

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

IN RE NEW MOTOR VEHICLES
CANADIAN EXPORT ANTITRUST
LITIGATION

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MDL Docket No. 03-md-1532
ALL CASES

**MEMORANDUM OF DECISION ON MOTION TO INTERVENE AND
RECOMMENDED DECISION ON MOTION
TO MODIFY PROTECTIVE ORDER**

A collection of plaintiffs in a putative class action proceeding filed in the Superior Court of Justice, Ontario, Canada ("Intervenors"), have moved to intervene in this case in order to seek modifications to the Master Protective Order so that they may obtain copies of discovery materials produced in this litigation. (Mot. to Intervene for the Limited Purpose of Obtaining a Modification of the master Protective Order that Will Allow for Access to Discovery ("Motion to Intervene") (Doc.¹ 980).) The Motion is opposed by the "Non-Settling Defendants" (Doc. 985) and by the National Automobile Dealers Association (Doc. 984). The Court referred the Motion to me on February 11, 2009. Though styled as a singular motion, the Motion to Intervene presents two requests governed by different standards: (1) a request for permissive intervention and (2) a request that the Court modify its Master Protective Order. I address the first part of the request pursuant to 28 U.S.C. § 636(b)(1)(A) because it concerns a non-dispositive, pretrial matter in the nature of a discovery dispute.² I would address the second request in the same

¹ Docket entry.

² When referring motions to intervene to magistrate judges under 28 U.S.C. § 636, different judges or districts have taken different approaches to the question of whether a magistrate judge should resolve such a motion in an order or in a recommended decision. Some judges or districts prefer recommended decisions. See Weyend v.

fashion, except for the fact that the Master Protective Order was signed in the first instance by the United States District Court Judge and my conclusion in this case involves a potential modification of that Order which would be best addressed by the judge who signed the original Order. The Intervenor's request to intervene is granted. I further recommend that their request to modify the Master Protective Order may be granted at a later date, subject to a condition set forth at the end of this Memorandum of Decision. A proposed Amended Master Protective Order is attached as Appendix A.

Background

In this multi-district litigation (MDL Proceeding) the Plaintiffs allege broadly that the Defendants, beginning as early as 2001, entered into a series of agreements in restraint of trade that were designed to prevent new motor vehicles purchased in Canada from entering the United States for resale in order to keep the price of new motor vehicles sold in the United States artificially high. In 2007, a group of Canadian citizens commenced a putative class action, Bester et al. v. General Motors Corporation et al., in the Superior Court of Justice for Ontario,

Hubman Found., No. 4:06CV343, 2007 U.S. Dist. Lexis 89380, *1-2, 2007 WL 4300477, *1 (**E.D. Tex.** Dec. 5, 2007); Maryland Cas. Co. v. W.R. Grace & Co., No. 88 CIV 2613, 1994 U.S. Dist. Lexis 15322, *33-34, 1994 WL 592267, *10 (**S.D.N.Y.** Oct. 26, 1994) (same); Bramante v. McClain, No. SA-06-CA-10, 2007 U.S. Dist. Lexis 28716, *5, 2007 WL 1173574, *1-2 (**W.D. Tex.** Apr. 17, 2007) (recommending that motion to intervene be denied); Burlington Ins. Co. v. Christ for the Nations, Inc., No. 3:05CV1164LECF, 2006 U.S. Dist. Lexis 57973, 2006 WL 2381862 (**N.D. Tex.** Aug. 17, 2006); Nat'l Union Fire Co. v. Pontiac Flying Serv., No. 03-1288, 2006 U.S. Dist. Lexis 46019, 2006 WL 1881356 (**D. Ill.** July 6, 2006); In re. Infiltrator Sys., Inc., No. 3:98CV1534, 1998 U.S. Dist. Lexis 22916, 1998 WL 1574648 (**D. Conn.** Nov. 6, 1998); Amgen, Inc. v. Chugai Pharm. Co., No. CIV-A-87-2617-Y, 1989 U.S. Dist. Lexis 19150, 1989 WL 87484 (**D. Mass.** May 5, 1989) (denying mot. to intervene in rec. dec.). Others have permitted magistrate judges to dispose of motions to intervene in orders. See Counihan v. Allstate Ins. Co., 907 F. Supp. 54 (**E.D.N.Y.** 1995); Peterson Builders v. A.C. Hoyle Co., 163 F.R.D. 550 (**E.D. Wis.** 1995); Diluzio v. R.L.R. Inv., LLC, No. 05-CV-0586A(Sr), 2008 U.S. Dist. Lexis 39689, *2, 2008 WL 2079919, *1 (**W.D.N.Y.** May 15, 2008); Gateway Fireworks, LLC v. Whiteford Township, No. 07-CV-14961-DT, 2008 U.S. Dist. Lexis 35207, 2008 WL 1902205 (**E.D. Mich.** Apr. 30, 2008); WFK & Assocs., LLC v. Tangipahoa Parish, No. CIV.A.06-6684, 2007 U.S. Dist. Lexis 38093, 2007 WL 1537633 (**E.D. La.** May 23, 2007); NRDC v. Gutierrez, No. C 01-0421JL, 2007 U.S. Dist. Lexis 40895, 2007 WL 1518359 (**N.D. Cal.** May 22, 2007); Insignia Sys., Inc. v. New Am. Mktg. In-Store, Inc., No. CIV 04-4213 JRT/AJB, 2006 U.S. Dist. Lexis 94071, 2006 WL 3841510 (**D. Minn.** Dec. 29, 2006); Saltsman v. Valmont Indus., 2006 U.S. Dist. Lexis 84974 (**D. Neb.** Nov. 21, 2006); Rapp v. Cameron, No. CIV A 00-1376, 2001 U.S. Dist. Lexis 17046, 2001 WL 1295606 (**E.D. Pa.** Oct. 18, 2001).

Canada. The defendants in that action are General Motors Corporation, General Motors of Canada, Ltd., American Honda Motor Company, Inc., Honda Canada, Inc., Chrysler Canada, Inc., Chrysler LLC, Nissan North America Inc., Nissan Canada Inc., Canadian Automobile Dealers Association, BMW Canada Inc., BMW of North America LLC, Ford Canada Inc., and Ford Motor Company. Many of the defendants in the Ontario proceeding are defendants in this MDL proceeding.

In the Ontario proceeding the Canadian Plaintiffs allege that the defendants engaged in conduct and practices in the 2005 to 2007 timeframe designed to reduce and prohibit the exportation of new cars from the United States to Canada, thereby artificially preventing any reduction in the price of cars sold in Canada. (Karp Aff. ¶¶ 4-8, Doc. 980-2.)

On December 31, 2008, the Canadian Plaintiffs filed the instant Motion to Intervene, seeking to obtain a modification of the Master Protective Order (MPO). The MPO imposes obligations on the parties to the MDL Proceeding respecting the release or disclosure of all documents and other materials and information (collectively, "discovery") produced by a party to this proceeding or by third parties, whenever the discovery is designated as confidential or highly confidential by the producing party. (MPO, ¶¶ 1-5, Doc. 146.) The Canadian Plaintiffs want the Court to modify the MPO, particularly paragraphs 7 and 13, so that they³ will be included as persons to whom confidential and highly confidential discovery may be disclosed, in order that the Plaintiffs in this proceeding may share such discovery with them without violating the MPO and in order that they may use the discovery in connection with the Ontario proceeding.

³ The proposed modified MPO would permit disclosure to the Canadian Plaintiffs' counsel and their staff, to the Canadian Plaintiffs, to outside consultants retained in connection with the Ontario litigation, to deponents and witnesses and their counsel in the Ontario proceeding and to the Ontario courts and their personnel. (Motion to Intervene Ex. 2, [Proposed] Amended Master Protective Order ¶¶ 7(b), (f)-(i) & 13(b), (f)-(i), Doc. 980-3.)

The Canadian Plaintiffs' counsel, Mr. Eliezer Karp of Juroviesky & Ricci LLP, of Toronto, Ontario, Canada, represents that:

Counsel and Canadian Plaintiffs have reviewed the protective order entered in the MDL Proceeding and agree to abide by the terms of the order with respect to any materials or testimony that they may obtain. Upon grant of our motion to intervene in this litigation counsel and Canadian Plaintiffs will submit to the personal jurisdiction of the U.S. District Court for the District of Maine for the purpose of enforcement of the Master Protective Order.

(Karp Aff. ¶ 15.)

Discussion

When it comes to third-party challenges to protective orders, intervention under Rule 24 is "*the* procedurally correct course" for the third-party to follow. Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 783 (1st Cir. 1988) (agreeing with and quoting In re Beef Indus. Antitrust Litig., 589 F.2d 786, 789 (5th Cir. 1979), and also adding emphasis). There are two weigh stations along the path. First, the prospective intervenor must satisfy the requisites of Rule 24. Second, the intervenor must next persuade the court that it should modify its protective order in light of changed circumstances. Id. at 782, 785; Cullbreath v. Dukakis, 630 F.2d 15, 20-24 (1st Cir. 1980).

A. Intervention

Intervenors seek to intervene under Rule 24(b), which allows the Court to "permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). As Intervenors argue (Mot. to Intervene at 6, 11), this initial requirement is met here because they request intervention only for the limited purpose of seeking modification of the MPO and all of the parties share a common interest in the maintenance or modification of the MPO. Public Citizen, 858 F.2d at 783-84 (holding that

"third-party claims of access to information generated through judicial proceedings" are "legitimate interests" for purposes of permissive intervention and affirming district court's "implicit" recognition of such a claimant as a "proper party"); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 778 (3d Cir. 1994) ("By virtue of the fact that the Newspapers challenge the validity of the Order of Confidentiality entered in the main action, they meet the requirement of Fed. R. Civ. P. 24(b)(2) that their claim must have 'a question of law or fact in common' with the main action.").⁴

In the particular context where the intervenors are collateral litigants seeking access to discovery materials protected by a court order, courts have considered as an additional factor whether the main action and the collateral action are sufficiently similar so that the materials pursued by the intervenors are apt to be relevant to the collateral proceeding, though a "strong nexus of common fact or law" is not required. Meyer Goldberg, Inc. v. Fisher Foods, 823 F.2d 159, 164 (6th Cir. 1987). See also In re Linerboard Antitrust Litig., 33 F. Supp. 2d 333, 339 (E.D. Pa. 2004) ("Courts have regularly held this requirement satisfied if the movant raises a common question in a suit in another jurisdiction."); Kerasotes Mich. Theaters, Inc. v. Nat'l Amusements, Inc., 139 F.R.D. 102, 103 (E.D. Mich. 1991) ("[W]hen intervention for purposes of

⁴ When a movant seeks to intervene for purposes of asserting an additional cause of action, the movant must additionally demonstrate an independent ground for subject matter jurisdiction over the new cause. Int'l Paper Co. v. Jay, 887 F.2d 338, 346 (1st Cir. 1989) ("As this court has previously stated, 'permissive intervention ordinarily must be supported by independent jurisdictional grounds.'") (quoting Moosehead Sanitary Dist. v. S.G. Phillips Corp., 610 F.2d 49, 52 n.5 (1st Cir. 1979)). However, the right of access to information generated in a public proceeding but shielded from view by a protective order is a presumptively valid ground for intervention. Public Citizen, 858 F.2d at 783-84; see also Pansy, 23 F.3d at 778 n.3 ("[A]lthough permissive intervention ordinarily requires independent jurisdictional grounds, an independent jurisdictional basis is not required because intervenors do not seek to litigate a claim on the merits. Thus, in cases where intervenors seek to modify an order of the court, the court has jurisdiction based on the fact that it already has the power to modify the protective order and no independent jurisdictional basis is needed.") (citing Beckman Indus. v. Int'l Ins. Co., 966 F.2d 470, 473 (9th Cir.), cert. denied, 506 U.S. 868 (1992)). This rationale has been extended to circumstances in which collateral litigants seek access to discovery in order to use it in a collateral proceeding. EEOC v. Nat'l Children's Ctr., 146 F.3d 1042 (D.C. Cir. 1998); In re Linerboard Antitrust Litig., 333 F. Supp. 2d 333, 339 (E.D. Pa. 2004)

discovery is thus sought, and the two actions involve the same defendants charged with anti-competitive conduct, no stringent showing of a strong nexus of common fact or law is required."). Intervenor's complaints of anticompetitive conduct are sufficiently similar to the claims advanced in the instant action. Although Non-Settling Defendants maintain that the allegations in the Ontario proceeding "conflict" with the allegations in this proceeding, because they focus on cross-border trade traveling in the opposite direction (Non-Settling Defs.' Opposition at 1-2), the commonality between the two cases is more than apparent when the alleged anticompetitive policies and practices are considered. Both cases involve allegations of the same anticompetitive conduct, occurring in contiguous or overlapping time frames, which could have been employed by the Defendants to influence trade on either side or both sides of the international boundary, depending on varying economic conditions. This commonality between the two actions is sufficient to satisfy the requirements of intervention for purposes of discovery, assuming that commonality between the two actions is a necessary prerequisite to such intervention under Rule 24.

In addition to requiring that the claims or defenses of intervenors present questions of law or fact in common with the main action, the Rule requires that the Court "must consider whether the intervention will unduly delay or prejudice *the adjudication* of the original parties' rights." Fed. R. Civ. P. 24(b)(3) (emphasis added). There is no apparent way by which the requested intervention should unduly delay or prejudice the adjudication of the claims or defenses advanced in the main action. Indeed, it is not easy to understand how the Motion to Intervene would disrupt the Court's calendar at all in light of the fact that only the MPO is at issue and the Intervenor's do not seek any new discovery, only access to what the Plaintiffs have already obtained. Nevertheless, this is a discretionary matter and the timeliness consideration is to be

guided by four factors: (1) the length of time the Intervenor knew of their interest before petitioning to intervene; (2) prejudice that befalls the existing parties on account of the Intervenor's delay; (3) prejudice that befalls the Intervenor if not allowed to intervene; and (4) the existence of significant *ad hoc* circumstances weighing one way or the other. Public Citizen, 858 F.2d at 785-87; Cullbreath, 630 F.2d at 20-25.

