

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

## **ORDER GOVERNING IDENTIFICATION AND DISCLOSURE OF PRIVILEGED AND/OR CONFIDENTIAL DOCUMENTS**

## 1. PURPOSES, PRINCIPLES, AND LIMITATIONS

Disclosure and discovery activity in this action is likely to involve production of confidential or privileged documents for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted. The Court has a substantial interest in regulating pre-trial discovery to facilitate the search for truth, to promote justice, and to protect the legitimate privacy interests of the litigants and third parties. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984). The Court's interest in truth and justice is best served by allowing liberal discovery of information in the possession of opposing parties or in the control of third parties that may be calculated to lead to admissible evidence. Privacy and privilege concerns must only be exercised upon a showing of good cause pursuant to Fed. R. Civ. P. 26(c). Since "the trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery" (*Seattle Times Co. v.*

*Rhinehart*, 467 U.S. 20, 36), accordingly, the Honorable Court enters the following Protective Order.

The Court's Order does not confer blanket protections on all disclosures or responses to discovery, and the protection it affords extends only to the limited information or items that are entitled to treatment as confidential under applicable legal principles. This Protective Order creates no entitlement to file confidential information under seal; Local Rule 7.2 sets forth the procedures that must be followed and reflects the standards that will be applied when a party seeks permission from the court to file material under seal.

Further, the Court's Order does not inhibit the First Amendment right of the Defendants or other journalists, reporters, or citizens to summarize redacted, confidential, or privileged information, documents, or data entered into the court record (*In re Providence Journal Co., Inc.*, 293 F.3d 1 (1st Cir. 2002)), unless it is specifically sealed pursuant to Local Rule 7.2. This Court further invokes the principles in *Seattle Times v. Rhinehart* which in part permit “a protective order [that] is entered on a showing of good cause . . . , is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources.” 467 U.S. 20, 37.

## 2. DEFINITIONS

2.1     Party: any party to this action, including all of its officers, directors, employees, consultants, retained experts, and outside counsel (and their support staff).

2.2     Disclosure or Discovery Material: all items or information, including without limitation testimony, transcripts, or tangible things, regardless of the medium or manner generated, stored, or maintained, that are produced or generated in disclosures or responses to discovery requests.

2.3     “Confidential” Information or Items: information (regardless of how

generated, stored or maintained) or tangible things that qualify for protection under standards developed under Fed. R. Civ. P. 26(c).

2.4     “Privileged” Information or Items: information or tangible things that qualify for privilege according to standards developed under Fed. R. Civ. P. and precedent established within the First Circuit or the U.S. Supreme Court.

2.5     Receiving Party: a Party that receives Disclosure or Discovery Material from a Producing Party.

2.6     Producing Party: a Party or non-party that produces Disclosure or Discovery Material in this action.

2.7     Designating Party: a Party or non-party that designates information or items that it produces in disclosures or in responses to discovery as “Confidential” or “Privileged,” or that withholds information otherwise discoverable by claiming that it is “Privileged.”

2.8     Protected Material: any Disclosure or Discovery Material that is designated as “Confidential” or as “Privileged.”

2.9     Confidentiality Designation: the designating of Disclosure or Discovery material as “Confidential” or as “Privileged.”

2.10    Outside Counsel: attorneys who are not employees of a Party but who are retained to represent or advise a Party in this action, or a Party *pro se*.

2.11    House Counsel: attorneys who are employees of a Party.

2.12    Counsel (without qualifier): Outside Counsel and House Counsel (as well as their support staffs).

2.13    Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a Party or its Counsel to serve as an expert

witness or as a consultant in this action, and who is not a past or a current employee of the retaining Party, and who, at the time of retention, is not anticipated to become an employee of the retaining Party. This definition includes a professional jury or trial consultant retained in connection with this litigation.

2.14 Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations; organizing, storing, retrieving data in any form or medium; etc.), and their employees and subcontractors.

### **3. SCOPE**

The protections conferred by this Order cover not only Protected Material (as defined above), but also any information copied or extracted therefrom, as well as all copies and redacted or protected excerpts.

### **4. DURATION**

Even after the termination of this litigation, the confidentiality obligations imposed by this Order shall remain in effect for all documents (or portions thereof) designated “Confidential” or “Privileged” that are not entered into the court record, unless a court order otherwise directs.

