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**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

BARBARA A. WIEBENLE
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

TOTAL QUALITY LOGISTCS, LLC :
Plaintiff : **CASE NO. 2015 CVH 01223**
vs. : **Judge McBride**
ERIC LOVE, ET AL. : **DECISION/ENTRY**
Defendant :

Lindhorst & Dreidame, Barry F. Fagel, counsel for the plaintiff Total Quality Logistics, LLC, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202;

Lundrigan Law Group Co, LPA, Nicole M. Lundrigan and Kelly Lundrigan, counsel for the defendant Shane Moore, 1080 Nimitzview Drive, Suite 201, Cincinnati, Ohio 45230;

White, Getgey & Meyer Co., LPA, C. Joseph McCullough, counsel for the defendant Kansas Continental Express, 7587 Central Parke Blvd., Mason, Ohio 45103;

Nichols, Speidel & Nichols, Donald W. White, counsel for the defendant Eric Love, 237 Main Street, Batavia, Ohio 45103.

This cause is before the court for consideration of (1) a motion filed by the defendant Shane Moore for entry of an appropriate protective order in this case and modification of an existing protective order and (2) a motion filed by the plaintiff Total Quality Logistics, LLC for entry of a protective order as to Shane Moore.

The court scheduled and held a hearing on the motion on December 7, 2015. At the conclusion of that hearing, the court took the issues raised by the motions under advisement.¹

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The plaintiff Total Quality Logistics, LLC (hereinafter referred to as "TQL") filed its complaint against the defendants Kansas Continental Express (hereinafter referred to as "Kansas"), Eric Love, and Shane Moore on September 16, 2015, requesting a temporary and permanent restraining order and alleging claims of "trade secret misappropriation, unfair competition, unjust enrichment, breach of contract (express and implied), tortious interference with contractual relationship, fraud, breach of fiduciary duty, civil conspiracy, and conversion."²

TQL is a national freight brokerage company that links customers who need to transport freight with trucking companies.³ TQL alleges that the defendant Eric Love, its former employee, provided a competitor with confidential information regarding seven TQL customers.⁴ Specifically, TQL alleges that the information was provided by

¹ The defendant Shane Moore's motion also moved to compel the plaintiff to serve discovery responses. This issue is not addressed in this decision because the plaintiff has indicated that it will serve discovery to the defendant Shane Moore once a protective order is entered.

² Compl. at ¶ 1.

³ Compl. at ¶¶ 2-3.

⁴ Compl. at ¶ 12.

Love to the defendant Shane Moore, who is an employee at Kansas, which is a competing trucking broker.⁵

TQL has further alleged that Shane Moore received the prices TQL charged the customers, TQL's profit margins per load, the routes that TQL handled for the customers, the profit margins for each route, and the amounts TQL paid trucking companies to transport customer loads.⁶ As a result, TQL alleges that Shane Moore contacted TQL's customers and then offered to arrange for transportation of the customers' freight at lower prices than TQL's, and that as a result some customers stopped doing business with TQL in favor of doing business with Shane Moore and Kansas.⁷

TQL and Shane Moore have been unable to reach an agreement on the terms for their protective order and confidentiality agreement, which has consequently led to discovery delays. The thrust of the disagreement centers on (1) whether the order will contain an attorneys' eyes only provision and (2) the appropriate timeframe for making and disputing confidentiality designations.

On November 24, 2015 the defendant Moore filed a motion (1) for an entry of an appropriate protective order and confidentiality agreement, (2) to compel TQL to serve its discovery responses, and (3) to modify the existing stipulated protective order and confidentiality agreement among the other parties to the litigation. The main issue in Shane Moore's briefing is an attorneys' eyes only provision.⁸ This provision states:

⁵ Compl. at ¶¶ 4, 6.

⁶ Compl. at ¶ 12.

⁷ Compl. at ¶¶ 14-15.

⁸ A Stipulated Protective Order and Confidentiality Agreement was previously entered on October 9, 2015. Subsequently, the court found that this agreement and order, which purported to be applicable to all parties to this proceeding and to be stipulated to by the parties, was in fact

"2. Any party to this litigation and any third-party shall have the right to designate as 'Attorneys' Eyes Only' and subject to this Order any information, document, or thing, or portion of any document or thing that contains highly sensitive business or personal information. Any party to this litigation or any third party who is covered by this Order, who produces or discloses any Attorneys' Eyes Only material, including without limitation any information, document, thing, interrogatory answer, admission, pleading, or testimony, shall mark the same with the foregoing or similar legend: 'ATTORNEYS' EYES ONLY' OR 'ATTORNEYS'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER' ('Attorneys' Eyes Only') * * * "

Pursuant to paragraph four, material marked as "Attorneys' Eyes Only" may only be shared with the following: counsel of the receiving party; counsel's supporting personnel, experts, or consultants; court reporters, deposition videographers or stenographers; and the court. The parties themselves are not included in the list of permissible recipients.