1. Length of time

"[T]he appropriate inquiry is when the intervenor became aware that its interest in the case would no longer be adequately protected by the parties." Public Citizen, 858 F.2d at 785. The MPO issued August 11, 2004. (Doc. 146.) The Intervenor filed the pending motion on December 31, 2008. (Doc. 980.) The Intervenor does not necessarily stumble over this four-year delay. They did not commence their action in Ontario until September of 2007. (Karp Decl. ¶ 2, Doc. 980-2.) Moreover, discovery has yet to commence in their case. (Id. ¶ 12.) The Intervenor describes their interest in the MPO in terms of its tendency to assist them in their own discovery quest by obtaining copies of discovery produced in this proceeding. (Id. ¶ 14.) I conclude that this showing is sufficient to satisfy the first timeliness factor. Running from the commencement of their own action, Intervenor has waited roughly a year and a half to file their Motion to Intervene in this action for discovery purposes. That delay does not strike me as troubling. Additionally, the First Circuit has observed that in cases like this, where third parties seek to intervene for the limited purpose of challenging a protective order, courts have permitted intervention even years after the entry of judgment. Public Citizen, 858 F.2d at 785.

2. Prejudice to Defendants caused by delay

The second timeliness factor concerns "prejudice to existing parties due to [the] delay in intervening." Id. at 786. The Non-Settling Defendants do make a prejudice argument. They say

that they have produced millions of documents in reliance on the MPO and that collateral litigants should not be permitted to access that information absent exceptional circumstances. (Non-Settling Defs.' Opposition Mem. at 9.) I address this argument in the subsequent section concerning modification of the MPO because I regard it as a Rule 26(c) concern respecting modification of a protective order, rather than a Rule 24(b) concern. I base that conclusion on the fact that the Intervenor seek only to challenge a protective order and do not threaten to disrupt the existing proceedings or prejudice the Defendants with respect to the adjudication of their rights in the main action. Public Citizen, 858 F.2d at 786 (holding that delay in intervention for purposes of addressing a "discrete and ancillary issue" related to a protective order and unrelated to the merits causes "little prejudice").⁵ I note that Non-Settling Defendants brief the issue in that exact fashion, discussing prejudice and their reliance interest in a section of their brief addressed to amendment of the MPO (Non-Settling Defs. Opposition at 9), without asserting prejudice or reliance in their opposition to permissive intervention (id. at 1-4). Intervention under the circumstances of this case will not prejudice the Defendants in regard to the adjudication of their rights in the MDL Proceeding.

3. Prejudice to Intervenor if intervention is denied

The Intervenor assert that they should not be required to reinvent the wheel where discovery is concerned and that they should be permitted to take advantage of the efficiencies that would result from modification of the MPO. Because there is no significant prejudice to the Defendants arising from the delay associated with the Motion to Intervene, there is no need to

⁵ See also Public Citizen, 858 F.2d at 787 (adopting the view that prejudice arising from late access to discovery materials "should affect not the right to intervene but, rather, the court's evaluation of the merits of the applicant's motion to lift the protective order") (quoting Mokhiber v. Davis, 537 A.2d 1100, 1106 (D.C. 1988)).

determine whether prejudice to the Intervenors arising from denial of intervention would outweigh any prejudice to the Defendants.

4. *Special circumstances*

Non-Settling Defendants contend that the Intervenors should be denied access to discovery materials produced in this case because to allow access would circumvent discovery restrictions imposed by Canadian law. They posit that because the Intervenors are not yet entitled to commence court-sanctioned discovery in the Canadian proceeding, it would undermine Canadian law to permit the Plaintiffs in this action to share with the Intervenors discovery produced by the Defendants. (Non-Settling Defs.' Opposition at 4-5.) They cite an unpublished order issued by Judge Dalzell of the Eastern District of Pennsylvania in the matter of In re: Hydrogen Peroxide Antitrust Litigation. (Id. Ex. 3, Doc. 985-4.) There, Judge Dalzell summarily concluded that Canadians seeking to intervene in the District of Pennsylvania proceeding were attempting to bypass the rules of the Canadian court system because they wanted to obtain discovery through intervention at a time when they could not yet initiate discovery in the Canadian action. (Id.)

The Intervenors have a reassuring response to this theory. They cite decisional law from the Ontario Superior Court of Justice to the effect that intervention in a proceeding before a United States court for purposes of accessing discovery already acquired by the parties to the American litigation does not undermine Canadian law. In Vitapharm Canada Limited v. Hoffman-La Roche Limited, Judge Cumming of the Ontario Superior Court of Justice addressed a question of first impression when class action defendants requested that the judge enjoin class action plaintiffs "from gaining access to documentary and deposition evidence from discovery in United States litigation dealing with claims analogous to those seen in this Canadian action."

[2001] O.T.C. 47, ¶ 1. The plaintiffs in that action were engaged in an effort to intervene in United States MDL litigation for purposes of obtaining access to discovery already available but subject to a protective order, just as the Intervenors here are attempting. Id. ¶¶ 4, 19, 20. The defendants sought an order "requiring the plaintiffs to discontinue and withdraw the U.S. motion." Id. ¶ 23. The Court observed:

As a result of the inexorable forces of globalization and expanding international free trade and open markets, there will be an ever-increasing inter-jurisdictional presence of corporate enterprises. This is seen particularly in respect of American and Canadian business activity, given the extent of cross-border trade. If both societies are to maximize the benefits of expanding freer trade and open markets, the legal systems of both countries must recognize and facilitate an expeditious, fair and efficient regime for the resolution of litigation that arises from disputes in either one or both countries.

Id. ¶ 27. The defendants argued that the Court should enjoin the plaintiffs because they might obtain "early" discovery and "nonparty" discovery not yet available in the Canadian proceeding. Id. ¶ 30; see also id. ¶ 38 (observing that the Canadian class was not yet certified and was therefore subject to discovery restrictions). Judge Cumming flatly rejected this notion: "The plaintiffs are not seeking discovery in the U.S. through their U.S. Motion. Rather, they are only seeking access to the discovery of the litigants in the U.S. Litigation. From a legal standpoint, the U.S. Motion is only necessary because of the Protective Order." Id. ¶ 31. The judge observed: "A Canadian court generally will be reluctant to prevent someone from gathering evidence extraterritorially, as its ultimate admissibility in a Canadian proceeding will be determined by the Canadian courts." Id. ¶ 45. The Ontario court denied the defendants' request for injunctive relief, despite objections pertaining to confidentiality, because confidentiality was a concern to be addressed by the United States court and also because the plaintiffs represented that they would consent to an order of the Canadian court "if the

defendants see that to be of assistance in maintaining confidentiality and the sanctity of the Protective Order." Id. ¶ 47. Recognizing the potential to save "considerable time and money in the Canadian proceedings," and the possibility that the plaintiff might "determine earlier and with greater certainty the nature and extent of the precise evidence available that is relevant to the Canadian proceedings," id. ¶ 48, Judge Cumming concluded that "[t]he plaintiffs' request for access to discovery evidence which they believe necessary to prepare their case in Canada, a request made through means lawful in the United States, does not violate the rules and procedure of this court." Id. ¶ 50. This decision was subsequently affirmed by the Divisional Court, as well as by the Court of Appeal for Ontario. (See Court of Appeal Endorsement, Doc. 980-2 at 84.) The Court of Appeal for Ontario observed, among other things:

To the extent that [a United States judge] is concerned about the type of order that a Canadian court could make to ensure compliance in Canada with his protective order, we see no impediment to his making any variation of his order conditional upon it being matched by an order of similar nature from the Superior Courts of the provinces in which Canadian litigation is proceeding.

