fifth Circuit upheld a protective order that restricted the use of discovery materials to

¹ Also included within these materials are hundreds of pages of documents containing private medical, financial and/or contact information of MTD's customers which should be kept confidential. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 245 F.R.D. at 637; *EEOC.*, 2006 U.S. Dist. LEXIS 43124, at *2; *Williams*, 2006 U.S. Dist. LEXIS 62585, *46-48; *Mich. Prot. & Advocacy Serv.*, 2006 U.S. Dist. LEXIS 18100, *4-5; *Stewart*, 2002 U.S. Dist. LEXIS 12958.

plaintiffs, their representatives, their counsel and their experts or consultants in that litigation. *Scott v. Monsanto Co.*, 868 F.2d 786, 792 (5th Cir. 1989). The court stated that in preventing the sharing and comparison of information with other litigants in other cases, the protective order was not unduly constricting and there was no prejudice to plaintiffs sufficient to overcome the protective order. *Id.* In addition, in a more recent case, the Fifth Circuit also stated that the grounds for a protective order can include the improper sharing of confidential information between litigants in separate cases. *Crosswhite v. Lexington Ins. Co.*, 321 Fed. Appx. 365 (5th Cir. Tex. 2009).

As one federal court has recognized, dealing with Federal Rule 26(c):
Unless a valid Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences.... After balancing the interests at stake, we are satisfied that, absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need, none of which appear here, a witness should be entitled to rely upon the enforceability of a protective order against any third parties.

Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 296 (2d Cir. N.Y. 1979)(“Once a court enters a protective order and the parties rely on that order, it cannot be modified ‘absent a showing of improvidence in the grant’ of the order

or 'some extraordinary circumstance or compelling need.' "); see *S.E.C. v. TheStreet.com*, 273 F.3d 222, 230 (2d Cir. 2001)(Finding that it is "presumptively unfair for courts to modify protective orders which assure confidentiality and upon which the parties have reasonably relied."); see also *AT&T Corp. v. Sprint Corp.*, 407 F.3d 560, 562 (2d Cir. N.Y. 2005).

Here, MTD relied upon the protective order in providing tens of thousands of pages of documents in discovery about commercially sensitive issues that relate to developing, manufacturing, and distributing a new product line. Without question, MTD is entitled to restrict the flow of this type of information. *Zyprexa Litig.*, 474 F. Supp. 2d 385, 416 (E.D.N.Y. 2007); see also *Brittain v. The Stroh Brewery Co.*, 136 F.R.D. at 415-17 (granting a protective order to protect Stroh's distributor information); See *Vesta Corset Co. v. Carmen Found.*, 1999 U.S. Dist. LEXIS 124, at *5 (S.D.N.Y.1999) (refusing disclosure of confidential commercial information such as "pricing, profits, costs, overhead, manufacturing specifications, customer lists, price structure, and dealings with a common customer"); see also *Vesta Corset Co.*, at *5 (refusing disclosure of confidential commercial information such as "dealings with a common customer"); see *Hickman v. Whirlpool Corp.*, 186 F.R.D. 362, 364 (N.D. Ohio 1999); (Finding that documents which contain confidential self-critical analysis are clearly privileged); see also *Kerns v. Caterpillar, Inc.*, 2008 U.S. Dist. LEXIS 9301 (M.D. Tenn. Feb. 7, 2008)(maintain confidentiality of documents evidencing negotiations and strategy); *Naples Cmty. Hosp., Inc. v. Medical Sav. Ins. Co.*, 2006 U.S. Dist. LEXIS

25894 (M.D. Fla. May 3, 2006)(protecting confidential business decisions from disclosure).²

Once the order has been in place and relied upon by the parties, this discretion is not as broad. As another court observed:

Of course, when a district court initially considers a request to seal a file or to approve or take other protective measures, it enjoys considerable discretion in determining whether good cause exists to overcome the presumption of open access to documents filed in our courts. However, after a district court has approved a sealing order, discretion of that breadth no longer exists. Although a district court has power to modify a protective order, the required showing must

² Also included within the materials that MTD provided during discovery are thousands of pages of documents containing private medical, financial and/or contact information of MTD's customers. As a matter of law, courts have routinely interpreted Rule 26(c) to include documents containing this type of confidential information. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 245 F.R.D. 632, 637 (D. Minn. 2007) ("the Court concludes that Duron's medical and personal financial information should remain sealed."); *EEOC v. Ala. Dep't of Youth Servs.*, 2006 U.S. Dist. LEXIS 43124, at *2 (M.D. Ala. June 26, 2006) ("Undoubtedly, employees have a strong privacy interest in the contents of their medical records and employers have an interest in protecting those records."); *Williams v. Art Inst.*, 2006 U.S. Dist. LEXIS 62585, 46-48 (N.D. Ga. Sept. 1, 2006) ("The Court agrees with Defendant that employee medical records and personnel information are private information that should not be widely disseminated."); *Mich. Prot. & Advocacy Serv. v. Caruso*, 2006 U.S. Dist. LEXIS 18100, 4-5 (W.D. Mich. Apr. 10, 2006) ("Indeed, such Report indicated, after balancing both privacy and public openness, that confidential medical information in social security files should not be disclosed because the public has little legitimate interests in obtaining such information."); *Stewart v. Mitchell Transp.*, 2002 U.S. Dist. LEXIS 12958 (D. Kan. July 11, 2002) ("The Court does, however, recognize that at least the potential for injury exists if the alleged confidential documents, and, in particular, documents containing medical information about Ramsey, are disclosed to non-parties.")

be more substantial than the good cause needed to obtain a sealing order in the first instance. “Absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need ... a witness should be entitled to rely upon the enforceability of a protective order...” *This rigorous approach is especially appropriate as to any modification of a protective order that is proposed to a court as part of a settlement.*

Geller v. Branich Int’l Realty Corp., 212 F.3d 734, 738 (2d Cir. N.Y. 2000)(citing *In re “Agent Orange” Product Liability Litigation*, 821 F.2d 139, 145 (2d Cir. 1987))[emphasis added, citations omitted].

IV. CONCLUSION

For the foregoing reasons, MTD’s Motion to Seal should be granted. And, Plaintiff’s exhibits filed in support of summary judgment should be sealed. Finally, the Defendants seek an Order compelling the Plaintiff to show cause why he did not comply with this Court’s August 21, 2009 Order by publishing confidential documents.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December 2010, the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.



Eric W. F. Niederer (CT 25773)