Under paragraph one, the protective order also permits parties to designate information as "confidential," including "trade secrets, competitively sensitive technical, marketing, financial, sales or other confidential business information." Per paragraph three, "[c]onfidential" information may be used "solely for purposes of the prosecution or defense of this action, shall not be used by the receiving party for any business, commercial, competitive, personal or other purpose, and shall not be disclosed by the receiving party to anyone unless permitted by this Order * * * "

TQL filed its response to the defendant Moore's motion on December 1, 2015, asking this court to deny Moore's motion and to enter a protective order that includes an attorneys' eyes only provision. That same day, the court held a hearing on the motions.

never stipulated to by the defendant Shane Moore or by his counsel. Accordingly, on December 14, 2015, this court vacated the protective order as it applied to Shane Moore. In all other respects, the order remains in full force and effect as it applies to the other parties.

At the end of the hearing the court directed the parties to brief the specific issue of whether an attorneys' eyes only provision is appropriate, which is now the subject of this decision.

On December 4, 2015, TQL filed a motion asking the court to enter a protective order applicable to TQL and Moore that is the same as the protective order that governs the remaining parties, which would include an attorneys' eyes only provision. On that same day, Moore filed additional argument addressing only the entry of a protective order. This court listened to oral argument regarding the protective order issue on December 7, 2015. Following the hearing, this court took the issue regarding the protective order under advisement.

Both parties agree that a protective order and confidentiality agreement should be entered. However, the parties have been unable to stipulate to a protective order and agree on proposed terms. In the discovery that TQL has served upon Kansas, it has only designated one document as attorneys' eyes only. This document contains pricing information from January 2014 to November 2015. Specifically, the document identifies TQL's sales by listing the names of customers, the month and year of service, the route used for delivery, and the price of the service.

LEGAL ANALYSIS

Civ.R. 26(C) and R.C. 1333.65 contemplate disclosing trade secrets in the course of discovery.⁹ Protective orders are governed by Civ.R. 26(C):

⁹ *Armstrong v. Marusic*, 11th Dist. Lake No. 2001-L-232, 2004-Ohio-2594, ¶ 23.

“Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * * (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.”¹⁰

Moreover, R.C. 1333.65 tasks courts with preserving “the secrecy of an alleged trade secret by reasonable means that may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.”

In designating trade secret information as confidential or for attorneys’ eyes only, the party “asserting trade secret status has the burden to identify and demonstrate that the material” is protected beneath Ohio’s Uniform Trade Secrets Act.¹¹ Under Ohio’s Uniform Trade Secrets Act, a “trade secret” is defined as:

“information, * * * design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”¹²

¹⁰ See *Ramun v. Ramun*, 7th Dist. Mahoning No. 08 MA 185, 2009-Ohio-6405, ¶¶ 29-30, citing Civ.R. 26(C).

¹¹ *Block Communications, Inc. v. Pounds*, 34 N.E.3d 984, 2015-Ohio-2679, ¶ 47(6th Dist.), quoting *Amos v. MedCorp., Inc.*, 6th Dist. Lucas, No. L-09-1248, 2010-Ohio-1883, ¶ 26.

¹² R.C. 1333.61(D); *Northeast Professional Home Care, Inc. v. Advantage Home Health*, 188 Ohio App.3d 704, 2010-Ohio-1640, 936 N.E. 964, ¶ 35 (5th Dist.).

A party seeking to shield a trade secret bears the burden of showing that the information at issue is a trade secret.¹³ When the producing party seeks to include an attorneys' eyes only ("AEO") designation, the "court cannot presume, in absence of proof, that a particular company's prices are confidential."¹⁴ Generally, an AEO designation permits only the attorneys and experts to view the documents, excluding the party.¹⁵ Trade secrets are protected because "injury results from the dissemination of the information itself."¹⁶ However, "[a]lthough confidential, trade secret information is not absolutely privileged."¹⁷

Additionally, the Supreme Court has adopted the following six factors to analyze a trade secret claim: "(1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information." *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-25, 1997-Ohio-75, 687 N.E.2d 661.

¹³ *Pounds*, 2015-Ohio-2679 at ¶ 51 (6th Dist.) See *Ramun*, 2009-Ohio-6405 at ¶¶ 29-30, citing *Covington v. The Metro Health Sys.*, 150 Ohio App.3d 558, 2002-Ohio-6629, 782 N.E.2d 624, ¶24 (10th Dist.) ("The burden of showing that testimony or documents are confidential or privileged rests with the party seeking to exclude it."). *Ramun*, 2009-Ohio-6405 at ¶ 31, citing *Fred Sigel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 181, 1999-Ohio-260, 707 N.E.2d 853 (stating "the burden to identify and demonstrate that the material is a trade secret is on the person claiming it to be a trade secret.").

¹⁴ *Arvco Container*, 2009 WL 311125 at *7.

¹⁵ *Ramun*, 2009-Ohio-6405 at ¶ 40. See *Stout v. Remetronix*, S.D. Ohio, 298 F.R.D. 531, 534 (2014), citing *Penn, LLC v. Prosper Boys Dev. Corp.*, No. 2:10-cv-0993, 2012 WL 5948363, * 4 (S.D. Ohio Nov. 28, 2012) ("A Protective Order with an AEO designation serves to limit the disclosure of trade secret information to the opposing party's attorneys and expert witnesses only.").

¹⁶ *Advantage Home Health*, 2010-Ohio-1640 at ¶ 34, citing *Bennett v. Martin*, 186 Ohio App.3d 412, 2009-Ohio-6195, 928 N.E.2d 763, ¶ 33 (10th Dist.).

¹⁷ *Armstrong*, 2004-Ohio-2594 at ¶ 23, citing *Svoboda v. Clear Channel Communications Inc.*, 6th Dist. Lucas No. L-02-1149, 2003-Ohio-6201, ¶ 19. See *Stout*, 298 F.R.D. 531 at 533 citing *Penn, LLC*, 2012 WL 5948363 at *4 ("The mere presence of 'trade secrets' does not automatically entitle the producing party to an AEO Protective Order. The burden remains on the producing party to show that AEO protection is warranted."); *Penn, LLC*, 2012 WL 5948363 at *4 ("Even if the Court accepts as true the fact that certain documents contain 'trade secrets,' it

Once a court enters a protective order, courts presume that the parties will abide by it.¹⁸ The case of *Armstrong v. Marusic*, 11th Dist. Lake No. 2001-L-232, 2004-Ohio-2594, ¶¶ 19-20, involved trade secret information, and the court affirmed a lower court's decision not to include an AEO provision in the protective order despite the movant's allegation that the non-producing party had already divulged confidential information to a business competitor. The court proclaimed:

"In sum, Apollo's evidence that Armstrong would be likely to disregard the trial court's order restricting the use of discoverable material, which, as noted above, includes confidential as well as non-confidential material, under penalty of contempt, is highly speculative. Apollo has failed to demonstrate the court's order would fail to adequately protect its interests and we will not presume in advance the violation of the court's order by any of the parties involved."¹⁹

The court holds discretionary power to rule upon protective orders.²⁰ In crafting a protective order, the court "must balance the competing interests to be served by allowing discovery to proceed against the harm which may result."²¹ Those interests include "the difficulties imposed upon the [receiving party] against the need to protect

remains [the producing party's] burden to show why the documents should be designated AEO.").

¹⁸ See *Armstrong*, 2004-Ohio-2594 at ¶¶ 19-20.

¹⁹ *Armstrong*, 2004-Ohio-2594 at ¶ 20. See *Westbrook v. Charlie Sciara & Son Produce Co., Inc.* 70 Fed.R.Serv.3d 261, 2008 WL 839745, *5 (finding an AEO was unwarranted when, among additional reasons, the producing party failed to present evidence and demonstrate that the receiving party has a propensity to release confidential information to third parties).

²⁰ *Northeast Professional Home Care, Inc. v. Advantage Home Health*, 188 Ohio App.3d 704, 2010-Ohio-1640, 936 N.E. 964, ¶ 36 (5th Dist.)

²¹ *Pounds*, 2015-Ohio-2679 at ¶ 51, quoting *Arnold v. Am. Natl. Red Cross*, 93 Ohio App.3d 564, 576, 639 N.E.2d 484 (8th Dist. 1994). See *Advantage Home Health*, 2010-Ohio-1640, at ¶ 48, quoting *Arnold*, 93 Ohio App.3d 564, 576 (holding same); *Armstrong v. Marusic*, 11th Dist. Lake No. 2001-L-232, 2004-Ohio-2594, ¶17 quoting *Martin v. The Budd Co.*, 128 Ohio App.3d 115, 119, 713 N.E.2d 1128 (9th Dist. 1998) ("Despite this broad discretion held by trial courts in discovery matters, trial courts must consider the interests of parties seeking discovery and the interests of parties and nonparties resisting discovery.").

information from abuse by competitors.”²² In protecting a trade secret, the court may exercise its authority by: (1) ordering the discovery information to be used in a particular way, (2) limiting access to the information, (3) limiting or prohibiting document reproduction, (4) requiring a bond to guard against the risk of injury from disclosure, and (5) designating a custodian for the records.²³ Furthermore, R.C. 1333.65 enables the court to impose an AEO provision in a protective order.²⁴ The determination of whether information constitutes a trade secret is a question of fact, and as such, it is resolved by the trial court.²⁵

Certainly, “courts have permitted the ‘Attorneys’ Eyes Only’ designation” in protective orders.²⁶ As enumerated above, an AEO designation is one of a myriad of options at the court’s disposal to protect trade secret information.²⁷

The law underpinning AEO designations is “well-established and straightforward.”²⁸ “Succinctly stated, because of the extremely restrictive nature of an AEO designation, the party seeking such a designation must provide specific evidence of the harm it will suffer if the designation is broadened.”²⁹ Courts routinely characterize

²² *K & M International, Inc. v. NDY Toy, LLC*, N.D. Ohio, No. 1:13CV771, 2015 WL 520969, * 4 (Feb. 9, 2015), quoting *Arvco Container*, 2009 WL 311125 at *6.