(Id. at 86, ¶ 6.)

I find that Judge Cumming's decision in Vitapharm undermines the Non-Settling Defendants' argument that the Intervenors are attempting to circumvent Canadian law pertaining to the timing of discovery in Canadian litigation. With this obstacle overcome, I conclude that intervention is appropriate in this matter. Whether, when and how to modify the MPO is another question.

B. Modification

The issuance of protective orders is governed by a good cause standard. Fed. R. Civ. P. 26(c)(1). Nevertheless, the Non-Settling Defendants argue that they have produced documents in reliance on the MPO and that collateral litigants should not be permitted to access that

information absent "exceptional circumstances" or proof that the MPO should not have issued in the first place.⁶ (Non-Settling Defs.' Opposition Mem. at 9.) They cite AT&T Corp. v. Sprint Corp., 407 F.3d 560 (2d Cir. 2005). Among the rationales offered by the Second Circuit for its "exceptional circumstances" standard was the notion that "[i]t is 'presumptively unfair for courts to modify protective orders which assure confidentiality and upon which the parties have reasonably relied.'" Id. at 562 (quoting S.E.C. v. TheStreet.com, 273 F.3d 222, 230 (2d Cir. 2001)). Non-Settling Defendants also argue that notice and an opportunity to be heard should be extended to third parties such as J.D. Power and KPMG and to former parties such as Toyota and Mercedes, all of whom produced materials in this case. (Non-Settling Defs.' Opposition Mem. at 10 n.8.) The Intervenor asserts that there is no prejudice for the Non-Settling Defendants in relation to the main action because the Motion to Intervene should not disrupt these proceedings. (Mot. to Intervene at 9-10.) They cite precedent to the effect that it makes no sense to make them "reinvent the wheel" through new and comprehensive discovery initiatives "when much of the same discovery has already taken place in this action." (Id. at 10, quoting Kraszewski v. State Farm Gen. Ins. Co., 139 F.R.D. 156, 160 (N.D. Cal. 1991).) They assert that "[t]he need to avoid duplication and waste is particularly apparent in litigation of this magnitude." (Id. at 11.)

There are divergent lines of thinking on this issue. One view is the view expressed by the Second Circuit in AT&T Corporation v. Sprint Corporation that it is presumptively unfair to modify a protective order once parties have relied on it. 407 F.3d at 562. The Second Circuit

⁶ The National Automobile Dealers Association (NADA) also opposes modification of the MPO. NADA is a former party to this Proceeding but is not named as a defendant in the Ontario Action. NADA reveals that it has already provided certain documents to counsel for the Canadian Plaintiffs on a voluntary basis, provided that counsel would disclose the documents only within counsel's firm and to persons working with the firm. (NADA Opposition Mem. at 1, Doc. 984.) They argue that the Canadian Plaintiffs "should not now be allowed less restrictive access." (Id. at 2.) I am not persuaded that NADA's prior, voluntary disclosure of some documents places their non-disclosed discovery materials in a special category deserving special protection.

has held previously that modification of a protective order requires a showing of "extraordinary circumstance or compelling need" if the result of modification would be to allow third-party access. Martindell v. Int'l Tel. & Tel. Corp., 594 F.2d 291, 296 (2d Cir. 1979). On the other hand, there is the view that *bona fide* collateral litigants should gain access to discovery because the reliance interest of objecting parties "can be preserved by subjecting the intervenor to the provisions of a protective order" in cases where protection is required. In re Linerboard Antitrust Litig., 333 F. Supp. 2d 333, 340 (E.D. Pa. 2004) (involving Canadian intervenors); see also Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1131-32 (9th Cir. 2003) ("Where reasonable restrictions on collateral disclosure will continue to protect an affected party's legitimate interests in privacy, a collateral litigant's request to the issuing court to modify an otherwise proper protective order so that collateral litigants are not precluded from obtaining relevant material should generally be granted.").

The First Circuit has rejected the extraordinary circumstances standard set out in Martindell, observing that application of this standard would only arguably be appropriate where the government is the third party seeking modification. Public Citizen, 858 F.2d at 791. Based on Public Citizen, it is highly unlikely that the First Circuit would find it an abuse of discretion to modify a protective order to permit third-party access by collateral litigants, particularly if the collateral litigants are made subject to the provisions of the protective order. That approach is the most appropriate approach in this case, I conclude, because it protects the Defendants (and third parties) who produced confidential discovery material in reliance on the MPO and simultaneously preserves the efficiency interests of the Intervenors as well as the interest of judicial economy.

There is one remaining hurdle, however. It is not clear that making the Intervenor subject to the MPO based on their voluntary submission to this Court's jurisdiction offers sufficient protection to the parties against a breach of confidentiality in Canada. The specter of being sanctioned under Rule 37(b) has little or no meaning where the Intervenor has no abiding claim in this Court. Consequently, violation of the protective order would have to be remedied through an exercise of contempt powers. Public Citizen, 858 F.2d at 782. The Supreme Court of Canada has held that Canadian courts may not enforce contempt orders issued by the courts of the United States. Pro Swing Inc. v. Elta Golf Inc., 2006 SCC 52, ¶¶ 34-39, 62.⁷ Given this predicament, I would condition modification of the MPO on the Intervenor's acquisition of an order from the Ontario Superior Court of Justice that requires the Intervenor to comply with the terms of the draft, amended MPO attached to this order. This process would be consistent with the suggestion made by Judge Cumming in the Vitapharm case and would definitively put to rest any suggestion that the Intervenor had somehow circumvented Canadian law by obtaining modification of the MPO in this country. It would also provide the Defendants in this action with a viable enforcement mechanism should there be any violation of the protective order. In the absence of unauthorized disclosure of this information, it is in the interest of both judicial economy and cost efficiency to allow the Canadian Plaintiffs access to this already compiled information. The Plaintiffs in this action have no objection to producing the material already in their possession, subject to the terms of a modified MPO.

