

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ADAM STEELE,)	
BRITTANY MONTROIS, and)	Case No. 1:14-cv-1523-RDL
JOSEPH HENCHMAN, on behalf of)	
themselves and all others similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

~~PROPOSED~~ PROTECTIVE ORDER

The Court hereby ORDERS:

1. This Protective Order is intended to balance the need for an open and public proceeding in this case with the protection from disclosure of the proprietary information of third-parties subject to subpoena. It shall apply to any agents, attorneys, experts, consultants, employees, parent companies, subsidiaries, officers, directors and employees of the parties, the named plaintiffs, (i.e., the class representatives), and any third parties subject and responding to subpoenas, including but not limited to employees of the attorneys' firms, litigation support vendors engaged by attorneys subject to the Protective Order and their employees, and personnel of an office, board, division, or bureau of the Department of Justice ("Department"), clerical personnel and supervisory personnel of the Department, officers and employees of the Internal Revenue Service ("IRS"), and officers and employees of another federal agency working under the direction and control of the Department of Justice. For the purposes of this Protective Order, the "parties" include the named Plaintiffs in Steele v. United States, No. 1:14-cv-1523-RDL, the Internal Revenue Service, and any third parties to this litigation that may receive subpoenas pursuant to Federal Rule of Civil Procedure 45.

2. The restrictions and limitations contained in this Protective Order shall apply to documents and electronically stored information ("ESI") (including all copies, excerpts and summaries thereof) produced, and deposition testimony provided, in connection with third party subpoenas served during the pendency of this case (collectively, "material").

* Joint Motion [102] for protective order is GRANTED.

3. Subject to the following provisions of this paragraph, parties may designate material as either "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL."

(i) A party or third-party may designate material as "CONFIDENTIAL" only when it believes in good faith that the material falls within the protections of Federal Rule of Civil Procedure 26(c), including, but not limited to, "trade secret or confidential research, development, or commercial information." See Fed. R. Civ. P. 26(c)(1)(G). The party or third-party asserting confidentiality bears the burden of establishing compliance with Rule 26(c).

(ii) A party or third-party may designate material as "HIGHLY CONFIDENTIAL" only: (a) when it believes in good faith that the material falls within the protections of Federal Rule of Civil Procedure 26(c), including, but not limited to, "trade secret or confidential research, development, or commercial information," see Fed. R. Civ. P. 26(c)(1)(G); and (b) the material relates to highly sensitive technical or financial information (such as cost or pricing data, or profit information), or other such highly sensitive company information that would risk significant competitive harm if publicly disclosed. The party or third-party asserting high confidentiality bears the burden of establishing both compliance with Rule 26(c) and that the material is "HIGHLY CONFIDENTIAL."

(iii) Any party or third party can challenge a "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" designation to the designating party in writing identifying distinct documents by Bates number. If such challenge is made, the party or third party must respond in writing to the challenge within fourteen (14) days. If the challenge includes more than one thousand (1,000) distinct documents, the designating party may request a reasonable extension of time, which will be granted by the challenging party. The challenged documents will be not be disclosed until the dispute is resolved.

(iv) Any dispute regarding the "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" nature of particular material shall not serve as the basis for refusing to produce that particular material. However, all material designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" that is subject to a dispute will be treated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" by the receiving party until the dispute is resolved. All confidentiality or high confidentiality designations are subject to the provisions of Paragraph 13 of this Protective Order.

4. All copies, duplicates, extracts, summaries, or descriptions (hereinafter referred to collectively as "copies") of material designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" under this Order, or any portion thereof, must be immediately affixed with the words: "CONFIDENTIAL: Subject to Protective Order in Steele v. United States, No. 1:14-cv-1523" or "HIGHLY CONFIDENTIAL: Subject to Protective Order in Steele v. United States, No. 1:14-cv-1523" respectively.

5. ESI may be designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL." The physically produced storage device containing confidential ESI must be immediately affixed with the words: "CONFIDENTIAL: Subject to Protective Order in Steele v. United States, No. 1:14-cv-1523" or "HIGHLY CONFIDENTIAL: Subject to Protective Order in Steele v. United States, No. 1:14-cv-1523" respectively.