²³ *Advantage Home Health*, 2010-Ohio-1640 at ¶ 51, citing *Alpha Benefits Agency, Inc. v. King Ins. Agency, Inc.*, 134 Ohio App.3d 673, 683, 731 N.E.2d 1209 (1999).

²⁴ *Ramun*, 2009-Ohio-6405 at ¶ 40.

²⁵ *Pounds*, 2015-Ohio-2679 at ¶ 51 (6th Dist.), quoting *Nunex Vega v. Tivurcio*, 10th Dist. Franklin No. 14AP-327, 2014-Ohio-4588.

²⁶ *Ramun*, 2009-Ohio-6405 at ¶ 40, citing *Medtronic Sofamor Danek, Inc. v. Michelson* (S.D. Tenn. 2003), Nos. 01-2373 MLV, 03-2055 MLV and *Montrose Ford, Inc. v. Starn*, 147 Ohio App.3d 256, 770 N.E.2d 83, 2002-Ohio-87.

²⁷ *Ramun*, 2009-Ohio-6405 at ¶ 44.

²⁸ *Guild Associates, Inc. v. Bio-Energy (Washington) LLC*, S.D. Ohio No. 2:13-cv-1041, 2015 WL 196422 (Apr. 28, 2015).

²⁹ *Guild Associates, Inc.*, 2015 WL 196422 at * 3. See *Advantage Home Health*, 2010-Ohio-1640 at ¶ 52 (denying a protective order for trade secrets when the movant failed to show how discovery “in any way jeopardizes [the movant’s] ability to conduct business,” as well as failing

AEO provisions as “the most restrictive possible protective order.”³⁰ An AEO provision will only be “upheld in narrow circumstances”³¹ because the “indiscriminate use of [AEO] protective orders does pose a significant handicap on the restricted litigant.”³² When over-designation occurs, the receiving party is “kept in the dark about the important facts of the case,” especially when the receiving party would have had meaningful input for the case.³³

Indeed, such restriction makes it “difficult, and perhaps impossible for an attorney to counsel a client to compromise or even abandon a case on the basis of information kept secret from the client.”³⁴ Moreover, it is “more expensive when an attorney cannot make complete disclosure of the facts to the litigant.”³⁵

The producing party bears the burden of establishing “good cause” for a protective order, including for AEO provisions.³⁶ “To demonstrate good cause, the movant ‘must articulate specific facts showing clearly defined and serious injury resulting from the discovery sought and cannot rely on mere conclusory statements.’”³⁷

to show that the information “contains specific proprietary or other business information that could provide another party with a competitive advantage.”)

³⁰ *Brown v. Tellerate Holdings Ltd.*, S.D. Ohio, No.2:11-cv-1122, 2014 WL 2987051, *22 (July 21, 2014), quoting *Penn, LLC*, 2012 WL 5948363 at * 4. See *Davis*, 2012 WL 3600106 at *5 (characterizing an AEO provision as the “most restrictive” restriction).

³¹ *K & M International, Inc.*, 2015 WL 5813194 at * 2.

³² *U.S. ex rel. Daugherty v. Bostwick Labs.*, No. 1:08-cv354, 2013 WL 3270355, *3 (S.D. Ohio June 26, 2013), quoting *Arvco Container*, W.D. Mich., No. 1:08-cv-548, 2009 WL 311125, * 6.

³³ *K & M International, Inc.*, 2015 WL 520969 at *5.

³⁴ *Waite, Schneider, Bayless & Chesley Co. L.P.A. v. Davis*, S.D. Ohio, No.1:11-cv-0851, 2012 WL 3600106, *5, quoting *Arvco Container*, 2009 WL 311125.

³⁵ (Citation omitted.) *K & M International, Inc.*, 2015 WL 520969, at 5.

³⁶ *Stout*, 298 F.R.D. 531, 534 (Feb. 9, 2009).

³⁷ *Stout*, 298 F.R.D. 531, at 534, citing *Nix v. Sword*, 11 Fed.Appx. 498, 500 (6th Cir. 2001). See *Bostwick Labs.*, 2013 WL 3270355 at *2, quoting *Nemir v. Mitsubishi Motors, Corp.*, 381 F.3d 540, 550 (6th Cir. 2004) (noting that producing party “must detail the alleged harm it is likely to suffer absent the required protection ‘with a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.’”). See *Davis*, 2012 WL 3600106, at * 5, quoting *Nemir*, 381 F.3d 540, 550 (holding same).

"In the business context, such showing usually requires 'specific demonstrations of fact, supported where possible by affidavits and concrete examples.'"³⁸ An AEO provision may be "justified upon a specific factual showing that 'especially sensitive information is at issue or the information is to be provided to a competitor.'"³⁹ Moreover, a party seeking an AEO provision "for purported trade secrets must prove that the material is proprietary."⁴⁰ In determining whether an AEO designation is appropriate, the "court cannot presume, in absence of proof, that a particular company's prices are confidential."⁴¹

As with the issue of whether the information is a trade secret, "whether competitive harm would result from the disclosure of these types of documents to a competitor is a factual issue. Courts decide such issues on the basis of evidence."⁴² When further documentation does not accompany a producing party's briefing, the lack of evidence is fatal.⁴³ In describing the harm, conclusory statements are insufficient, but rather the producing party's evidentiary support should be specific to the particular company, the way in which it is competing with the opposing party, and how disclosure would harm the producing party's interest.⁴⁴

For instance, in *Stout v. Remetronix*, S.D. Ohio, 298 F.R.D. 531 (2014), the Southern District of Ohio found that an AEO was warranted. The defendant made a

³⁸ *Stout*, 298 F.R.D. 531 at 535, quoting *Penn, LLC*, 2012 WL 2948363 WL at * 4.

³⁹ *Id.*, quoting *Bostwick Labs.*, 2013 WL 3270355 at *2.

⁴⁰ *Bostwick Labs.*, 2013 WL. 3270355 at *3, citing *Arvco Container*, 2009 WL 311125 at * 7.

⁴¹ *Arvco Container*, 2009 WL 311125 at *7.

⁴² *Brown*, 2014 WL 2987051 at *22.

⁴³ *Brown*, 2014 WL 2987051 at *22. See *Pounds*, 2015-Ohio-2679 at ¶ 48 (denying a motion for protective order when the movant failed to substantiate its claims that it would be irreparably harmed by disclosure; the movant presented no evidence at the hearing or elsewhere in the record, aside from conclusory statements from counsel).

⁴⁴ *Brown*, 2014 WL 2987051 at *23.

sufficient factual showing through use of an affidavit to demonstrate that the pricing information at issue was proprietary.⁴⁵ The affidavit came from the defendant's vice president and chief operating officer.⁴⁶ To make this showing, the affidavit maintained that the documents were password protected, rarely shared with other employees or businesses, and when shared the recipient was instructed not to disseminate the information.⁴⁷

The defendant also adequately showed it would suffer harm. To this end the affidavit described the type of market that the defendants operated in as small and highly competitive, and that several former employees left to work for competitors.⁴⁸ It buttressed this point by submitting further documentation identifying a specific competitor that was shown to employ one of the defendant's former employees.⁴⁹

Another prime example of a sufficient factual showing is illustrated in *U.S. ex rel. Daugherty v. Bostwick Labs.*, No. 1:08-cv354, 2013 WL 3270355, *3 (S.D. Ohio June 26, 2013). In *Bostwick Labs*, the defendants wanted to implement an AEO provision to protect confidential business and financial information, among other categories of information.⁵⁰ The court allowed the provision as it applied to business and financial information upon determining that the defendants demonstrated good cause supported by specific showings of fact.⁵¹ The court was persuaded by an affidavit the defendants

⁴⁵ *Stout*, 298 F.R.D. 531 at 535.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Bostwick Labs.*, 2013 WL 3270355 at *4.

⁵¹ *Id.* at *5.

filed that came from a neutral, non-party who had significant experience in the industry involved.⁵²

In that case, and by contrast, the plaintiff's two unpersuasive affidavits, while informative, were from two interested parties, those being the party itself and its employee.⁵³ The defendants' affidavit from the neutral non-party provided an "overarching perspective as to the competitive nature of the laboratory services industry where price is a key factor in how laboratories maintain clients and suppliers. This evidence demonstrates that the defendants could suffer economic harm should relator, its direct competitor, be permitted to access its pricing information."⁵⁴ Moreover, the court found the contents of the defendants' affidavit more persuasive than plaintiff's in demonstrating the required competitive harm.⁵⁵ Accordingly, the court allowed the AEO designation; however, it limited the provision to apply to only current pricing information.⁵⁶ The defendants also attempted to have competitive technological information protected by an AEO provision, but because they failed to submit any evidence on that issue, the court quickly denied this request.⁵⁷

As with a lack of supporting affidavits or other evidence, conclusory statements are insufficient.⁵⁸ For instance, in *Guild Associates, Inc. v. Bio-Energy (Washington) LLC*, S.D. Ohio, No. 2:13-cv-1041, 2015 WL 196422 (Apr. 28, 2015), the Southern

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at *6.

⁵⁶ *Id.*

⁵⁷ *Id.* at 7.