I recommend this Court issue an amended MPO upon receipt of suitable evidence that this condition relating to an order from the Ontario Superior Court of Justice has been satisfied.

⁷ Westlaw users will have more success "keyciting" 273 D.L.R. (4th) 663. The Canadian Case Citations Supplement Vol. 15 (2008) does not record any subsequent reconsideration of this issue by the Supreme Court of Canada through June of 2008.

A copy of a Proposed Amended MPO is attached as an appendix to this Memorandum of Decision and Recommended Decision. Amendments are highlighted in italic print.

CERTIFICATE

Any objection to the decision regarding the motion to intervene shall be filed in accordance with Fed. R. Civ. P. 72.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

March 26, 2009

Appendix A

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

**IN RE NEW MOTOR VEHICLES
CANADIAN EXPORT ANTITRUST
LITIGATION**

)
) **MDL Docket No. 03-md-1532**
)
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AMENDED MASTER PROTECTIVE ORDER

WHEREAS, certain documents and information have been and may be sought, produced or exhibited by and between the parties to the above-styled proceeding (the “Proceeding”) which relate to the parties’ financial information, competitive information, personnel information or other kinds of commercially sensitive information which the party making the production deems confidential; and

WHEREAS, it has been agreed by and among the parties in the Proceeding, through their respective counsel, that, to expedite the flow of discovery material and to preserve the confidentiality of certain documents and information, a protective order should be entered by the Court; and

WHEREAS, the Court has reviewed the terms and conditions of this Protective Order submitted by the parties; and

WHEREAS, plaintiffs in a collateral proceeding pending in the Ontario Superior Court of Justice, styled Bester et al. v. General Motors Corp. et al., Sup. Ct. of Justice (Ont.), Court File No. 07-CV-3403633 (hereinafter “the Canadian Plaintiffs” and “the Ontario Action”), have been granted leave to intervene in this proceeding for purposes of modifying this Master Protective

Order to enable them to obtain discovery produced in this proceeding for possible use in the Ontario Action; and

WHEREAS, the Superior Court of Justice has issued an order requiring the plaintiffs in the Ontario Action to comply with the terms of this Master Protective Order,

IT IS HEREBY ORDERED THAT:

1. This Protective Order shall govern all documents, the information contained therein, and all other information produced or disclosed during the Proceeding whether revealed in a document, deposition, other testimony, discovery response or otherwise, by any party in this Proceeding (the “supplying party”) to any other party (the “receiving party”), *including the Canadian Plaintiffs*, when same is designated in accordance with the procedures set forth herein. This Protective Order is binding upon the parties to the Proceeding *and the Canadian Plaintiffs*, including their respective corporate parents, subsidiaries and affiliates and their respective attorneys, agents, representatives, officers and employees and others as set forth in this Protective Order.
2. A subpoenaed third party who so elects may avail itself of, and agree to be bound by, the terms and conditions of this Protective Order and thereby become a supplying party for purposes of this Protective Order. The parties, in conducting discovery from third parties, shall attach to such discovery requests a copy of this Protective Order so as to apprise such third parties of their rights herein. A third party who elects to become a supplying party for purposes of this Protective Order shall provide written notice thereof to the party requesting discovery (the “requesting party”). Upon receiving such notice, the requesting party shall notify all other parties to the Proceeding that the discovery received from the third party is subject to the terms and conditions of this Protective Order.

3. Any supplying party shall have the right to identify and designate as “Confidential” or “Highly Confidential” any document or other materials it produces or provides (whether pursuant to court order, notice or subpoena or by agreement), or any testimony given in this Proceeding, which testimony or discovery material is believed in good faith by that supplying party to constitute, reflect or disclose its confidential and proprietary information, as those terms are understood under Rule 26(c)(7) of the Federal Rules of Civil Procedure (“Designated Material”).

4. “Confidential Information” as used herein means any Designated Material that is designated pursuant to this Protective Order as “Confidential” by the supplying party, whether it is a document, information contained in a document, information revealed during a deposition or other testimony, information revealed in an interrogatory answer or information otherwise revealed. In designating material as “Confidential,” the supplying party will make such designation only as to that material that it in good faith believes to be entitled to confidential treatment.

5. Specific documents and interrogatory answers produced by a supplying party shall, if appropriate, be designated as “Confidential” by marking the first page of the document and each subsequent page thereof containing Confidential Information with the legend:

CONFIDENTIAL

Interrogatory answers containing Confidential Information shall be separately bound.

6. Information disclosed at a deposition taken in connection with this Proceeding may be designated as “Confidential” as follows:

(a) A supplying party (or its counsel) may designate testimony, given by it or its present or former employee(s), officer(s), director(s), partner(s), representative(s), or any

expert(s), as “Confidential” on the record during the taking of the deposition, in which case the stenographic employee or court reporter recording or transcribing such testimony shall be directed to bind any transcript page(s) containing Confidential Information separately and apart from any transcript page(s) containing no such Confidential Information; or

(b) A supplying party (or its counsel) may notify all other parties in writing, within twenty (20) calendar days of receipt of the transcript of a deposition, given by it or its present or former employee(s), its officer(s), director(s), partner(s), representative(s), or any expert(s), of specific pages and lines of the transcript which are designated as “Confidential,” whereupon each party shall attach a copy of such written designation to the face of the transcript and each copy thereof in that party’s possession, custody or control. To facilitate the designation of Confidential Information, all transcripts of depositions shall be treated, in their entirety, as Highly Confidential Information for a period of twenty (20) calendar days following delivery by the court reporter of certified transcripts to all parties.

7. Confidential Information shall be disclosed by the receiving party only to the following persons:

(a) Counsel for the Plaintiffs in this Proceeding, including their attorneys, paralegals, investigators, stenographic and clerical employees; the attorneys, paralegals, stenographic and clerical employees in law firms engaged to assist the Plaintiffs in this Proceeding; the personnel supplied by any independent contractor (including litigation support service personnel) with whom such attorneys work in connection with the Proceeding;

(b) Counsel for the Canadian Plaintiffs in the Ontario Action, including their attorneys, paralegals, investigators, stenographic and clerical employees; the attorneys, paralegals, stenographic and clerical employees in law firms engaged to assist the Canadian Plaintiffs in this Proceeding or the Ontario Action; the personnel supplied by any independent contractor (including litigation support service personnel) with whom such attorneys work in connection with this Proceeding or the Ontario Action;

(c) Outside counsel for the Defendants in this Proceeding (“outside counsel”); the attorneys, paralegals and stenographic and clerical employees in the respective law firms of such outside counsel; the personnel supplied by any independent contractor (including litigation support service personnel) with whom such attorneys work in connection with the Proceeding;

(d) In-house counsel of the receiving party, for the sole purpose of assisting in this Proceeding;

(e) The parties to this Proceeding, for the sole purpose of assisting in, or consulting with respect to, the prosecution or defense of this Proceeding;

(f) The Canadian Plaintiffs in the Ontario Action, for the sole purpose of assisting in, or consulting with respect to, the prosecution of the Ontario Action;

