

NO. UWY-CV-14-6026552-S

NUCAP INDUSTRIES, INC. et al.,)	SUPERIOR COURT
)	
Plaintiffs,)	J.D. OF WATERBURY
)	
v.)	
)	
PREFERRED TOOL AND DIE, INC., et al.,)	
)	
Defendants.)	July 9, 2015

**REPLY IN SUPPORT OF PREFERRED’S
MOTION FOR PROTECTIVE ORDER**

Defendants Preferred Tool and Die, Inc. and Preferred Automotive Components (collectively “Preferred”), respectfully submit this reply in further support of their pending Motion for Protective Order governing discovery in this action.

I. Applicable Law Supports Preferred’s Motion

Plaintiffs Nucap Industries, Inc. and Nucap U.S., Inc. (collectively, “Nucap”) argue that Preferred’s reliance on federal authority is less persuasive because Preferred fails to cite Connecticut precedent. However, Nucap has failed to identify any Connecticut case on point. Instead, Nucap distorts Preferred’s position in this dispute in an attempt to liken the instant case to *Microtech Int’l, Inc. v. Fair*, 1992 WL 239087 (Conn. Super. Ct. Sept. 18, 1992) (unpublished opinion). However, the dispute in *Microtech* was wholly different from the dispute before this Court.

In *Microtech*, the defendant sought a protective order precluding any discovery of documents he asserted disclosed his employer’s trade secrets. 1992 WL 239087, *2. The defendant argued that his duty to protect the confidentiality of the information precluded him from producing it in litigation with *Microtech*. *Id.* While the *Microtech* court did grant the plaintiff access to the information, neither party had proposed a protective order with an AEO

ORAL ARGUMENT REQUESTED/
TESTIMONY NOT REQUIRED

designation or suggested limiting review of AEO information to outside counsel and independent experts; the defendant simply sought to withhold any and all disclosure. *Id.* at *4. After rejecting the defendant’s argument that trade secrets were not discoverable, the court simply entered the protective order proposed by the plaintiff with a single confidentiality designation. *Id.* *Microtech* is thus clearly distinguishable from the instant case and far from “directly on point” as Nucap asserts.

Nucap also relies on *Automation Sys. Integration, Inc. v. Autoswage-Prods., Inc.*, 1996 WL 278275 (Conn. Super. Ct. May 6, 1996) (unpublished opinion). However, the issue in *Automation Sys.* was the same as that in *Microtech*—the defendant sought to avoid any disclosure of trade secret information whatsoever. *Id.* at *3. The *Automation Sys.* court denied the defendant’s requested protective order and rejected the defendant’s argument that trade secrets “are insulated from civil discovery.” *Id.* Neither party proposed an AEO designation nor did either argue for limited review of AEO information. These cases have no bearing on the issue before the Court.

Preferred properly relies on Second Circuit case law with facts nearly identical to those at issue here. *See Filstein v. Filshstein*, 1994 WL 702947, *4 (Conn. Super. Ct. Dec. 5, 1994) (“[The Connecticut rule on protective orders] substantially parallels Rule 26(c) of the Federal Rules of Civil Procedure and, therefore, federal precedents are germane.”) (unpublished opinion). Indeed, Nucap does not attempt to distinguish the authority Preferred cites. Nor can Nucap question the propriety of relying on federal cases. *Automation Sys.*, 1996 WL 278275, *3 (“Since [the Connecticut rule] is nearly identical to Federal Rule of Civil Procedure 26(c), it is appropriate for this court to look to federal case law for guidance in this matter.”). Instead, Nucap incorrectly asserts that federal courts are split on this issue and cites to distinguishable cases from Illinois and Tennessee.

In *THK Am., Inc. v. Nippon Seiko K.K.*, 141 F.R.D. 461 (N.D.Ill. 1991), a suit for patent infringement, the defendant sought a protective order precluding review of all confidential information by any person currently or previously employed by the plaintiff's parent company. *Id.* at 462. The plaintiff's president, inventor of the patents in suit, was also the president of the plaintiff's parent company and would have been precluded, under the defendant's proposed protective order, from reviewing any confidential documents. *Id.* The *THK* court accordingly rejected the defendant's proposal because, as the inventor of the patents-in-suit, the president had unique knowledge needed to pursue the claims. *Id.* Nucap has not identified any uniquely qualified person necessary to pursue its claims, and neither party in *THK* suggested a separate AEO designation with limited review.

Likewise, *Medtronic Sofamor Danek, Inc. v. Michelson*, 2002 WL 33003691 (W.D.Tenn. Jan. 30, 2002) involved a uniquely qualified person's review of confidential information. The plaintiff in *Medtronic* sought a protective order that would preclude review of AEO information by the defendant himself, Dr. Michelson, who was the inventor of the patented technology at issue in the suit. *Id.* at *2. Noting that the parties were "not directly in competition," the court permitted Dr. Michelson to review documents concerning the patents and devices and methods thereunder because he was uniquely qualified as the inventor to assist in determining ownership rights. *Id.* at *3-*4 ("Without access to Medtronic's documents on the devices and methods, Dr. Michelson would be unable to assist his attorneys in determining whether the devices or methods were previously sold to Medtronic or are still the property of Dr. Michelson. This issue is the heart of the lawsuit—a lawsuit instigated by Medtronic. Medtronic cannot prevent Dr. Michelson's access to the information which may prove or disprove his ownership rights in a case where it seeks to have those same ownership rights affirmed.").