⁵⁸ *Id.*

District of Ohio found that an AEO designation was unwarranted even though the producing party had attached an affidavit.⁵⁹

In *Guild Associates*, the producing party argued that the AEO provision was needed because there was a "potential for unearned pricing advantage," and the receiving party was the producing party's competitor.⁶⁰ In support, the producing party submitted an affidavit that spoke to these two points, but the court found the statements "conclusory," and as such they were "the sort summarily disregarded when considering the viability of an AEO designation."⁶¹ Specifically, the affidavit failed to provide "detailed examples of what specific information would lead to an unearned advantage or the potential of any such advantage."⁶² As such, the court held that the documents at issue would be designated as confidential only.⁶³

Of note, even if parties stipulate to a protective order and "agree to designate certain commercially sensitive or strategic information as 'Attorneys' Eyes Only,' the scope of protective order is always subject to the overriding right to public access."⁶⁴ Furthermore, the court "retains the power to modify or terminate a protective order

⁵⁹ *Guild Associates, Inc.*, 2015 WL 196422. See *Brown v. Tellerate Holdings Ltd.*, S.D. Ohio, No.2:11-cv-1122, 2014 WL 2987051, *22 (July 21, 2014) (explaining that the producing party, who desired an AEO, bore the burden of demonstrating entitlement to the AEO designation, and its unsupported claims that the parties were competitors was insufficient to satisfy the burden for this "higher level of protection").

⁶⁰ *Guild Associates, Inc.*, 2015 WL 196422 at *3.

⁶¹ *Id.* See *Ramun*, 2009-Ohio-6405 at ¶¶ 37-40 (affirming the trial court's exclusion of an AEO provision and deeming it "inappropriate" when the producing party failed to allege sufficient information to prove an AEO was warranted, in spite of the fact that the movant attached an affidavit that included more than mere "blanket statements of confidentiality and/or trade secrets.").

⁶² *Guild Associates, Inc.*, 2015 WL 196422 at *3.

⁶³ *Id.* at * 4.

⁶⁴ *K & M International, Inc.*, 2015 WL 5813194 at *3.

despite the parties' agreement."⁶⁵ For example, in *K & M International, Inc. v. NDY Toy, LLC*, N.D. Ohio, No. 1:13CV771, 2015 WL 5813194, * 2 (Oct. 5, 2015), the parties stipulated to a protective order that allowed for AEO designation of certain sensitive commercial or strategy information.⁶⁶ However, the court affirmed the magistrate judge's decision to strike the application of an AEO provision because the defendants failed to meet their burden of demonstrating the "requisite degree of commercial harm."⁶⁷

The case involved copyright infringement, in which the plaintiff accused the defendant of infringing upon the plaintiff's plush toy designs.⁶⁸ The defendants used an AEO designation for pictures of their plush toys.⁶⁹ The plaintiff asked to remove the designation, arguing that it was impossible to assess and prepare its case against the defendant without allowing the client to view the pictures of the toys at issue.⁷⁰ The defendant countered that some of the samples at issue were "works in progress" that had never been shown to anyone, and the defendant had already agreed to the AEO provision in the protective order.⁷¹

However, the court found that the inspection of the plush toy photographs was relevant to the "very heart" of the plaintiff's claims.⁷² As such, the court concluded that, in this instance, prohibiting the plaintiff from viewing the photos placed a "substantial

⁶⁵ *Id.* citing *In re Upjohn Co. Antibiotoc Cleocin Products Liability Litigation*, 664 F.2d 114, 118 (6th Cir. 1991).

⁶⁶ *K & M International, Inc.*, 2015 WL 5813194 at *3.

⁶⁷ *Id.* at *4.

⁶⁸ *Id.* at *1.

⁶⁹ *Id.* at * 2.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at *3.

impediment” upon the plaintiff’s ability to “prepare and litigate this claim.”⁷³ The Southern District of Ohio affirmed the magistrate judge’s decision to re-designate photographs to confidential instead.⁷⁴ The court found that the magistrate “properly balanced the policy of free exchange of discovery, the public right of access and the commercial harm possible from disclosure of sensitive information.”⁷⁵

The issue before this court is whether TQL has met its burden to show good cause to implement an AEO designation in its proposed protective order with Shane Moore.⁷⁶ TQL must (1) demonstrate that “the information is proprietary,”⁷⁷ and (2) “must detail the alleged harm it is likely to suffer absent the required protection ‘with a particular and specific demonstration of fact.’”⁷⁸ As discussed, both showings require evidence for the court’s consideration, as these are both questions of fact.⁷⁹

TQL cannot meet either of these requirements because it has failed to submit any evidence in support of the AEO designation. Unlike the cases where AEO designations have been successful, TQL has not submitted either affidavits or other documentation to demonstrate that the information at issue is trade secret or sensitive business information.⁸⁰ Moreover, TQL has not substantiated its claim that it will suffer

⁷³ *Id.*

⁷⁴ *Id.* at *4.

⁷⁵ *Id.*

⁷⁶ *Stout*, 298 F.R.D. 531, 534 (Feb. 9, 2009); Civ.R. 26(C).