6. If material designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" is introduced during a deposition, the portion of the deposition regarding such material may be designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" respectively, if such designation is made on the record immediately prior to the introduction of the "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material.

(i) If the party who designated the material as "CONFIDENTIAL" is not present at the deposition, the party who noticed the deposition must provide written notice within three days after the deposition to the not-present designating party that its confidential materials were used during the deposition. Within three days after receiving such notice, the not-present designating party may then designate the portion of the deposition regarding the material designated as "CONFIDENTIAL" by written notice to counsel for the plaintiffs and the United States.

(ii) If the party who designated the material as "HIGHLY CONFIDENTIAL" is not present at the deposition, the material may not be introduced during the deposition without prior written approval from the designating party.

(iii) The portions of the transcript designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" shall be affixed with the words: "CONFIDENTIAL: Subject to Protective Order in Steele v. United States, No. 1:14-cv-1523" or "HIGHLY CONFIDENTIAL: Subject to Protective Order in Steele v. United States, No. 1:14-cv-1523" respectively. The designation of any such deposition portions are subject to the provisions of Paragraph 13 of this Protective Order.

7. Except as otherwise provided in this Protective Order, material designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" under this Protective Order shall not be used or disclosed by anyone who receives such designated material for any purposes whatsoever other than preparing for and conducting the litigation in this lawsuit (including any appeals).

8. Anyone who receives material designated as "CONFIDENTIAL" shall not disclose or permit the disclosure of any such material under this Protective Order to any other person or entity, except that disclosures may be made in the following circumstances:

- (i) Disclosure may be made to employees of counsel for plaintiffs or the United States, or to current or former employees of the named plaintiffs or the United States (including former employees) to properly accomplish any purpose or activity described in 26 U.S.C. §§ 6103(h) or (k) and the regulations thereunder, which is appropriate in handling this case.
- (ii) Disclosures may be made to the Court and its employees.
- (iii) Disclosure may be made to court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of processing, storing, transmitting, or reproducing the material designated as "CONFIDENTIAL" in this case.
- (iv) Disclosure may be made to:
 - (a) any independent outside experts or consultants retained by the parties or their counsel for purposes of this litigation;
 - (b) employees and subcontractors of the independent outside experts or consultants retained by the parties or by their counsel for purposes of this litigation in paraprofessional, clerical, stenographic and ministerial positions;
- (v) Disclosures may be made to any fact witnesses or potential fact witnesses when a good faith determination is made that the material would be relevant to their testimony or potential testimony.
- (vi) Disclosure may not be made to any individual involved in competitive decision making for any third party receiving a subpoena in this case. For the purposes of this Protective Order, competitive decision making includes counsel's "activities, associations, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor." U.S. Steele Corp. v. United States, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984). The party designating a witness for deposition is obligated to disclose whether the witness is involved in competitive decision making as soon as possible but no later than the start of any deposition and before any such "CONFIDENTIAL" material is disclosed.

Other than persons identified in Paragraphs 8(ii) and 8(iii) of this Protective Order, any person to whom counsel for the parties intends to make a disclosure must first be

advised of, and become subject to, the provisions of this Protective Order requiring that the material be held in confidence.

9. Anyone who receives "HIGHLY CONFIDENTIAL" material shall not disclose or permit the disclosure of any such material under this Protective Order to any other person or entity, except that disclosures may be made in the following circumstances:

- (i) Disclosure may be made to employees of counsel for the plaintiffs or the United States, or to current or former employees of the named plaintiffs or the United States (to properly accomplish any purpose or activity described in 26 U.S.C. §§ 6103(h) or (k) and the regulations thereunder), which is appropriate in handling this case.
 - (a) Before any such "HIGHLY CONFIDENTIAL" material is disclosed, the retaining party shall also obtain a copy of the certification in the form annexed hereto as Exhibit B from employees of counsel for the plaintiffs or the United States, or to current or former employees of the named plaintiffs.
- (ii) Disclosures may be made to the Court and its employees.
- (iii) Disclosure may be made to court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of processing, storing, transmitting, or reproducing the material designated as "HIGHLY CONFIDENTIAL" in this case.
- (iv) Disclosure may be made to independent outside experts or consultants retained by plaintiffs or the United States, who are not currently employed by, and have not been employed in the last two years, by any entities that may gain a competitive advantage from access to the material designated as "HIGHLY CONFIDENTIAL."
 - (a) Before any such "HIGHLY CONFIDENTIAL" material is disclosed, the retaining party shall also obtain a copy of the certification in the form annexed hereto as Exhibit B from the independent outside expert or consultant.
- (vi) If any independent outside expert or consultant retained by plaintiffs or the United States is currently employed by or was employed in the last two years by any entities that may gain a competitive advantage from access to the material designated as "HIGHLY CONFIDENTIAL," the

retaining party must obtain written approval from the designating party before disclosing any "HIGHLY CONFIDENTIAL" material to:

- (a) independent outside expert or consultant; or
 - (b) employees and subcontractors of that independent outside expert or consultant in paraprofessional, clerical, stenographic and ministerial positions; and
 - (c) before any such "HIGHLY CONFIDENTIAL" material is disclosed, the retaining party shall obtain a copy of the certification in the form annexed hereto as Exhibit B from the independent outside expert or consultant.
- (vii) Disclosures may be made to any fact witnesses when a good faith determination is made that the material would be relevant to their testimony and prior written approval from the designating party is received.

Other than persons identified in Paragraphs 9(iii) and 9(iv) of this Protective Order, any person to whom counsel for the parties intend to make a disclosure must be first advised of, and become subject to, the provisions of this Protective Order requiring that the material be held in confidence.

10. Except as provided otherwise in this Protective Order, counsel for the parties shall keep all material designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL", which is received under this Protective Order, secure within their exclusive possession and must place such material in a secure area.

11. As defined in Paragraphs 3(i) and 3(ii), material designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," pursuant to Fed. R. Civ. P. 26(c)(1)(G), shall not be disclosed to any person described in Paragraphs 8(v), 9(v), 9(vi), or 9(vii), of this Protective Order until such time as any such person executes a copy of the Confidentiality Agreement in the form annexed hereto as Exhibit A (with regard to "CONFIDENTIAL" material) or Exhibit B (with regard to "HIGHLY CONFIDENTIAL" material), thereby agreeing to be bound by the terms of this Protective Order. The parties shall retain all copies of all Confidentiality Agreements executed by such persons until this action is resolved, at which time, upon request, the parties or their attorneys will exchange all Confidentiality Agreements executed in this action.

12. Nothing in this Protective Order limits the right of any party to seek any protection it deems necessary for any material, in accordance with Federal Rule of Civil Procedure 26.

13. All proceedings before the Court in this case are intended to be public, including any hearing or trial, as well as any material filed with the Court. Accordingly, the designation of any proceeding or filing as "under seal" is disfavored. Notwithstanding the foregoing, any material designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" shall be filed under seal pursuant to Paragraph 3(ii) of this Protective Order. To the extent that any party seeks to use any material designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in any proceeding or public filing, its use shall be subject to the following provisions::

- (i) If any party intends to introduce or publicly file any material designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" pursuant to this Protective Order, it shall serve a written notice or objection to the designating party no less than fourteen (14) days prior to such introduction or filing. This notice shall specifically identify the material that the party wishes to have introduced or filed, or if objecting to the confidentiality designation, have the designation removed.
- (ii) Within fourteen (14) days of receipt of such notice or objection, the designating party:
 - (a) shall review the material to which the notice or objection applies, and
 - (b) notify the party in writing whether the designating party will agree to remove the designation, and
 - (c) if it will not agree to remove the designation, the designating party will state with specificity its reasons for not agreeing, including but not limited to a declaration setting forth the party's good faith basis for designating the material as confidential under Federal Rule of Civil Procedure 26(c).
- (iii) If an agreement cannot be reached, the designating party may move for a ruling from the Court, designating the material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" or for other similar protection, within fourteen (14) days of the expiration of the fourteen (14) day period referenced above. The material at issue will be treated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" until the Court decides the motion. If the challenge includes more than one thousand (1,000) distinct documents, the designating party may request a reasonable extension of time, which will be granted by the challenging party.

- (iv) After receiving notice pursuant to Paragraph 13(i), if the parties disagree about whether the material is "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and the designating party does not timely move the Court pursuant to Paragraph 13(iii), then the material is deemed to be not confidential.
- (iv) If the Court rules that the material is subject to protection under Federal Rule of Civil Procedure 26(c), any proceeding or filing containing such material shall be "under seal," but the "under seal" designation shall be limited to the portion of the proceeding or filing related to the protected material. The remainder of the proceeding or filing shall be public.

14. Nothing in this Protective Order shall prevent disclosure of any "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material if the designating party consents in writing to the disclosure.

15. Material designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and all copies, summaries, compilations, notes, or abstracts thereof shall be used exclusively for this litigation, Steele et al. v. United States, No. 1:14-cv-01523-RDL, and for no other purpose. Notwithstanding the foregoing or any provision of this Protective Order, where counsel for the United States interprets "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material, either on its face or in conjunction with other information, to be a violation or potential violation of law—criminal, civil, or regulatory in nature—the relevant material may be disclosed to the appropriate federal, state, local, foreign, or tribal, law enforcement authority or other appropriate agency charged with the responsibility of investigating or prosecuting such a violation or enforcing or implementing such law.

16. Notwithstanding any provision of this Protective Order, only after providing the designating party with written notice at least seven (7) days prior to the potential disclosure, unless otherwise prohibited by law, the parties may disclose "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material if necessary to comply with a subpoena or court order, whether or not originating with the Court in this captioned Protective Order. The written notice must be provided within seven (7) days of when it is recognized that disclosure of "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material is required to comply with a subpoena or court order. There shall be no disclosure of "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material other than that which is permitted by the remaining provisions of this Protective Order.

17. At the conclusion of this litigation (including any appeals) all material designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" pursuant to the Protective Order shall either be destroyed or returned to the designating party, within


sixty (60) days after the conclusion of the litigation, except with respect to (a) material that becomes part of the Court record in this litigation, (b) work product of counsel, (c) transcripts, exhibits, and other documents required to be maintained by the Department's written record retention policy as necessary for an understanding of the outcome of the case, provided that all material designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in such retained material is maintained in accordance with the provisions hereof.

18. Subject to the provisions of Paragraphs 3(ii) and 13, nothing in this Protective Order shall be grounds for limiting or restricting the use of materials filed with the Court or during a public hearing or trial.

19. This Protective Order may be modified or amended only by an order of this Court or by written agreement between the parties.

SO ORDERED.

DATED: 12/23/19


HON. ROYCE C. LAMBERTH
United States District Judge

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Signatures

/s/ William H. Narwold
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EXHIBIT A

CONFIDENTIALITY AGREEMENT

I have received and read all the terms of the Protective Order in the action captioned Steele v. United States, No. No. 1:14-cv-1523, and understand and hereby agree to be bound by all the terms thereof with respect to the use and disclosure of materials designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL." I further expressly agree that I will not in any way use, disclose, discuss, summarize, reveal or refer to any material designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" for any purpose whatsoever other than as permitted in the terms of the Protective Order, unless the Court hereafter alters the Protective Order or its applicability to me.

Dated:

Signature

Print Name

Print Name, Address,
and Phone Number of
Company or Firm

EXHIBIT B

**CERTIFICATION FOR ACCESS
TO MATERIAL DESIGNATED AS HIGHLY CONFIDENTIAL**

I hereby certify that I am not involved in competitive decision-making for or on behalf of any party to the litigation or any other firm that might gain a competitive advantage from access to the material designated as "HIGHLY CONFIDENTIAL." Neither I nor my employer provides advice or participates in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means, for example, that neither I nor my employer provides advice concerning or participates in decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which material designated as "HIGHLY CONFIDENTIAL" could provide a competitive advantage.

Dated:

Signature

Print Name

Print Name, Address,
and Phone Number of
Company or Firm