### **5. DESIGNATING PROTECTED MATERIAL**

5.1 The Court Orders Exercise of Restraint and Care in Designating Material for Protection. Each Party or non-party that designates information or items for protection under this Order must take care to limit any such designation to specific material that qualifies under the appropriate standards. A Designating Party must take care to designate for protection only those parts of material, documents, items, or written communications that qualify, so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this Order.

Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown to be clearly unjustified, or that have been made for an improper purpose (e.g., to unnecessarily encumber or retard the case development process, or to impose unnecessary expenses and burdens on other parties), expose the Designating Party to sanctions.

If it comes to a Party's or a non-party's attention that information or items that it designated for protection do not qualify for protection at all, or do not qualify for the level of protection initially asserted, that Party or non-party must promptly notify all other Parties that it is withdrawing the mistaken designation.

5.2 Manner and Timing of Designations. Except as otherwise provided in this Order, or as otherwise ordered, material that qualifies for protection under this Order must be clearly so designated before the material is disclosed or produced.

Designation in conformity with this Order requires:

(a) for information in documentary form (apart from transcripts of depositions or other pretrial or trial proceedings), that the Producing Party affix the legend “CONFIDENTIAL” or “PRIVILEGED” at the top of each page that contains protected material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party must instead clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins) and must specify, for each portion, the level of protection being asserted (either “CONFIDENTIAL” or “PRIVILEGED”).

(b) transcript pages containing Protected Material, that the court reporter must affix to the top of each such page the legend “CONFIDENTIAL” or “PRIVILEGED” as instructed by the Party or non-party offering or sponsoring the witness or presenting the testimony. When only a portion or portions of the material on a page qualifies for protection, the court reporter must instead clearly identify the protected portion(s) (e.g., by making appropriate

markings in the margins), and must specify, for each portion, the level of protection being asserted (either “CONFIDENTIAL” or “PRIVILEGED”), as instructed by the Party or non-party offering or sponsoring the witness or presenting the testimony. All pages containing Protected Material must be separately bound by the court reporter.

(c) for information produced in some form other than documentary, and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the container or containers in which the information or item is stored the legend “CONFIDENTIAL” or “PRIVILEGED.” If only portions of the information or item warrant protection, the Producing Party, to the extent practicable, shall identify the protected portions, specifying whether they qualify as “CONFIDENTIAL” or as “PRIVILEGED.”

(d) for discoverable information withheld because of a claim of privilege by the Producing Party, a privilege log shall be produced to the Requesting Party which, without revealing information itself privileged or protected, contains the number assigned to the individual document or item for which privilege is claimed, and, wherever applicable, the date of the document or item, the title of the document or item, the type of document or item (letter, memo, report, handwritten note, etc.), the identity and position of the author(s) or creator(s) of the document or item, the identity and position of the recipient(s) of the document or item, the identity and position of individuals who received copies of the document or item, the present location of the document or item, and the type of privilege claimed. If only portions of the document or item contain privileged information, the document or item shall be produced, and, if the Producing Party redacts the privileged information, a corresponding entry in a privilege log shall be made in the manner described above for each portion so redacted.

5.3     Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items as “Confidential” or “Privileged” does not,

standing alone, waive the Designating Party's right to secure protection under this Order for such material. If material is appropriately designated as "Confidential" or "Privileged" after the material was initially produced, the Receiving Party, on timely notification of the designation, must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

## **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

6.1 Timing of Challenges. Unless a prompt challenge to a Designating Party's Confidentiality Designation is necessary to avoid foreseeable substantial unfairness, unnecessary economic burdens, or a later significant disruption or delay of the litigation, a Party does not waive its right to challenge a Confidentiality Designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. A Party that elects to initiate a challenge to a Designating Party's Confidentiality Designation must do so in good faith and must begin the process by conferring directly (in voice to voice dialog or written communication) with counsel for the Designating Party. In conferring, the challenging Party must specifically define and explain the basis for its belief that the Confidentiality Designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A challenging Party may proceed to the next stage of the challenge process only if it has engaged in this meet and confer process first.

6.3 Judicial Intervention. A Party that elects to press a challenge to a Confidentiality Designation after considering the justification offered by the Designating Party may file and serve a motion under Local Rule 7.1 that identifies the challenged material and sets forth in detail the basis for the challenge. Each such motion must be accompanied by a

competent declaration that affirms that the movant has complied with the meet and confer requirements imposed in the preceding paragraph, and that sets forth with specificity the justification for the Confidentiality Designation that was given by the Designating Party in the meet and confer dialog.

The burden of persuasion in any such challenge proceeding shall be on the Designating Party. Until the court rules on the challenge, all parties shall continue to afford the material in question the level of protection to which it is entitled under the Producing Party's designation.

In the case of information withheld because of a claim of privilege, the Designating Party shall have the burden of persuasion that the information requested is subject to the privilege specified in the privilege log it produced, and that that privilege has not been waived or excluded. The challenging Party shall then have the burden of persuasion to the contrary, or that discovery should otherwise be ordered.

## **7. ACCESS TO AND USE OF PROTECTED MATERIAL**

7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a non-party in connection with this case only for prosecuting, defending, or attempting to settle this litigation, unless otherwise ordered. Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the litigation has been terminated, a Receiving Party must comply with the provisions of Section 10 below (FINAL DISPOSITION). Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

7.2 Disclosure of "Confidential" Information or Items. Unless otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may

disclose any information or items designated “Confidential” only to:

- (a) the Receiving Party’s Outside Counsel of record in this action, as well as employees of said Counsel to whom it is reasonably necessary to disclose the information for this litigation and who have signed an “Agreement to Be Bound by Protective Order”;
- (b) the officers, directors, and employees (including House Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this litigation.
- (c) experts (as defined in this Order) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed an “Agreement to Be Bound by Protective Order”;
- (d) the Court and its personnel;
- (e) court reporters, their staffs, and professional vendors (as defined in this Order) to whom disclosure is reasonably necessary for this litigation;
- (f) the author of the document or the original source of the information;
- (g) during their depositions, witnesses in the action to whom disclosure is reasonably necessary and who have signed an “Agreement to Be Bound by Protective Order.”

**7.3      Disclosure of “Privileged” Information or Items.** Unless otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or items designated “Privileged” only to:

- (a) the Receiving Party’s Counsel of record in this action, as well as employees of said Counsel to whom it is reasonably necessary to disclose the information for this litigation and who have agreed to be bound by this Protective Order;
- (b) the Court and its personnel, when challenging the designation of “Privileged” for the information or item in question.

**8.      PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION**

If a Receiving Party is served with a subpoena or an order issued in other litigation that would compel disclosure of any information or items designated in this action as “Confidential” or “Privileged,” the Receiving Party must so notify the Designating Party in writing immediately (by fax, if possible), and in no event more than five court days after receiving the subpoena or order. Such notification must include a copy of the subpoena or court order.

The Receiving Party also must immediately inform in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must deliver a copy of this Protective Order promptly to the party in the other action that caused the subpoena or order to issue.

The purpose of imposing these duties is to alert the interested parties to the existence of this Protective Order and to afford the Designating Party in this case an opportunity to try to protect its confidentiality interests in the court from which the subpoena or order issued. The Designating Party shall bear the burdens and the expenses of seeking protection in that court of its confidential material — and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

## **9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to execute an “Acknowledgment and Agreement to Be Bound by Protective Order.”

**10. FINAL DISPOSITION**

Unless otherwise ordered or agreed to in writing by the Producing Party, within sixty days after the final termination of this action, each Receiving Party must return all Protected Material to the Producing Party. As used in this subdivision, “all Protected Material” includes all copies, abstracts, compilations, or any other form of reproducing or capturing any of the Protected Material. With permission in writing from the Designating Party, the Receiving Party may destroy some or all of the Protected Material instead of returning it. Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written certification to the Producing Party that affirms that the Receiving Party has not retained any copies, abstracts, compilations, or other forms of reproducing or capturing any of the Protected Material, unless entered into evidence within the court record.

Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney work product, even if such materials contain Protected Material. Any such archival copies that contain or constitute Protected Material remain subject to this Protective Order as set forth in Section 4 (DURATION) above.

**11. RIGHT TO FURTHER RELIEF**

Nothing in this Order abridges the right of any person to seek its modification by the Court in the future.

So Ordered this \_\_\_\_\_ day of March, 2008

By: \_\_\_\_\_  
Timothy S. Hillman  
United States Magistrate Judge

Respectfully submitted,

Dated: March 20, 2008

/s/ Robert Pickle, pro se  
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**AFFIDAVIT OF SERVICE**

Under penalty of perjury, I, Bob Pickle, hereby certify that this document, with accompanying affidavit and exhibits, filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and by email to Gailon Arthur Joy on March 20, 2008.

Dated: March 20, 2008

/s/ Bob Pickle