⁷⁷ *Bostwick Labs.*, 2013 WL 3270355 at *3, citing *Arvco Container*, 2009 WL 311125 at * 7.

⁷⁸ *Bostwick Labs.*, 2013 WL 3270355 at *2, quoting *Nemir*, 381 F.3d 540, 560.

⁷⁹ *Pounds*, 2015-Ohio-2679 at ¶ 51 (6th Dist.), quoting *Tivurcio*, 2014-Ohio-4588; *Brown*, 2014 WL 2987051 at *22.

⁸⁰ Although TQL highlights *Montrose Ford, Inc. v. Stam*, 147 Ohio App.3d 256, 2002-Ohio-87, 770 N.E.2d 83 (9th Dist.) as an instructive case where the court permitted an AEO, the court actually held that an AEO was not justified. In *Montrose*, the plaintiff employed the defendant, during which time he had access to customer lists, information on discounting, vendor habits, and accounts. The defendant left his employ with the plaintiff and began a new job. The plaintiff claimed that the defendant misappropriated the information and used it while working at his new job.

harm by submitting evidence that describes the specific harms TQL could suffer, the way in which it is competing with Shane Moore and Kansas, or how disclosure would harm TQL's interest.⁸¹ TQL's arguments in its briefing and during oral argument are simply insufficient to satisfy its burden.

Kansas submitted to the court the single document that TQL has thus far designated as AEO in its production to Kansas. However, this document does not buttress TQL's position. It lists customer names, the months and years of each service, the number of loads in each shipment, and the price. An affidavit is necessary to explain how this constitutes sensitive business information or trade secrets that would harm TQL if exposed to Shane Moore. This is particularly so because the prices for the same customer, same routes, and same destinations can greatly vary by the date of service. For instance, there is pricing information regarding a route from Colorado to

The plaintiff issued a subpoena duces tecum upon the new employer, requesting customer invoices, purchase and sale invoices, account statements, sales analysis reports, portions of financial statements customer lists, and document identifying discounts made by the new employer to vendors. The information was sought to ascertain the extent of any transfer from the defendant to the new employer. The new employer sought a protective order, which included an AEO provision prohibiting the plaintiff's in-house counsel from viewing the information, so that the plaintiff could not use the discovery information to its advantage.

The Ninth District Court of Appeals affirmed the lower court's decision not to allow an AEO. It concluded that the new employer failed to show that there was an unacceptable risk that revealing the information to the plaintiff's in-house counsel would lead to the plaintiff learning of the information as well.

Unlike the instant case, *Montrose* dealt with prohibiting general counsel from viewing discovery information, as opposed to the party itself. Moreover, *Montrose* discusses the impermissibility of the AEO provision but fails to set forth the requirements, rules, or standards for permitting an AEO. The case more closely focused on the validity of such a claim against in-house counsel and whether in-house counsel is to be presumptively distrusted to maintain confidentiality. It holds that the status of the plaintiff's in-house counsel as in-house (e.g. as opposed to working for a separate firm) was insufficient to prove the information's confidentiality was in jeopardy: " * * * this court cannot find that the trial court abused its discretion in granting *Montrose's* general counsel access to *Clarke's* trade secret under the protective order." *Id.* at ¶ 18. Given these distinctions, and the fact that the holding is inapposite to TQL's more favorable interpretation, *Montrose* is not particularly instructive in the instant case.

⁸¹ *Brown*, 2014 WL 2987051 at *23.

California. It involves the same customer and the same number of loads. However, the price of service varies by \$925. It is therefore not immediately clear the defendant Moore would benefit from this information.

Unlike cases that have successfully used an AEO designation, in the case at bar there is no evidence explaining the overarching perspective as to the competitive nature of the freight brokerage industry, no evidence explaining how the prices are a key factor in maintaining clients, no detailed examples of what specific information would lead to an unearned advantage by Shane Moore, and no explanation as to how this information is proprietary (e.g. whether it was maintained as password protected, rarely shared with other employees or businesses, or when shared the recipient was instructed not to disseminate the information).⁸²

Furthermore, the court must balance the interests of the parties.⁸³ TQL has argued that if Shane Moore sees TQL's pricing information, he would be able to steal TQL's customers by undercutting their bids. TQL urges that the risk is great here due to its allegations that Shane Moore has previously misappropriated alleged trade secrets of TQL's. Shane Moore's position is that, without being able to see the information, his counsel will not be able to discuss the information with him, thus depriving counsel from fully understanding the documents and preparing a defense to TQL's claims.

TQL's position would be more persuasive if it had submitted evidence describing how the pricing information, with its fluctuating prices, would benefit Shane Moore. In failing to present such evidence, TQL has "failed to demonstrate the court's order would

⁸² See *Bostwick Labs.*, 2013 WL 3270355 at *5; *Guild Associates, Inc.*, 2015 WL 196422; *Stout*, 298 F.R.D. 531 at 535.