Accordingly, the *Medtronic* court removed such documents from the definition of AEO information to permit Dr. Michelson’s review. *Id.* at *4. In fact, the court granted the plaintiff’s requested limitations to review of AEO information, which included the plaintiff’s “commercial, financial, and marketing data” because Dr. Michelson was not uniquely qualified to review it. *Id.*

The *Medtronic* case is not only distinguishable, but actually shows why AEO protection is necessary in this case. The parties are direct competitors, the proprietary information Nucap seeks from Preferred—including trade secrets and information about non-public inventions as well as commercial and financial data—is ripe for abuse, both commercially and in Nucap’s other lawsuits, and Nucap has not provided any justification for review of this information by any “uniquely qualified” employee. Preferred has cited three second circuit cases directly on point to support its position and the terms requested in its Proposed Protective Order, and Nucap has identified no persuasive contrary authority.

II. Disclosure of Preferred’s Highly Confidential, Proprietary Information to Employees of Nucap, a Direct Competitor, Would Create a Substantial Risk of Serious and Irreparable Harm to Preferred’s Commercial Interests

Preferred has shown good cause for the protection it seeks in its Proposed Protective Order. Nucap has requested the production of highly sensitive proprietary information, including design plans, drawings, specifications, material data sheets, and marketing and business plans and strategies for its automotive brake components, as well as financial data and customer information. These documents include Preferred’s proprietary commercial information, trade secrets, and information germane to Preferred’s non-public, patentable inventions.

The risk of commercial misuse (whether intentional or not) and corporate espionage by Nucap, a direct competitor in the automotive brake components marketplace, is sufficient good cause to grant the protection Preferred seeks in its Proposed Protective Order. *See, e.g., Tailored Lightning, Inc. v. Osram Sylvania Prds., Inc.*, 236 F.R.D. 146, 149 (W.D.N.Y. 2006) (finding

good cause for entry of a protective order limiting review of AEO information to outside counsel and independent experts because of “the substantial risk of competitive injury that attends disclosure of such trade secret information to the opposing party”); *Vesta Corset Co., Inc. v. Carmen Found., Inc.*, 1999 WL 13257, *2-*3 (S.D.N.Y. Jan 13, 1999) (finding good cause for entry of a protective order limiting review of documents reflecting “pricing, profits, costs, overhead, manufacturing specifications, customer lists, price structure, and dealings with a common customer” to counsel and independent experts); *Quotron Sys., Inc. v. Automatic Data Proc., Inc.*, 141 F.R.D. 37, 40 (S.D.N.Y. 1992) (finding “concerns of commercial espionage” sufficient good cause to grant a protective order limiting review of AEO information to outside counsel and independent experts in a trade secret misappropriation case).

Nucap does not even attempt to rebut Preferred’s concerns of commercial misuse by a direct competitor or misuse of Preferred’s AEO information in Nucap’s other lawsuits, one of which is against Preferred’s customer Bosch Brake Components, LLC. Instead, Nucap asserts that Preferred’s concerns are adequately addressed by Nucap’s proposed protective order “imposing severe penalties.” Yet, no specific penalties are articulated therein. Misused purposely or otherwise, giving Nucap employees—who may be involved in technical development, sales, or litigation strategy in Nucap’s other pending cases—access to Preferred’s current commercial information, trade secrets, and non-public invention information raises a significant risk of competitive injury, a risk avoided under the terms of Preferred’s Proposed Protective Order.

III. It is Nucap’s Burden to Demonstrate a Need for Its Employees Review of AEO Information, and Nucap Has Utterly Failed to Do So.

Nucap also asserts that Preferred “bears the heavy burden of establishing entitlement to a protective order.” As outlined above, Preferred has carried its burden of showing good cause for a protective order with the terms of protection it seeks. Indeed, the burden is on *Nucap* to show a

need for employee review of AEO information. *E.g., Medtronic*, 2002 WL 33003691, *4 (“[T]he defendants have not established a need for Dr. Michelson to personally examine Medtronic’s financial and other commercial data.”); *Vesta*, 1999 WL 13257, *3 (“[The defendant] has failed to demonstrate why limiting access to counsel and experts is inadequate for it to litigate its case. Thus, disclosure is limited to counsel and experts.”); *Quotron*, 141 F.R.D. at 40 (“[The plaintiff] has not demonstrated a need for [its] employees’ access to the documents sufficient to outweigh these concerns [of commercial espionage].”). Nucap has failed to demonstrate any such need.

CONCLUSION

Preferred respectfully requests that the Court grant the Motion for Protective Order and enter Preferred’s Proposed Protective Order, submitted previously at Entry No. 137.00, to govern discovery in this action.

Respectfully Submitted,

July 9, 2015
Dated

/s/ Gene S. Winter
Gene S. Winter
Benjamin J. Lehberger
St. Onge Steward Johnston & Reens LLC
986 Bedford Street
Stamford, Connecticut
06905-5619
Telephone: (203) 324-6155
litigation@ssjr.com
Juris No. 053148

Stephen J. Curley
Brody Wilkinson PC
2507 Post Road
Southport, CT 06890
(203) 319-7100
Juris No. 102917

*ATTORNEYS FOR PREFERRED TOOL AND DIE, INC.
AND PREFERRED AUTOMOTIVE*

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2015, a copy of the foregoing REPLY IN SUPPORT OF PREFERRED'S MOTION FOR PROTECTIVE ORDER was served via electronic mail on the following counsel of record:

Stephen W. Aronson
Email: saronson@rc.com
Nicole H. Najam
Email: nnajam@rc.com
ROBINSON & COLE LLP
280 Trumbull Street
Hartford, CT 06103

Jeffrey J. Mirman
Email: jmirman@hinckleyallen.com
David A. DeBassio
Email: ddebassio@hinckleyallen.com
HINCKLEY, ALLEN & SNYDER LLP
20 Church Street
Hartford, CT 06103

and via first class mail on the following counsel of record:

Lawrence H. Pockers
Harry M. Byrne
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103

07/09/2015
Date

/s/ Jessica L. White