

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

GENERAL ELECTRIC COMPANY,)
)
Plaintiff,)
)
V.) Civil Action No. C-87-59-WS
)
THOMAS J. ZUCHOWSKI,)
)
Defendant.)

GENERAL ELECTRIC COMPANY,)
)
Plaintiff,)
) Civil Action No. C-87-249-WS
V.)
)
R SQUARED SCAN SYSTEMS, INC.,)
)
Defendant.)

GENERAL ELECTRIC COMPANY,)
)
Plaintiff,)
) Civil Action No. C-90-78-WS
V.) [Formerly 89-C-8604]
)
R SQUARED SCAN SYSTEMS, INC.,)
)
Defendant.)

**UNITED STATES' MOTION
TO MODIFY THE PROTECTIVE ORDERS
ENTERED ON AUGUST 4, 1987 AND JANUARY 3, 1990**

The United States moves for the modification of Protective Orders entered in the United States District Courts for the

Middle District of North Carolina (Winston Salem Division) and Northern Illinois (Eastern Division).

On August 4, 1987, Protective Orders were entered in General Electric Company v. Zuchowski, C-87-59-WS, and General Electric Company v. R Squared Scan Systems, Inc., C-87-249-WS, both in the Middle District of North Carolina. On January 3, 1990, a nearly identical Protective Order was entered in the Northern District of Illinois in General Electric Company v. R Squared Scan Systems, Inc., 89-C-8604, which was subsequently transferred to this Court, combined with C-87-59-WS and C-87-249-WS, and recaptioned C-90-78-WS. Plaintiff in those cases, General Electric Co., has informed the government that it will not stipulate to a modification of the Protective Orders. The grounds for this motion are set forth in the accompanying Memorandum in Support.

Dated: October , 1996

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION
TO MODIFY THE PROTECTIVE ORDERS ENTERED ON AUGUST 4, 1987 AND
JANUARY 3, 1990**

Introduction

The United States has moved for the modification of Protective Orders ("Orders") entered in three cases.¹ The United States requests that it be allowed to review and use the materials covered by those Orders. The materials are relevant to the Government's pending antitrust suit against General Electric Company ("GE") in the United States District Court in Montana, United States v. General Electric Co., CV-96-121-M, filed August 1, 1996. GE has refused to stipulate to the requested modification.

Background

On August 4, 1987, U.S. Magistrate Eliason entered Protective Orders in General Electric Company v. Zuchowski, C-87-59-WS (M.D.N.C.), and General Electric Company v. R Squared Scan Systems, Inc., C-87-249-WS (M.D.N.C.). [Exhibit #1]. The Protective Orders limited the disclosure of certain pleadings and deposition testimony.

¹ Those cases are: General Electric Company v. Zuchowski, C-87-59-WS (M.D.N.C.); General Electric Company v. R Squared Scan Systems, Inc., C-87-249-WS (M.D.N.C.); and General Electric Company v. R Squared Scan Systems, Inc., 89-C-8604 (N.D.I.) (recaptioned C-90-78-WS).

On January 3, 1990, Judge Plunkett entered a nearly identical Protective Order in General Electric Company v. R Squared Scan Systems, Inc., 89-C-8604, in the United States District Court for Northern Illinois, Eastern Division. [Exhibit #2]. Matter 89-C-8604 ultimately was combined with C-87-59-WS and C-87-249-WS and recaptioned C-90-78-WS where Judge Tilley presided over the Orders' implementation. All three cases were resolved through settlement.

The Orders restricted the use of materials claimed to be "confidential" or "sensitive" that the parties obtained or created during the litigations. As a result, certain pleadings were filed under seal, and some deposition testimony taken in these actions may be protected from disclosure (collectively, the "Litigation Materials").

On April 13, 1994, the United States served Civil Investigative Demand ("CID") No. 10677 on GE as part of an investigation into GE's conduct in the medical imaging equipment industry. The Litigation Materials were among those documents responsive to the CID. The CID statute specifically provides that responsive materials must be produced even when they are covered by protective orders. 15 U.S.C. §1312(c)(2) (1987). GE produced those Litigation Materials that it had in its possession, [Exhibit #3, 4] however, GE, did not produce all relevant deposition transcripts, and pleadings filed "under

seal." GE stated it no longer physically possessed such materials, and thus could not produce them. [Exhibit #5]. The Final Judgment and Decree required R Squared to return or destroy all materials in its possession subject to the Orders. Therefore, this Court and the court reporters are likely the only sources for these materials.

On August 1, 1996, in the United States District Court for Montana, the United States filed a civil antitrust complaint against GE. The United States continues to seek access to certain Litigation Materials in connection with this lawsuit.

Accordingly, the United States requests that this Court modify the subject Orders to allow the United States to obtain and review Litigation Materials whose disclosure the Orders would otherwise prohibit.

Discussion

I. Providing the United States with access to the Litigation Materials would be in the public interest.

A. Providing the United States with access to the Litigation Materials would meet the objectives of Congress and the courts.

On August 1, 1996, the United States filed a complaint in District Court in Montana charging GE with engaging in certain anticompetitive licensing practices in connection with the software at issue in the previous R Squared litigation.

Pleadings filed and depositions taken in the R Squared cases are relevant to the Government's litigation.

