

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Postal Rate and Fee Changes,
2006

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Docket No. R2006-1

**ANSWER OF ALLIANCE OF NONPROFIT MAILERS
AND NATIONAL ASSOCIATION OF PRESORT MAILERS
TO MOTION OF DR. JAMES CLIFTON
FOR PROTECTIVE ORDER AND EXPEDITED RELIEF
(November 1, 2006)**

Pursuant to Presiding Officer's Ruling No. R2006-1/95 (issued Oct. 30, 2006), the Alliance of Nonprofit Mailers ("ANM") and National Association of Presort Mailers ("NAPM") answer the October 27 Request For Expedited Relief And Motion Of The Greeting Card Association On Behalf Of Dr. James Clifton For Protective Order Concerning GCA Production In Response To ANM/GCA-1 ("Clifton Motion"). This pleading also constitutes ANM's notice of disclosure of materials pursuant to ordering paragraph 3 of the Ruling. While the Commission's decision to enter a temporary protective order was understandable, Dr. Clifton's request for a protective order should be denied, and the temporary protective order should be vacated.

SUMMARY

(1) GCA and Dr. Clifton have waived any right to a protective order by failing to seek it in time. Parties that desire a protective order to shield discovery responses from public disclosure must request such relief from the tribunal before, not after, producing the supposedly sensitive material. This requirement serves important policy

interests. It promotes orderly discovery; avoids the disruption of 11th-hour emergency requests for relief and after-the-fact investigations into the whereabouts of previously distributed documents; and provides litigants with the assurance that the sharing of discovery responses will not lead to questions about the participants' integrity and *bona fides*.

GCA is represented by experienced regulatory counsel, and Dr. Clifton is an experienced professional witness before the Commission and other tribunals. Both GCA counsel and Dr. Clifton knew, or should have known, that his March 2006 study for GCA would likely be a subject of discovery after the filing of his September 2006 testimony for GCA. Yet GCA made no attempt to seek protective conditions until October 27—three days *after* providing the March 2006 study and other documents at issue to ANM counsel. Moreover, there is no indication that Dr. Clifton took any steps before October 27 to put GCA counsel on notice that they should seek such relief on his behalf.¹

The courts have repeatedly held that the failure of a party to take reasonable steps to protect a document before producing it in discovery constitutes a waiver of any right to a protective order. Dr. Clifton has identified no extenuating circumstances that might warrant a contrary outcome here. To the contrary, his belated demand for relief from his own improvidence, filed less than one business day before GCA witness

¹ It is telling that GCA, although nominally the moving party, disclaims any request for relief on its own behalf. See Clifton Motion at 2 (“GCA is a stranger to this issue in that it does not seek or claim a basis for a protective order on its own behalf”). In addition, GCA carefully avoids taking any position on the truth of Dr. Clifton’s claim. See *id.* at 1 (“According to Dr. Clifton . . .”).

Kelejian, the source of the documents, was scheduled to appear on the witness stand, disrupted the activities of the Commission and prejudiced the interests of parties adverse to GCA. ANM and NAPM, which had been planning to cross-examine Dr. Kelejian, spent the weekend instead researching and drafting this response and tracking down the distribution of the documents at issue.

(2) A protective order would be unwarranted even if Dr. Clifton's request were timely. Protective orders are an exception to the general policy that government proceedings should be transparent and open to the public. For this reason, the showing of "good cause" required by Rules 26(g), 27(e) and 31a(b) necessarily includes a showing that that disclosure of the information at issue will cause a "clearly defined and very serious injury." Dr. Clifton has not begun to make such a showing.

To the extent that the path of Dr. Clifton's reasoning can be discerned, he seems to be claiming that public disclosure of the March 2006 GCA study would (1) allow NAPM and ABA to obtain material that is "relevant, or otherwise potentially relevant to his collateral dispute with NAPM and ABA" over his termination last month as their expert witness; and (2) destroy the commercial value of the portion of the March 2006 GCA study that provides "analyses and estimates of cross elasticities for worksharing mail that did not appear in my testimony," which material Dr. Clifton apparently hopes to resell to other customers. See Clifton Motion at 1; Clifton Decl. ¶ 7.²

² The portion of the Clifton Motion drafted by GCA counsel also states that, "[a]ccording to Dr. Clifton, NAPM seeks material contained in the March study for which it owes Dr. Clifton, but has not yet paid him." Clifton Motion at 1. This appears to misstate Dr. Clifton's position. His Declaration does not claim that NAPM commissioned the March 2006 study, agreed to pay for it, or was even aware of its existence before the GCA produced it in discovery.

Disclosure of Dr. Clifton's March 2006 study to GCA to the adjudicator in any subsequent litigation against NAPM and ABA would undoubtedly be prejudicial to him, for timing of the report casts serious doubt on the good faith of his subsequent representations to NAPM that he was not planning to propose on behalf of GCA a shift in institutional cost coverage from single-piece First-Class Mail Standard Mail. The imposition of a protective order here does not solve this problem, however, because the conceded relevance of the document would entitle NAPM and ABM to production of the document anew in any future litigation. In any event, the Commission need not (and should not) attempt to prejudge this issue, which (as GCA admits) is "collateral" to this rate case, and indeed beyond the Commission's jurisdiction.

Finally, the supposed conspiracy among ANM, NAPM, ABA, and individual members of those groups to "free ride" on Dr. Clifton's "analyses and estimates of cross elasticities for worksharing mail that did not appear in [his] testimony" is a fantasy. Dr. Clifton has offered no evidence that anyone other than GCA would pay for this work, and no one has expressed any commercial interest in it to ANM or NAPM. Moreover, the makeweight nature of this claim is underscored by the failure of Dr. Clifton to make any effort to market the study to NAPM—an existing client and, under his theory, an obvious target for marketing the study—before September 27, 2006. Finally, it is unclear that Dr. Clifton even has standing to assert a commercial interest in the GCA report, which on its face appears to be work for hire, and thus owned by GCA.

STATEMENT OF FACTS

A. ANM's Document Requests To GCA

On October 4, 2006, ANM filed a request for a variety of documents and workpapers underlying the testimony of Dr. Clifton (GCA-T-1) and Prof. Kelejian (GCA-T-5). The requested documents included, *inter alia*:

- Background or preparatory information provided to Professor Harry Kelejian for his work in this proceeding.
- Drafts of the testimony of GCA witness Dr. James A. Clifton in this proceeding that were furnished to Professor Kelejian before he completed his Declaration.
- Communications by Professor Kelejian concerning (i) Dr. Clifton's testimony for GCA in this proceeding (GCA-T-1), or (ii) drafts of that testimony.
- Drafts of Professor Kelejian's Declaration that were furnished to Dr. Clifton before he completed GCA-T-1.
- Communications by Dr. Clifton concerning (i) the Declaration of Professor Kelejian filed as Appendix C to GCA-T-1, or (ii) drafts of that Declaration.
- Communications by Professor Kelejian concerning (i) the prefiled testimony of USPS witness Thress (USPS-T-7) or (ii) the related interrogatory answers and oral testimony of Mr. Thress.
- Any other communications by Professor Kelejian to assist Dr. Clifton in this proceeding.
- Any other communications by Dr. Clifton to assist Professor Kelejian in this proceeding.
- Any communication between Professor Kelejian and Dr. Clifton about any matter covered in Professor Kelejian's Declaration or Dr. Clifton's testimony for GCA.

First Discovery Requests of ANM to GCA (ANM/GCA-1) (filed Oct. 4, 2006).

Discovery requests of this kind are conventional and well established. Contemporary discovery rules entitle litigants to discover any written communications and other documents that were provided to and considered by an expert retained to testify on behalf of an opposing party. For example, Rule 26(a)(2) of the Federal Rules requires such litigants to submit a written report, prepared and signed by the expert witness, which must contain (*inter alia*) “a complete statement of all opinions to be expressed and the basis and reasons therefor,” and “the data or *other information considered by the witness*” in forming the opinions. Fed.R.Civ.P. 26(a)(2)(B) (emphasis added). In the absence of a directive from the court, the report and the information considered by the expert must be provided at least 90 days before trial. Fed.R.Civ.P. 26(a)(2)(C).

As a result of these requirements, “counsel should now expect that any written or tangible data provided to testifying experts will have to be disclosed.” Wright, Miller & Marcus, *Federal Practice and Procedure: Civil 2d*, § 2031.1, at 442 (1994).³ Courts have therefore held that documents or information transmitted to or from a testifying expert, including draft reports, are discoverable if the expert considered them—even if he ultimately rejects them.⁴ When “the expert has read or reviewed the privileged

³ Although a few cases suggest that an expert must have actually read or reviewed a document to trigger the disclosure requirements of Rule 26(a)(2), even these cases make clear that the burden of showing that the expert did not read or review the document lies with the party resisting discovery. *E.g.*, *United States Fidelity & Guaranty co. v. Braspetro Oil Servs. Co.*, 2002 WL 15652, at *7 (S.D.N.Y., Jan. 7, 2002).

⁴ *See, e.g.*, *Fidelity Nat. Title Ins. Co. of N.Y. v. Intercounty Nat’s title Ins. Co.*, 412 F.3d 745, 751 (7th Cir. 2005) (“A testifying expert must disclose and therefore retain whatever materials are given him to review in preparing his testimony, even if in the end he does not rely on them in formulating his expert opinion”); *In re Pioneer Hi-Bred International, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001); *McDonald v. Sun Oil Co.*, 423 F.Supp.2d 1114, 1122 (D. Ore. 2006); *Kooima v. Zacklift International, Inc.*, 209 F.R.D. 444, 447 (footnote continued on next page)

materials before or in connection with formulating his or her opinion, the expert will be deemed to have ‘considered’ those materials for purposes of Rule 26(a)(2)(B).” *Johnson v. Gmeinderi*, 191 F.R.D. 638, 649 (D. Kan. 2000).⁵

The courts have likewise recognized that recognized documents considered by an expert are appropriate material for cross-examination. See, e.g., *Fidelity Nat. Title Ins. Co. of N.Y.*, 412 F.3d at 750 (production is necessary “because such materials often contain effective ammunition for cross-examination”); *In re Pioneer Hi-Bred International, Inc.*, 238 F.3d at 1375 (revised Rule 26 “proceeds on the assumption that

(D. S.D. 2002) (documents and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party, regardless of whether the expert relied on them in preparing his report); *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61, 62 (D. N.M. 1996) (when Rule 34(c), which provides that a person not a party to the action can be compelled to produce documents and things or to submit to a subpoena, is read with Rule 26(a)(2), “it is clear that all documents provided to a party’s expert witness must be produced on request”). See also, e.g., *Southern Union Co. v. Southwest Gas Corp.*, 180 F.Supp.2d 1021, 1060 (D. Ariz. 2002) (defendant should have produced with its expert reports all documents that its expert witnesses considered, even if the experts did not ultimately rely on the documents in forming their opinions); *Weil v. Long Island Savings Bank FSB*, 206 F.R.D. 38, 39 (E.D.N.Y. 2001) (documents and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party irrespective of whether the expert relies on the documents or information in the preparation of his report); *TV-3, Inc. v. Royal Ins. Co. of America*, 193 F.R.D. 490, 492 (S.D. Miss. 1990) (same); *Barna v. United States*, 1997 WL 417847, at *3 (N.D. Ill., July 23, 1997) (requiring production of documents that might have been reviewed by any of government’s experts in reaching their conclusions). In addition, although there is a split of opinion on the issue, some courts have held that information given to an expert that contains attorney work product must be disclosed to the other party. E.g., *McDonald*, 423 F.Supp.2d at 1122.

⁵ See also *Karn v. Intersoll-Rand Co.*, 168 F.R.D. 633, 635 (N.D. Ind. 1996) (“‘Considered,’ which simply means ‘to take into account,’ clearly invokes a broader spectrum of thought than the phrase ‘relied upon,’ which requires dependence on the information. . . . In this case, the experts reviewed the documents in connection with formulating their opinions. Thus, they ‘considered’ the information, requiring disclosure”).

fundamental fairness requires disclosure of all information supplied to a testifying expert in connection with his testimony”).⁶

B. GCA’s Response To ANM’s Document Requests

GCA, which is represented by experienced regulatory counsel, neither objected to ANM’s document requests nor requested that production be subject to a protective order. On October 23, 2006—nineteen days after the filing of the requests—GCA informed ANM that the documents were available for inspection at the offices of GCA counsel.⁷ On the evening of October 24, counsel for ANM (David Levy) visited the offices of GCA counsel (James Horwood and Peter Hopkins); inspected the documents, which the GCA lawyers had placed in a conference room for reviewing; and identified which documents ANM wished to have copied. Approximately 30-60 minutes then passed while an assistant to GCA counsel copied the requested documents. When the

⁶ *Accord, Estate of Manship v. United States*, 236 F.R.D. 291, 296-297 & n.5 (M.D. La. 2006) (requiring that documents considered by experts in rendering valuation opinions be produced to the United States, because absent such production “the United States will be unable to conduct a thorough cross-examination of those witnesses and will be unable to allow its own experts to review the same information ‘considered’ by the plaintiffs’ experts. . . . Without access to the materials reviewed by an expert witness, the opposing party will be denied the opportunity to a full and fair cross-examination”); *Jackson v. Gmeinder*, 191 F.R.D. at 645-647 (obtaining materials or documents “considered” by a testifying expert is “crucial if an adverse party is to determine the extent to which the opinion of the expert may have been influenced by counsel or by non-testifying experts. Without the materials, the opposing party will be denied the opportunity to a full and fair cross-examination of the expert witness”). See also, e.g., *Weil v. Long Island Savings Bank FSB*, 206 F.R.D. at 41 (“requiring disclosure of all material considered by the expert, including core attorney work product, will help promote more effective cross-examination, and will reveal the extent, if any, of the influence counsel may have had on the expert’s testimony”).

⁷ Responses of GCA Witness Harry Kelejian (GCA-T5) to Discovery Requests of ANM to GCA (ANM/GCA-1) (filed Oct. 23, 2006).

copies were finished, Horwood gave them to Levy, who carried them back to his own office.

At no time before or during the document production did GCA or its counsel offer any indication, written or oral, that GCA intended to seek protective conditions on production of the documents, or regarded them as commercially sensitive or proprietary.

The most significant document produced by GCA was a 95-page study, entitled "The Elasticity of First Class Mail in the Presence of Competing Substitutes," that GCA commissioned from Dr. Clifton's consulting firm, Washington Economics Consulting Group, Inc., earlier this year. The study is dated March 31, 2006. The title page states that the study was "Prepared for The Greeting Card Association." For the Commission's reference, ANM has filed two copies of the study under seal as library reference ANM-LR-1.

Most of the document appears to be a preliminary version of GCA-T-1, the testimony of Dr. Clifton filed by GCA on September 6, 2006. In Dr. Clifton's words, the March 2006 study "presents alternative elasticity estimates for FCLM [First-Class Letter Mail] than those made by the USPS," and "contains similar, if not identical arguments for those contained in my testimony for GCA." Clifton Decl. (Oct. 27, 2006) ¶¶ 6-7. GCA's response to ANM discovery request ANM/GCA-1 indicates that the March 2006 study was part of the material that GCA provided to Professor Kelejian to review in preparation for his own work for GCA.

In addition to Dr. Clifton's March 2006 study, the documents copied by GCA at ANM's request included several e-mails between Dr. Clifton and Professor Kelejian; and several pages of handwritten notes apparently made by Professor Kelejian.

C. Further Distribution Of The Documents

The Commission's rules do not restrict parties from sharing discovery responses in the absence of a protective order, and document sharing of this kind is a common means of reducing litigation costs in complex multiparty cases. *See, e.g., Manual for Complex Litigation (Fourth)* § 11.423 (2004) (when information is available from discovery conducted by others in the same litigation, court should consider requiring parties to review those materials before undertaking additional discovery; discovery responses in another action ordinarily are admissible if made by and offered against a party in the current action).⁸ On October 25, consistent with this practice, counsel for ANM made copies of some of the GCA discovery responses, including Dr. Clifton's March 2006 study, for representatives of ANM and two other parties that are allied with ANM in opposition to Dr. Clifton's rate proposals for GCA: (1) Eric Koetting (an attorney

⁸ *See also id.* § 11.423 (in multiparty cases with no designated lead counsel, judges sometimes require parties with similar positions to submit a combined set of discovery requests); *id.* § 11.464 (court should consider requiring similarly situated parties to confer and develop a single or master set of interrogatories to be served an opposing party, and to bar parties from propounding questions that have been previously asked in other litigation, where such answers are available or may be made available by the adversary); *id.* § 22.83 (court should encourage or require parties with similar interests to confer and fashion joint interrogatories to prevent multiple requests for the same information). In addition, committees of counsel are often formed (or appointed by the court) to conduct common discovery for all plaintiffs or all defendants. *See id.* § 10.221; *In re Abbott Laboratories Omniflox Products Liability Litigation*, 1997 WL 162891, at *1-2 (attorneys appointed by court to pursue common discovery for all plaintiffs in multidistrict tort litigation were entitled to recovery reasonably necessary expenses).

for the Postal Service); (2) Joel T. Thomas (Executive Director of NAPM); and (3) Lawrence G. Buc (an economic consultant for ANM). ANM counsel sent the copies to the offices of the three recipients by messenger and overnight courier.

D. Dr. Clifton's Request For An After-The-Fact Protective Order

At 11:36 a.m. on Friday, October 27, counsel for GCA filed a "Request For Expedited Relief And Motion Of The Greeting Card Association On Behalf Of Dr. James Clifton For Protective Order Concerning GCA Production In Response To ANM/GCA-1." GCA, although nominally the moving party, stated that it was not seeking relief for itself, and was filing the Request only as an accommodation to Dr. Clifton. See Clifton Motion at 2 ("GCA is a stranger to this issue in that it does not seek or claim a basis for a protective order on its own behalf"). In addition, GCA took no position on the truth of Dr. Clifton's claims. See *id.* at 1 ("According to Dr. Clifton . . .").

The undersigned counsel learned of the request later that afternoon, and spent much of the weekend researching and drafting a response. We also checked with Messrs. Koetting, Thomas and Buc to determine the extent of any further copying of the discovery documents for other recipients. They responded as follows:

- Mr. Koetting stated that the Postal Service had made further copies of the material for other individuals in the Postal Service's rate case effort.
- Mr. Thomas stated that he had not disclosed the documents to anyone else.
- Mr. Buc was tied up on other matters through October 27, when Dr. Clifton filed his request for protective conditions. Upon learning of the tenor of Dr.

Clifton's allegations, Mr. Buc returned his package of the material to ANM counsel unopened.

At about 9:30 a.m. on Monday, October 30, ANM counsel was advised by Commission counsel that the Commission had entered a temporary protective order. On October 31, the undersigned counsel, along with Mr. Thomas, filed Certifications with the Commission pursuant to the protective order.

ARGUMENT

I. THE FAILURE OF GCA AND DR. CLIFTON TO SEEK A PROTECTIVE ORDER BEFORE PRODUCING THE REQUESTED INFORMATION CONSTITUTED A WAIVER OF PROTECTION.

GCA and Dr. Clifton have waived any right to a protective order by failing to seek it before producing the material at issue. The case law is clear that a parties that wishes to shield discovery responses from public disclosure must request such relief from the tribunal before, not after, producing the supposedly sensitive material. The courts routinely deny protective orders where the documents in question already have been produced without restrictions on their use or dissemination. This rule promotes orderly discovery; avoids the disruption of 11th-hour emergency requests for relief and time-consuming after-the-fact investigations into the paper trail of previously distributed documents; and gives litigants assurance that sharing discovery responses in reliance on the absence of a protective order will not put the participants' integrity and *bona fides* under a cloud.⁹

⁹ See, e.g., *In re National Mortgage Equity Corp Mortgage Pool Certificates Litigation*, 821 F.2d 1422, 1425 (9th Cir. 1987) (holding that the District Court's denial of motion for (footnote continued on next page)

Commission practice is consistent with this. Parties that wish to shield sensitive material from public disclosure have long been on notice that the appropriate means for obtaining such protection is to file a motion for protective conditions under Rules 26(g), 26(e) and 31a *before* producing the material. See, e.g., Presiding Officer's Ruling No. R2006-1/5 (request of USPS for protective order); Presiding Officer's Ruling No. R2006-1/51 (request of MPA and ANM for protective order); Presiding Officer's Ruling No. MC2006-3/6 (request of Washington Mutual for protective order); Presiding Officer's Ruling No. MC2005-3/2 (request of Bookspan for protective order).

Neither GCA nor Dr. Clifton complied with this procedure here. GCA did not request protective conditions until October 27, three days *after* providing the March