⁸³ *Pounds*, 2015-Ohio-2679 at ¶ 51 quoting *Arnold*, 93 Ohio App.3d 564 at 576; *K & M International, Inc.*, 2015 WL 520969 at * 4 quoting *Arvco Container*, 2009 WL 311125 at *6.

fail to adequately protect its interests.⁸⁴ If the pricing information is not subject to an AEO designation, Shane Moore will nevertheless be legally bound to keep the pricing information confidential and refrain from using it for Kansas's or his benefit. Pursuant to paragraph three of the proposed protective order, "confidential" information may be used "solely for purposes of the prosecution or defense of this action, shall not be used by the receiving party for any business, commercial, competitive, personal or other purpose, and shall not be disclosed by the receiving party to anyone unless permitted by this Order. * * * "

Moreover, courts do "not presume in advance the violation of the court's order by any of the parties involved."⁸⁵ TQL alleges that Shane Moore misappropriated its trade secrets and confidential business information that it received from TQL employee Eric Love. Standing alone, this allegation does not tend to prove that Shane Moore has a propensity to violate court orders that specifically prohibit the use of confidential information for his own business gain.

Perhaps most significantly, the pricing information at issue is "relevant to the very heart" of TQL's claims.⁸⁶ The instant action involves claims of "trade secret misappropriation, unfair competition, unjust enrichment, breach of contract (express and implied), tortious interference with contractual relationship, fraud, breach of fiduciary duty, civil conspiracy, and conversion."⁸⁷

⁸⁴ *Armstrong*, 2004-Ohio-2594 at ¶ 20. See *Westbrook v. Charlie Sciara & Son Produce Co., Inc.* 70 Fed.R.Serv.3d 261, 2008 WL 839745, *5 (finding an AEO was unwarranted when, among additional reasons, the producing party failed to present evidence and demonstrate that the receiving party has a propensity to release confidential information to third parties).

⁸⁵ *Armstrong*, 2004-Ohio-2594 at ¶ 20; *Westbrook*, 2008 WL 839745 at *5.

⁸⁶ *K & M International, Inc.*, 2015 WL 5813194 at *3.

⁸⁷ Compl. at ¶ 1.

TQL has further alleged that Shane Moore received “the price TQL was charging the Customers, TQL’s profit margins per load, the routes that TQL was handling for the Customers, the profit margin for each route, and the amounts TQL was paying trucking companies for transportation of the Customers’ loads.”⁸⁸ TQL avers that Shane Moore “proceeded to contact the Customers and offered to arrange for transportation of the Customers’ freight for prices lower than TQL prices,” and “[a]s a result, on [sic] or more Customers stopped doing business directly with TQL but rather were doing business directly with Kansas or Moore.”⁸⁹

As the most restrictive type of protection, an AEO designation in this instance will make it “difficult, and perhaps impossible” for Shane Moore’s attorneys to counsel him and adequately prepare his defense.⁹⁰ Because TQL has alleged that Shane Moore has used its proprietary pricing information, for Shane Moore to defend himself he must know the information he is accused of misappropriating.

As such, preventing counsel from sharing and discussing the pricing information with Shane Moore creates a substantial impediment to his counsel’s ability to prepare and litigate his defense. In balancing the interests of the parties, the facts weigh in favor of barring an AEO provision in the proposed protective order because: (1) TQL has failed to show that the existing confidentially provision will fail to protect its interests, and (2) the nature of TQL’s claims require Shane Moore to know of the pricing information he is accused of misappropriating.

In summary, TQL has failed to meet its burden to show good cause for the inclusion of an AEO provision, and Shane Moore’s interests in learning of the contested

⁸⁸ Compl. at ¶ 12.

⁸⁹ Compl. at ¶¶ 14-15.

⁹⁰ *Davis*, 2012 WL 3600106 at *5.

information for his defense outweighs TQL's interest in protecting the information. Accordingly, the court finds that the protective order and confidentiality agreement between TQL and Shane Moore shall not include an AEO provision.

CONCLUSION

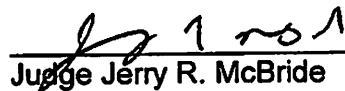
Both the plaintiff TQL and the defendant Shane Moore's motions for the court to enter a protective order and confidentiality agreement are not well taken and denied at this time.

The parties are directed to confer in good faith to resolve the remaining issues that exist with respect to the protective order and confidentiality agreement. They are to file a stipulated protective order within 14 days from the date of this entry. The protective order and confidentiality agreement shall not contain an attorneys' eyes only provision.

If the parties are unable to agree upon the protective order and confidentiality agreement, then they shall each submit to the court a final, proposed protective order and confidentiality agreement for the court's entry, and the court will either select one of the proposed orders as the order to be effective in this case or may fashion its own order after consideration of the alternative proposals.

IT IS SO ORDERED.

DATED: 12-21-15



Judge Jerry R. McBride