Congress and the courts have recognized that the government may want to gain access to the "products of discovery" taken in private antitrust litigation, and that providing such access will promote efficient and effective law enforcement without jeopardizing the interests intended to be served by Protective Orders.² See 15 U.S.C. §1312(c)(2); United States v. GAF Corporation, 596 F.2d 10 (2d Cir. 1979). Indeed, in 1980 Congress amended the Antitrust Civil Process Act to specifically provide that a valid CID for the products of discovery supersedes any inconsistent protective order. 15 U.S.C. §1312(c)(2). In doing so, Congress codified the decision of the Court of Appeals in GAF, which held that a protective order could not prevent the United States from obtaining confidential materials discovered during a private antitrust action. Id. See also Philips Petroleum Co. v. Pickens, 105 F.R.D. 545 (N.D. Texas 1985)(protective orders modified to permit subpoena recipients to produce documents covered by the orders).

² The Supreme Court has stated that private antitrust suits, like the one R Squared brought against GE, "supplement[] Government enforcement of the antitrust laws." United States v. Borden, 347 U.S. 514, 518 (1954). One way that such private actions supplement the Government's efforts is by gathering information for the Government's review and use in its antitrust enforcement efforts.

- B. The Litigation Materials do not merit any special protection from disclosure to the Government.

GE has no legitimate interest in preventing the Government from obtaining access to the Litigation Materials. Protective orders are appropriate to protect parties from annoyance, embarrassment, oppression, undue burden or expense, or to protect trade secrets or other valuable business information.

Fed.R.Civ.P. 26(c). Preventing the government from obtaining access to the Litigation Materials serves none of those legitimate interests.

First, there has been no determination made that the Litigation Materials in fact warrant special protection from disclosure. The Orders appear to have been drafted to allay GE's concerns about providing proprietary material to a competitor. The first two Protective Orders were entered because Magistrate Eliason determined that they would promote unrestricted discovery:

[T]he Court approves the Protective Order in order to minimize discovery problems and to promote, to the fullest extent possible, unrestricted discovery without Court intervention.

Supplemental Protective Order, C-87-59-WS and C-87-249-WS

(M.D.N.C.), at 2. In entering the initial Protective Orders, however, the Court made no effort to determine if any material was of such a confidential nature that it should be protected:

By approving this Order, this Court is not ruling on whether any document or information is, in fact, entitled to protection under Rule 26(c).

Id.

Second, the government is only asking to be placed in the same position that R Squared was with respect to the materials. If the Court was willing to let R Squared, a competitor of GE, obtain the materials under certain restrictions, the Court should be willing to let the United States obtain the materials under those same restrictions.

Finally, GE cannot credibly claim any prejudice if the Court modifies the Orders to permit Government access to the materials. GE would have been obligated to provide the materials to the United States if GE had them in its possession when it received the CID. GE should not be given the ability to circumvent United States' discovery by claiming confidentiality or protection simply because it has destroyed or relinquished its copies of the materials.

Relief Requested

The United States wishes to have the Litigation Materials available for possible use in its suit against GE, just as they were available to the litigating parties in the original suits. We propose the following modifications to the Orders:

1. The language of ¶ 3 of the Orders should be modified to state that the list of "Qualified Persons" includes:

(g) The United States and its representatives, including any independent accountants, statisticians, economists or other technical experts employed by the United States as an expert or consultant. The United States may disclose Confidential Information to GE's officers, or to the author or addressee, or any person who, as a matter of record, actually received a document designated as confidential.

2. The language of ¶ 4(a) of the Orders should be modified to state that the United States and its representatives are among the parties to whom "Sensitive Confidential" or "Secret" information may be disclosed. This may be brought about most efficiently by including the following sentence at the end of ¶ 4(a):

For the purpose of this Protective Order, the United States may receive and use "Sensitive Confidential" or "Secret" materials to the same extent as trial counsel of record.

3. The language of ¶ 12 should be modified to permit disclosure of the Litigation Materials in the United States' action against GE, styled United States v. General Electric Co., CV 96-121-M (District of Montana), subject to whatever protective order that court may elect to impose.
4. The United States should not be prejudiced in its ability to challenge the Protective Orders, or any aspect of them, any more than any non-litigating party.

We believe these modifications would be sufficient to allow the United States to obtain and use the Litigation Materials while continuing to fully protect GE's confidentiality needs.

CONCLUSION

For all of the above reasons, the subject Protective Orders should be modified as set forth in the attached proposed order.

Respectfully submitted,

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**ORDER MODIFYING PROTECTIVE ORDERS
ENTERED ON AUGUST 4, 1987 AND JANUARY 3, 1990**

IT IS HEREBY ORDERED as follows:

1. Paragraph 3 of the Protective Orders are modified to include:

(g) The United States and its representatives, including any independent accountants, statisticians, economists or other technical experts employed by the United States as an expert or consultant. The United States may disclose Confidential Information to GE's officers, or to the author or addressee, or any person who, as a matter of record, actually received a document designated as confidential.

2. Paragraph 4(a) of the Orders are modified to include, at the paragraph's end:

For the purpose of this Protective Order, the United States may receive and use "Sensitive Confidential" or "Secret" materials to the same extent as trial counsel of record.

3. Paragraph 12 of the Orders are modified to permit disclosure of the Litigation Materials in the United States action against GE, styled United States v. General Electric Co., CV96-121-M (District of Montana).
4. The United States is not prejudiced in its ability to challenge the Protective Orders, or any aspect of them, any more than any non-litigating party.

SO ORDERED

Dated: