IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

USA TECHNOLOGIES, INC. : CIVIL ACTION

:

v. :

:

ALPHANET HOSPITALITY SYSTEMS, INC. : NO. 98-3027

MEMORANDUM AND ORDER

HUTTON, J. May 25, 1999

Presently before this Court is the Plaintiff USA Technologies, Inc.'s Renewed Motion for Entry of Stipulated Protective Order (Docket No. 13) and Defendant Alphanet Hospitality System, Inc.'s Response (Docket No. 14). For the reasons stated below, Plaintiff's Motion is **DENIED**.

I. BACKGROUND

In this matter, USA Technologies, Inc. ("USA" or "Plaintiff") contends that Alphanet Hospitality Systems, Inc. and Alphanet Telecom, Inc. ("Defendants") have infringed on USA's patented technology and misappropriated USA's trade secrets. The parties signed a Stipulated Protective Order ("Confidentiality Agreement") on March 8, 1999 and March 4, 1999 respectively, to limit disclosure of discovered confidential trade secret information. On March 8, 1999, USA moved this Court to enter the Stipulated Protective Order. On March 24, 1999, this Court denied with leave to renew USA's Motion for Entry of Protective Order.

On May 10, 1999, the Plaintiff filed the instant motion moving the Court to enter the

accompanying Stipulated Protective Order ("Confidentiality Agreement" or "Agreement"), which has been fully executed by both parties. The Plaintiff asserts that such an Order is necessary to prevent the disclosure of information during the course of this patent and trade secret lawsuit, which the disclosing party considers to be a trade secret or otherwise confidential. On May 24, 1999, the Defendant filed its response joining in the request of Plaintiff's motion for entry of the Stipulated Protective Order.

II. DISCUSSION

A. Standard

Federal Rule of Civil Procedure 26(c)(7) allows a court, "upon good cause shown," to order that "a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Miles v. Boeing Co., 154 F.R.D. 112, 114 (E.D. Pa. 1994) (quoting Fed. R. Civ. P. 26 (c)(7)). Nevertheless, such orders of confidentiality cannot be granted arbitrarily. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 785-86 (3d Cir. 1994). "Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders." Id.

Therefore, this Court will carefully scrutinize the request for the confidentiality order.

A party wishing to obtain a confidentiality order over discovery materials must demonstrate that "good cause" exists for the order of protection. Pansy, 23 F.3d at 786; Miles, 154 F.R.D. at 114. "Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity." Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984)); see also Aetna Casualty & Surety Co. v. George Hyman Const. Co., 155 F.R.D. 113, 115 n.3 (E.D.Pa. 1994). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," do not support a good cause showing. Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986), cert. denied, 484 U.S. 976 (1987); see also Frupac Intern. Corp. v. MV "CHUCABUCO", Civ.A. No.92-2617, 1994 WL 269271, *1 (E.D. Pa. Jun.15, 1994). The burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the order. Id. at 1122. Pansy, 23 F.3d at 786-87 (footnote omitted).

In determining whether good cause exists, the federal courts have adopted a balancing approach, under which the following factors may be considered:

1) whether disclosure will violate any privacy interests;

2) whether the information is being sought for a legitimate purpose or for an improper purpose;

3) whether disclosure of the information will cause a party embarrassment;

4) whether confidentiality is being sought over information important to public health and safety;

5) whether the sharing of information among litigants will promote fairness and efficiency;

6) whether a party benefitting from the order of confidentiality is a public entity or official; and

7) whether the case involves issues important to the public.

Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995). "Whether this disclosure will be limited depends on a judicial balancing of the harm to the party seeking protection (or third persons) and the importance of disclosure to the public." Pansy, 23 F.3d at 787 (citing Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv.L.Rev. 427, 435 (1991)).

B. Analysis

Applying the Pansy test in this case, the Court concludes that the proposed Confidentiality Agreement does not satisfy the good cause standard. First, the parties have failed to show with specificity that disclosure would cause a defined and serious injury. See Aetna, 155 F.R.D. at 115. Second, the method by which the documents will be selected--those that any party or non-party believes in good faith to be "Confidential Information" (Stipulation, P 1-2),--"results in judicial discretion yielding to private judgment." Aetna, 155 F.R.D. at 115; see also Frupac, supra, at * 2 (holding that stipulated confidentiality order governing discovery materials fails to satisfy "good cause" standard where stipulation vests a private party with discretion to make determination as to which documents or information constitute "trade secrets or other confidential ... commercial information"); National Media Corp. v. Valuevision Int'l, Inc., 1994 WL 249785, at *1 (E.D.Pa. June 10, 1994) (Waldman, J.) (same). Moreover, under the stipulated confidentiality order, this exercise of private judgment would be given force by the public sanction of contempt. Such a broad abdication of judicial authority as that contemplated by the parties is wholly inconsistent with the good cause standard. See, e.g., Aetna, 155 F.R.D. at 115.

There are several other general public policy considerations which strongly militate against granting judicial sanction to broad confidentiality agreements such as that proffered by the parties in the present case. The agreement imposes a duty of confidentiality upon not only the parties to this lawsuit, but, potentially, upon third parties who may learn of "confidential" information as well. If the court were to approve such an agreement, the result may be substantial satellite litigation in the form of contempt hearings, an unnecessary waste of judicial resources. See Frupac, supra, at *2;Valuevision , supra, at *1.

Another public policy concern weighing strongly against court approval of broad private agreements concerning the confidentiality of discovery materials was identified by the Frupac court. In Frupac, the court recognized that such approval "may furnish the parties with a false sense of protection that they might innocently, but wrongly, rely upon when releasing information." Frupac, 1994 WL 269271, at *2. As the court further explained, the false sense of security occurs because it is impossible for a court to foresee what future interests will be compromised by granting the order today. When currently unknown parties seek to contest a private confidentiality order, they will be free to raise their concerns, which, [the court], at that time, will balance against the parties' current interest in privacy.... For this reason, it is

improvident for [the court], at this time, to sanction the imprecise confidentiality agreement presented...." Id. The Frupac court's reasoning is consistent with the Third Circuit's teaching in Pansy that "the injury must be shown with specificity." 23 F.3d at 786.

III. CONCLUSION

The proposed agreement fails to state with specificity what information should be protected or what interest the parties have in maintaining confidentiality. Further, countervailing interests outweigh any interest these private litigants may have in giving judicial sanction to their private agreement. Accordingly, the Court disapproves the proposed Confidentiality Order. Of course, this holding in no way limits the parties' ability "to stipulate among themselves to whatever confidentiality they reasonably, lawfully and ethically conclude is appropriate." Frupac, supra, at *3; see also Valuevision, supra, at *1;Aetna , 155 F.R.D. at 115.

An appropriate Order follows.

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O R D E R

AND NOW, this 25th day of May, 1999, upon consideration of the Plaintiff USA Technologies, Inc.'s Renewed Motion for Entry of Stipulated Protective Order (Docket No. 13) and Defendant Alphanet Hospitality System, Inc.'s response thereto (Docket No. 14), IT IS HEREBY ORDERED that Plaintiff's Motion is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.