(g) Any outside consultant or expert who is assisting counsel or a party to this Proceeding or Canadian Plaintiffs in the Ontario Action, to whom it is necessary to disclose Confidential Information for the purpose of assisting in, or consulting with respect to, the preparation of this Proceeding or the Ontario Action;

(h) *The Courts, including the Ontario Court, and any members of court staff to whom it is necessary to disclose Confidential Information for the purpose of assisting in this Proceeding or the Ontario Action;*

(i) Deponents, trial or hearing witnesses and their counsel, in preparation for and/or during depositions, trial or pretrial hearings in this Proceeding *or in the Ontario Action*, provided that counsel for the party intending to disclose Confidential Information has a good-faith basis for believing that such Confidential Information is relevant to specific events, transactions, discussion, communications or data about which the deponent or witness is expected to testify;

(j) Stenographic employees and court reporters recording or transcribing testimony relating to *this Proceeding or the Ontario Action*;

(k) Persons identified in a document designated as Confidential as an author of the document in part or in whole, or persons to whom a copy of such document was sent prior to its production in this action; or

(l) Any other person that all parties have agreed to in advance in writing, according to the procedures set forth in paragraph 20 below.

8. Persons having knowledge of Confidential Information by virtue of the disclosure of such information by a supplying party in discovery in this Proceeding shall use that Confidential Information only in connection with the prosecution or appeal of the Proceeding *or the Ontario Action*, and shall neither use such Confidential Information for any other purpose nor disclose such Confidential Information to any person who is not identified in paragraph 7 of this Protective Order.

9. Nothing shall prevent disclosure beyond the terms of this Protective Order (a) if the supplying party designating the material as “Confidential” (or its counsel) consents in writing to such disclosure, (b) if a supplying party knowingly discloses its own Confidential Information in a pleading filed in the Court’s public record or in a publication disseminated to the general public, or (c) if the Court, after reasonable written notice to counsel for all the parties, orders such disclosure.

10. Any party, *including the Canadian Plaintiffs*, that is served with a subpoena or other notice compelling the production of any Confidential Information produced by any supplying party is obligated to give written notice of such subpoena or other notice to counsel for all parties to this Proceeding and, if the supplying party is not a party to this Proceeding, to the supplying party by facsimile within three (3) business days. Upon receiving such notice, the supplying party shall bear the burden to oppose, if it deems appropriate, the subpoena on grounds of confidentiality. If the supplying party or any other party asserts objections to the subpoena or notice, the objections shall be made in writing and served on the party that received the subpoena or notice within five (5) business days of receipt of notice that a subpoena or other notice compelling production has been received.

11. Counsel shall take all reasonable steps to assure the security of any Confidential Information and shall limit access to Confidential Information to those persons listed in paragraph 7 of this Protective Order. Confidential Information produced or provided by any supplying party will be kept in the receiving party’s outside counsel’s possession or in the possession of the receiving party’s outside consultants or experts or other persons entitled to receive copies of the documents pursuant to paragraph 7 above.

12. It is possible that there may be certain discrete categories of extremely sensitive confidential and/or proprietary information, the disclosure of which, even if limited to the persons listed in paragraph 7 above, may compromise and/or jeopardize the supplying party's business interests ("Highly Confidential Information") such that the supplying party may deem such Highly Confidential Information to require greater limitations on disclosure than are set forth in paragraph 7 above. The supplying party may designate such Highly Confidential Information by marking the first page of the document or interrogatory answer and each subsequent page thereof containing Highly Confidential Information with the legend:

HIGHLY CONFIDENTIAL

13. All the provisions set forth above applicable to Confidential Information shall apply equally to Highly Confidential Information, except that disclosure of Highly Confidential Information by the receiving party shall be limited to the following persons:

(a) Counsel for the Plaintiffs in the Proceeding, including their attorneys, paralegals, investigators, stenographic and clerical employees; the attorneys, paralegals, stenographic and clerical employees in law firms engaged to assist the Plaintiffs in this Proceeding; the personnel supplied by any independent contractor (including litigation support service personnel) with whom such attorneys work in connection with the Proceeding;

(b) Counsel for the Canadian Plaintiffs in the Ontario Action, including their attorneys, paralegals, investigators, stenographic and clerical employees; the attorneys, paralegals, stenographic and clerical employees in law firms engaged to assist the Canadian Plaintiffs in this Proceeding or the Ontario Action; the personnel supplied by any independent contractor (including litigation support service personnel) with whom such attorneys work in connection with this Proceeding or the Ontario Action;

- (c) Outside counsel for the Defendants in this Proceeding (“outside counsel”); the attorneys, paralegals and stenographic and clerical employees in the respective law firms of such outside counsel; the personnel supplied by any independent contractor (including litigation support service personnel) with whom such attorneys work in connection with the Proceeding;
- (d) Designated in-house counsel of the receiving party for the sole purpose of assisting in the defense of this proceeding;
- (e) Any outside consultant or expert who is assisting counsel for Plaintiffs *or Canadian Plaintiffs* or who is assisting Defendants’ outside counsel to whom it is necessary to disclose Highly Confidential Information for the purpose of assisting in, or consulting with respect to, the prosecution or defense of this Proceeding *or the Ontario Action*;
- (f) Deponents, trial or hearing witnesses and their counsel, in preparation for and/or during depositions, trial or pretrial hearings in this Proceeding *or in the Ontario Action*, provided that counsel for the party intending to disclose Highly Confidential Information has a good- faith basis for believing that such Highly Confidential Information is relevant to specific events, transactions, discussions, communications or data about which the deponent or witness is expected to testify;
- (g) *The Courts, including the Ontario Court, and any members of court staff* to whom it is necessary to disclose Highly Confidential Information for the purpose of assisting *in this Proceeding or the Ontario Action*;
- (h) Stenographic employees and court reporters recording or transcribing testimony relating to *this Proceeding or the Ontario Action*;

(i) Persons identified in a document designated as Highly Confidential as an author of the document in part or in whole, or persons to whom a copy of such document was sent prior to its production in this action; or

(j) Any other person that all parties have agreed to in advance in writing, according to the procedures set forth in paragraph 20 below.

14. Persons having knowledge of Highly Confidential Information by virtue of the disclosure of such information by a supplying party in discovery in this Proceeding shall use that Highly Confidential Information only in connection with the prosecution or appeal of *this Proceeding or the Ontario Action*, and shall neither use such Highly Confidential Information for any other purpose nor disclose such Highly Confidential Information to any person who is not identified in paragraph 13 of this Protective Order.

15. Prior to the disclosure of any Designated Material to any person identified in paragraphs 7 or 13 above (other than the Court and its staff), such person shall be provided with a copy of this Protective Order, which he or she shall read and upon reading shall sign a Certification, in the form annexed hereto as Exhibit A, acknowledging that he or she has read this Protective Order and shall abide by its terms. A file of all written acknowledgments by persons who have read this Protective Order and agreed in writing, in the form annexed hereto as Exhibit A, to be bound by its terms shall be maintained by counsel of record for the party obtaining them and shall be made available, upon request, for inspection by the Court in camera. Persons who come into contact with Designated Material for clerical, administrative, paralegal, stenographic or court reporting purposes, and who do not retain copies or extracts thereof, are not required to execute acknowledgements.

16. A deponent shall not be permitted to retain copies of Designated Material unless the deponent is otherwise entitled to receive and retain such copies under the terms of this Protective Order. A deponent's counsel shall not be permitted to retain any copies of Designated Material unless such counsel represents one of the parties in this action or is otherwise entitled to receive and retain such copies under the terms of this Protective Order. Nothing in this paragraph shall prevent a deponent or deponent's counsel from having reasonable access to the deponent's deposition for purposes of executing the deposition, preparing to testify further in this action, or for other purposes agreed to by all the parties.

17. Any supplying party may redesignate under paragraphs 5 or 12 above (or withdraw a designation regarding) any material ("redesignated material") that it has produced; provided, however, that such redesignation shall be effective only as of the date of such redesignation. Such redesignation (or withdrawal) shall be accomplished by notifying counsel for each party in writing of such redesignation (or withdrawal) and supplying counsel for each party with the production numbers of redesignated documents and copies of the redesignated material. Upon receipt of any such written redesignation, counsel of record shall (i) not make any further disclosure or communication of such redesignated material except as provided for in this Protective Order; (ii) take reasonable steps to notify any persons known to have possession of any redesignated material of the effect of such redesignation under this Protective Order; and (iii) promptly endeavor to procure all copies of such redesignated material from any persons known to have possession of any such redesignated material who are not entitled to receipt under paragraphs 7 and 13 above.

18. If, in order to expedite the flow of discovery material in the Proceeding, counsel agree that specific documents or other information are to be provided for inspection without first

having been labeled pursuant to paragraphs 5 and 12, such documents or other information are to be treated by the receiving party as Highly Confidential Information pending the copying and delivery of designated copies of same by the supplying party to the receiving party.

19. Supplying parties may designate discovery material produced in the form of electronic media, such as computer disks and tapes, as Confidential or Highly Confidential in accordance with the provisions of this Protective Order. Any hard copies generated from electronic media designated as Confidential or Highly Confidential shall likewise be labeled “Confidential” or “Highly Confidential” and all such copies shall be treated in the same way they would be treated under this Protective Order if they had originally been produced in hard copy and so designated. Any bound compilation of hard copy pages generated from electronic media designated as Confidential or Highly Confidential may be designated Confidential or Highly Confidential by marking the appropriate legend on the first page and/or front cover of such compilation; loose pages generated from such electronic media, and any pages that are removed or copied from any bound compilation, shall be individually labeled with the appropriate legend. All persons who use or review any designated electronic media or hard copies derived therefrom shall be instructed to comply with the provisions of this Protective Order. Nothing in this paragraph shall relieve any party from its obligation to appropriately and individually designate all documents which are scanned or otherwise converted from hard copy to electronic form.

20. Any party, *including the Canadian Plaintiffs*, may request at any time permission to disclose Designated Material to a person other than those permitted under paragraphs 7 or 13 above (or to use such information in a manner prohibited by this Protective Order) by serving a written request upon the supplying party’s counsel with copies to Plaintiffs’ Lead Counsel and counsel for all Defendants in this Proceeding, and confirming receipt thereof. Any such request

shall state the material the party wishes to disclose, to whom it wishes to make disclosure and the reason(s) and purpose therefor. The supplying party or its counsel shall thereafter respond to the request in writing within ten (10) calendar days of its receipt of such written request; and if consent is withheld, it shall state the reasons why consent is being withheld. A failure to respond within such ten-day period shall constitute consent to the request. If, where consent is withheld, the requesting party and the supplying party are subsequently unable to agree on the terms and conditions of disclosure, disclosure may only be made in accordance with the supplying party's designation of the material as "Confidential" or "Highly Confidential" unless and until differing treatment is directed pursuant to order of the Court.

21. Any party may object to the propriety of the designation (or redesignation) of specific material as "Confidential" or "Highly Confidential" by serving a written objection upon the supplying party's counsel. The supplying party or its counsel shall thereafter respond to the objection in writing within ten (10) calendar days of its receipt of such written objection by either (i) agreeing to remove the designation; or (ii) stating the reasons why the designation was made. If the objecting party and the supplying party are subsequently unable to agree upon the terms and conditions of disclosure for the material(s) at issue, the objecting party may arrange a telephone conference with the Court in order to resolve the disputed designation. In such event, the supplying party or its counsel will participate in a telephone conference with the Court within five (5) business days, or as soon thereafter as the Court's schedule permits, in order to resolve the disputed designation. Pending the resolution of the disputed designation, the material(s) at issue shall continue to be treated in accordance with the supplying party's designation of the material as "Confidential" or "Highly Confidential" unless and until differing treatment is directed pursuant to order of the Court.

22. Nothing in this Protective Order shall restrict any party's outside counsel from rendering advice to its clients with respect to this Proceeding and, in the course thereof, relying upon Confidential Information or Highly Confidential Information, provided that in rendering such advice, outside counsel shall not disclose any other party's Confidential Information or Highly Confidential Information other than in a manner provided for in this Protective Order.

23. Inadvertent production of any document or information without an appropriate designation of confidentiality will not be deemed to waive a later claim as to its confidential nature or stop the supplying party from designating said document or information as "Confidential" or "Highly Confidential" at a later date by complying with the provisions of paragraph 17 above. Disclosure of said document or information by any party, *including the Canadian Plaintiffs*, prior to such subsequent designation shall not be deemed a violation of the provisions of this Protective Order, provided, however, that any party that disclosed the redesignated material shall make a good-faith effort promptly to procure all copies of such redesignated material from any persons known to have possession of any such redesignated material who are not entitled to receipt under paragraphs 7 and 13 above.

24. The inadvertent production of any privileged materials or other materials exempt from production by any party making production of materials in this Proceeding shall not be deemed a waiver or impairment of any claim of privilege or exemption (including under the attorney-client privilege or work product doctrine) concerning any such materials or the subject matter thereof. A party shall promptly notify all other parties, *including the Canadian Plaintiffs*, if it determines that it has inadvertently disclosed privileged materials. Any party, *including the Canadian Plaintiffs*, to whom such materials have been disclosed, shall cooperate in the return of all copies of such material from any persons known to have possession of any such redesignated

material who are not entitled to receipt under paragraphs 7 and 13 above. Nothing in this paragraph constitutes a waiver of any party's right to challenge a supplying party's claim of privilege for any reason, including the manner in which the material as to which privilege is claimed was produced. Until such challenge has been resolved by order of Court or by written agreement of the parties, no party shall use or disseminate the subject materials in any manner inconsistent with the supplying party's claim of privilege.

25. Except as agreed in writing by counsel of record, to the extent that any Confidential Information or Highly Confidential Information is, in whole or in part, contained in, incorporated in, disclosed in or attached to any pleading, motion, memorandum, appendix or other judicial filing, counsel shall file under seal that portion of the submission containing Confidential Information or Highly Confidential Information and that portion filed under seal shall be designated and treated as a "Sealed Document." The remainder of any such pleading, motion, memorandum, appendix or other judicial filing shall be filed with the Court with appropriate redactions. Disclosure of any portion of the transcript of a deposition which reflects or contains Confidential Information or Highly Confidential Information shall be subject to the terms of this Protective Order, and if filed with the Court, such portion containing Confidential Information or Highly Confidential Information shall be filed as a Sealed Document. All Sealed documents, filed under seal pursuant to this Protective Order, shall be filed in a sealed envelope and shall remain under seal until such time as this Court orders otherwise. Such Sealed Documents shall be identified with the caption of this action, a general description of the sealed contents and shall bear the following legend which shall also appear on the sealed envelope:

CONFIDENTIAL

Contents hereof are confidential and are subject to a court-ordered

protective order governing the use and dissemination of such contents.

The Clerk of the Court shall maintain such Sealed Documents separate from the public records in this action, intact and unopened except as otherwise directed by the Court. Such Sealed Documents shall be released by the Clerk of the Court only upon further order of the Court.

It is beyond the purview of this Protective Order to mandate how court filings containing Designated Materials must be made in the Ontario Superior Court of Justice. However, counsel for the Canadian Plaintiffs shall take all appropriate precautions, to the extent permitted by applicable law, to preserve the confidentiality of Designated Materials filed with the Ontario Court.

26. If Confidential Information or Highly Confidential Information is used during depositions, it shall not lose its confidential status through such use, and counsel shall exercise their best efforts and take all steps reasonably required to protect its confidentiality during such use.

27. Nothing herein shall be construed to affect in any manner the admissibility at trial of any document, testimony or other evidence. Without losing its confidential status, any Designated Material marked with the legend “Confidential” or “Highly Confidential” under this Protective Order shall be redacted so as to eliminate the legend before the document is shown to the jury.

28. Nothing in this Protective Order shall be deemed a waiver of any objection or privilege a party may claim to the production of any documents, nor shall anything in this Protective Order prevent the parties from seeking an order from the Court, upon proper notice to all parties, further restricting the disclosure of “Confidential” or “Highly Confidential” documents or information.

29. Upon the conclusion of the Proceeding, including any appeals related thereto, at the written request and option of the supplying party, within thirty (30) calendar days of such request all Designated Material and any and all copies thereof shall be either returned to the supplying party or destroyed, provided, however, that counsel may retain their attorney work product, attorney-client privilege information and all court-filed documents even though they contain Confidential Information or Highly Confidential Information. Any documents or other information retained pursuant to the provisions of this paragraph shall remain subject to the terms of this Protective Order. At the written request of the supplying party, any person or entity having custody or control of Designated Material or of recordings, notes, memoranda, summaries or other written materials, and all copies thereof, relating to or containing Designated Material shall certify that reasonable efforts have been made to assure that all such Designated Material and any copies thereof, any and all records, notes, memoranda, summaries or other written material regarding the Designated Material (except for attorney work product, attorney-client privilege and court-filed documents as stated above), have been destroyed or delivered in accordance with the terms of this Protective Order. Any request for return or destruction shall be made within ninety (90) days of the conclusion of this Proceeding. If a supplying party does not request the return of its Designated Material within the specified time period, parties in possession of said material shall destroy the material, and a Clerk of Court in possession of said material may destroy the material consistent with the terms of this Order. In the case of Designated Material that was produced by a third party, the party that requested the production of such material shall notify the supplying party of the conclusion of this Proceeding within thirty (30) days of its conclusion and shall inform the supplying party of the deadline for requesting the return or destruction of such material. If Designated Material is returned to a

supplying party that is a party to this Proceeding, the supplying party shall be responsible for paying the cost of shipment; if Designated Material is returned to a third party, the requesting party or parties shall be responsible for the cost of shipment. *This provision shall not apply to the Canadian Plaintiffs and their counsel until the conclusion of the Ontario Action, including any appeals related thereto.*

30. If Designated Material is disclosed to any person other than in the manner authorized by this Protective Order, the party responsible for the disclosure, *including the Canadian Plaintiffs*, shall within two (2) business days after learning of such disclosure, inform the supplying party of all pertinent facts relating to such disclosure and shall make every effort to prevent disclosure by each unauthorized person who received such information.

31. The foregoing provisions concerning confidentiality shall apply only to pre-trial proceedings and to matters provided in pre-trial discovery and designated as Confidential and Highly Confidential, and shall not affect the conduct of trial or of any hearing in open court. Subject to the applicable rules of evidence, Designated Material may be offered in evidence at trial or any court hearing. Any party or third party may move the court for an order that evidence be received in camera or under other conditions to prevent unnecessary disclosure of Confidential or Highly Confidential Information. Prior to trial or to the hearing in open court, the Court shall determine what protection, if any, may be afforded to such information at the trial or hearing.

32. The parties hereto contemplate coordinating discovery in this and certain related actions (the “Coordinated Actions”). However, nothing in this Order shall be construed to enlarge or otherwise modify the rights of the parties pursuant to protective orders entered in any of the Coordinated Actions.

33. The terms of this Order shall be binding upon all current and future parties to this Proceeding and their counsel. Within ten (10) days of (i) the entry of appearance by a new party to this Proceeding; (ii) the transfer of a tag-along action to this court pursuant to the rules of procedure of the Judicial Panel on Multidistrict Litigation; or (iii) notification of the filing in this District of a complaint that arises out of the same facts alleged in the Consolidated Amended Complaint, plaintiffs' co-lead counsel shall serve a copy of this Protective Order on such new party's counsel.

34. *The terms of this Order shall also be binding upon the Canadian Plaintiffs in the Ontario Action. Canadian Plaintiffs agree to submit to the jurisdiction of this Court for the purposes of enforcement on this Protective Order.*

35. Nothing contained in this Protective Order shall preclude any party from using its own Confidential Information or Highly Confidential Information in any manner it sees fit, without prior consent of any party or the Court. If a supplying party knowingly discloses its own Confidential Information or Highly Confidential Information in a pleading filed in the Court's public record or in a publication disseminated to the general public, the supplying party shall be deemed thereby to have consented to the removal of that designation with respect to the information disclosed.

35. By written agreement of the parties, or upon motion and order of the Court, the terms of this Protective Order may be amended, modified or vacated. This Protective Order shall supersede any previous protective order entered in this matter, and shall continue in full force and effect until amended or superseded by express order of the Court, and shall survive any final judgment or settlement in this action.

36. Any invalidity, in whole or in part, of any provision of this Protective Order shall not affect the validity of any other provision of this Protective Order.

SO ORDERED, this ____ day of March, 2009.

**U.S. DISTRICT COURT
DISTRICT OF MAINE (PORTLAND)
CIVIL DOCKET FOR CASE #: 2:03-MD-1532-DBH**

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