protective order was not an appropriate subject for the exercise of mandamus jurisdiction, because defendant had already produced the documents in dispute – which the defendant had previously claimed were privileged – only subject to the condition that the documents be returned if its appeal of the District Court's decision was successful); *Sherwin-Williams Co. v. Spitzer*, 2005 WL 2128938, at *15 (N.D.N.Y. 2005) (ruling that records to be produced would not be cloaked by a protective order to the extent that they “already have been placed in the public's view”); *Hollinger International Inc. v. Hollinger Inc.*, 2005 WL 3177880, at * 6 (N.D. Ill., Jan. 19, 2005) (declining to issue blanket protective order covering all of information claimed to be “confidential” by defendant, where some of the information already was in the public domain); *DVI Financial Service Inc. v. Florida Heart, LLC*, 2003 WL 21961977, at *5 (E.D. Pa., June 23, 2003) (ruling that documents that defendants had previously provided to a third party without restrictions would not be a proper subject for a motion for a protective order); *Topol v. Trustees of the University of Pennsylvania*, 160 F.R.D. 476, 477 (E.D. Pa. 1995) (denying plaintiff's request for protective order against discovery of her diary in sexual harassment litigation against professor, because plaintiff's complaint had already disclosed some of the intimate details of her sexual relationship with the professor); *Nestle Foods Corp. v. Aetna Casualty and Surety Co.*, 129 F.R.D. 483 (D. N.J. 1990) (denying defendants' request for protective order that would require that all documents and other discovery material provided to plaintiff be treated as confidential and used only for purposes of the lawsuit; defendants had already produced some of the documents to the plaintiff without a protective order, defendants had been “quite open in sharing the allegedly confidential information with their competitors,” and some of the documents were 30 years old).

2006 study and other documents at issue to ANM counsel. Neither GCA nor Dr. Clifton contends that he asked GCA counsel to seek such protection before then. And the March 2006 report has none of the markings customarily used to put readers on notice that the document is commercially sensitive. It contains no mention of an existing or pending protective order; no claim of proprietary status; no copyright mark (“©”) or claim (e.g., “All rights reserved”); no statement that the document “may not be copied in whole or in part without the written permission of” GCA or Dr. Clifton; no other indication that its distribution should be restricted to GCA; no indication that the document has any commercial value beyond its use as an advocacy piece for GCA; and no indication that Dr. Clifton or his consulting firm claim any residual property rights in the report or its content—a significant omission, because the report appears to be a work for hire, and therefore owned by GCA rather than Dr. Clifton or his firm.¹⁰

Dr. Clifton has identified no extenuating circumstances that might excuse this improvidence. GCA is represented by experienced regulatory counsel, and Dr. Clifton is an experienced professional witness before the Commission and other tribunals. Both GCA counsel and Dr. Clifton knew, or should have known, that his March 2006 study for GCA would likely be a subject of discovery after the filing of his September 2006 testimony for GCA.

¹⁰ See 17 U.S.C. § 201(b) (copyright to work for hire owned by entity that paid for the work, absent written agreement to the contrary). As noted above, GCA, although nominally the moving party, disclaims any request for relief on its own behalf. See Clifton Motion at 2 (“GCA is a stranger to this issue in that it does not seek or claim a basis for a protective order on its own behalf”).

Moreover, Dr. Clifton's belated demand for relief, filed less than one business day before the scheduled appearance of GCA witness Kelejian, the source of the documents, disrupted the activities of the Commission and prejudiced the interests of parties adverse to GCA. ANM and NAPM, which had been planning to cross-examine Dr. Kelejian, spent the weekend instead researching and drafting this response and tracking down the distribution of the documents at issue. Denial of the requested relief is appropriate to deter future abuses of this kind.

Ample precedent justifies this course. For example, in *Western United Life Assurance Co. v. Fifth Third Bank*, 2004 WL 2583920 (N.D. Ill., Nov. 12, 2004), the plaintiff produced a memorandum voluntarily to the government, without attaching any restrictions or conditions to the production (and with no claim that the memorandum was privileged or confidential). When the plaintiff later learned that one of the other defendants had come into possession of the memorandum (apparently because a co-defendant had acquired the memorandum from the government during the course of discovery in a related criminal proceeding), the plaintiff moved for a protective order preventing the defendant from obtaining or using the memorandum. The court denied the motion, finding that the plaintiff had waived any work product protection because it "produced the documents at issue, without taking any steps to safeguard their contents, apparently without considering that the government was embarking on a prosecution of [its co-defendant] that would likely result in the government's eventual production of those documents to [the co-defendant] through discovery." *Id.* at *3. Although the plaintiff contended that the court's refusal to issue a protective order would effectively be punishing it for its cooperation with the government, the court found that "It is not punishment to refuse Western's request to put the genie back in the bottle and treat

these documents in a manner Western could not be bothered to treat them when it counted.” *Id.* at *4.

Similarly, in *United States v. White*, 2004 WL 2399731 (E.D. Pa., Sept. 22, 2004), the court denied the government’s motion for a protective order restricting defense counsel from disclosing discovery materials except for the purpose of preparing for trial, because the government had previously produced the documents to the defense without attaching conditions to their disclosure. When the government produced the documents (which fell into five categories), it sought a protective order limiting the disclosure of one of the categories of documents—but not for the other four categories (which included grand jury testimony). Subsequently, the media carried reports based on the grand jury testimony disclosed to defense counsel. In denying the motion for a protective order, the court stated that the “most important factor” in its decision was “that the government elected to disclose all of its grand jury and other investigative materials to defense counsel . . . and without any restrictions (except as to Title III materials).” *Id.* at *6.

In short, when the “horse is already out of the barn,” a protective order should not issue. *See, e.g., Nestle Foods Corp. v. Aetna Casualty and Surety Co.*, 129 F.R.D. at 486-487 (denying defendants’ motion for a protective order as untimely, since it was filed more than two months after the date set for responding to subpoena); *United States v. Panhandle Eastern Corp.*, 118 F.R.D. 346, 350-351 (D. Del. 1988) (motion for protective order denied as untimely because defendants filed motion three weeks after the due date for the discovery); *United States v. IBM*, 70 F.R.D. 700 (S.D.N.Y. 1976) (motion for protective order was untimely because it was filed after return date for

subpoena); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004) (refusing to issue order sealing District Court's reference, in its unsealing order, to confidential information, since order had already become available on the databases of Westlaw and LEXIS, and the reference in the order had been described in newspaper reports).

II. EVEN IF DR. CLIFTON'S REQUEST FOR A PROTECTIVE ORDER WERE TIMELY, HE HAS FAILED TO MAKE THE NECESSARY SHOWING OF INJURY.

Protective orders are extraordinary remedies, because they are contrary to the general policy of keeping government proceedings transparent and open to the public. *See, e.g., Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178-1179 (9th Cir. 2006) (because courts have recognized a general right to inspect and copy public records and documents, including judicial records and documents, a "strong presumption of access" exists, and a party seeking to seal a judicial record must articulate "compelling reasons" that "outweigh the general history of access and the public policies favoring disclosure"); *American Telephone and Telegraph Co. v. MCI Communications Corp.*, 594 F.2d 594, 596 (7th Cir. 1978) ("As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings").¹¹

¹¹ *See also, e.g., Foltz v. State Farm Mutual Automobile Ins. Co.*, 331 F.3d 1122, 1134-1135 (9th Cir. 2003) (given the federal common law right to inspect and copy public records and documents, there is a "strong presumption" in favor of access to court records, which can be overridden only if "given sufficiently compelling reasons for doing so"); *San Jose Mercury News, Inc. v. U.S. District Court – Northern District (San Jose)*, 187 F.3d 1096, 1103 (9th Cir. 1999) (fruits of pretrial discovery are "presumptively public"); *Citizens First National Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (because "the public at large pays for the courts and therefore has an interest in what goes in at all stages of a judicial proceeding," that interest can be (footnote continued on next page)

For this reason, protective orders may be issued only upon a showing of “good cause.” See Clifton Motion at 2 (quoting Rule 26(g)); see also Rule 31a(b) (authorizing presiding officers to place documents and testimony under seal “only in those unusual and exceptional circumstances when good cause is found on the record”). To establish “good cause,” the party seeking to shield information from public disclosure must show disclosure “will result in a clearly defined and very serious injury.” *Andrew Corp. v. Rossi*, 180 F.R.D. 338, 340 (N.D. Ill. 1998). This showing must include “a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n. 16 (1981). See also, e.g., *Hollinger International Inc. v. Hollinger Inc.*, 2005 WL 3177880, at *2 (N.D. Ill., Jan. 19, 2005); 6 *Moore’s Federal Practice—Civil* § 26.104[1] (2006) (“good cause” requirement of Rule 26 of Federal Rules is met when “it is specifically demonstrated that disclosure will cause a clearly defined and serious injury”).

overridden only if the property and privacy interests of the litigants “predominate in the particular case”); *In re “Agent Orange” Product Liability Litigation*, 821 F.2d 139, 145-146 (2d Cir. 1987) (public has a “presumptive right of access to discovery materials,” and therefore should be open to public for inspection absent showing of good cause for protective order); *Balter v. RBC Dain Rauscher, Inc.*, 2006 WL 1168889, at *9 (D. Nev., May 1, 2006) (describing a protective order as “extraordinary relief”); *Cohen v. Brown University*, 2000 WL 1499494, at *1 (D. N.H., May 12, 2000) (pretrial must take place in public unless compelling reasons exist for denying the public access to the proceedings); *Trans-Pacific Ins. Co. v. Trans-Pacific Ins. Co.*, 136 F.R.D. 385, 391 (E.D. Pa. 1991) (same); *Green Construction Co. v. Kansas Power & Light Co.*, 1990 WL 120925, at *1 (D. Kan., July 9, 1990) (“A motion for protective order is a disfavored motion and the burden is on the moving party to show its necessity”); *Cresswell v. Sullivan & Cromwell*, 1987 WL 27676, at *1 (S.D.N.Y. 1987) (applicant for protective order must demonstrate compelling reasons for denying public access to disclosures made during the course of litigation).

Dr. Clifton has not begun to make such a showing. To the extent that a coherent thread can be drawn from his welter of allegations, he seems to be claiming two things:

1. That ANM, NAPM, ABA, and their lawyers and consultants, having made “false assertions” about him, are now conspiring to misuse the discovery process to obtain information that is “harmful” to him in his dispute with NAPM and ABA.
2. That the same web of conspirators, perhaps joined by one or more individual members of NAPM or ABA, are scheming to appropriate “the valuable information on worksharing cross elasticities” in the March 2006 GCA study, thereby destroying the commercial potential of reselling the same information to individual presort bureaus or banks.

These claims are utterly unfounded. They are also entirely “collateral” (GCA’s term) to the ratemaking issues before the Commission. We discuss each allegation in turn.¹²

¹² A brief response is also warranted here to the Commission’s suggestion that the “situation is made more difficult” because counsel for ANM also represent NAPM. Presiding Officer’s Ruling No. R2006-1/95 at 2. The apparent premise of the statement is the likelihood that representation of multiple parties facilitates the sharing of discovery responses among those parties. This is undoubtedly true; indeed, as noted above, ANM has in fact shared the documents at dispute with NAPM as well as with the Postal Service. There is nothing improper or questionable about this, however. As previously noted, sharing of discovery responses is not only permitted, but generally encouraged or even required as a cost saving measure in multiparty cases. See *Manual for Complex Litigation (Fourth)* §§ 11.423, 11.464, 22.83 (2004); *In re Abbott Laboratories Omniflox Products Liability Litigation*, 1997 WL 162891, at *1-2. Indeed, the Commission has gone even further than most courts in this regard by facilitating the posting of discovery responses on the Commission’s website as pleadings or library references. This practice enables the instantaneous (and untraceable) sharing of discovery responses not only with other participants, but with anyone in the world that has access to the Internet. The only thing arguably unusual about the document sharing that occurred here is the fewness of the participants.

A. Dr. Clifton's Dispute With NAPM And ABA

As the Commission is aware, NAPM and ABA withdrew the September 6 direct testimony of Dr. Clifton for the two parties (ABA/NAPM-T-1) on September 25, 2006. NAPM and ABA took this action in response to the filing of Dr. Clifton's September 6 testimony for GCA, and his September 15 answers to DMA interrogatories DMA/GCA-T1-1-6. In his testimony for GCA, Dr. Clifton advocates setting the single-piece First-Class Rate at 41 cents, a cent less than the amount proposed by the Postal Service, and making up the \$400+ million revenue shortfall by raising rates for Standard Mail. Clifton Direct (GCA-T-1) at 58; see *generally id.* at 3, 56-59.

Dr. Clifton's testimony for GCA creates a direct conflict with the interests of NAPM and ABA. The banking industry has come to rely heavily on Standard Mail, and the overwhelming share of First-Class Mail entered by the industry is presort, not single-piece. According to the 2005 Household Diary Study, the financial services industry mailed 19.4 billion pieces of Standard Mail advertising to households in 2005—a volume nearly as large as the total volume of bills, statements and First-Class advertising mail entered by the industry (22.5 billion pieces). 2005 Household Diary Study at 32 & 39. Moreover, 83.9 percent of the First-Class Mail received by households from the bank industry in 2005 was "sent presort." For the credit card industry, the figure was 97.1 percent. For the financial industry as a whole, the figure was 86.4 percent. *Id.*, Appendix A-2, Table A2-20.

Applied to this mail mix, Dr. Clifton's ratemaking proposal for GCA would cost banks tens of millions of dollars annually in extra postage. Recovering from Standard Mail the revenue forgone by a one-cent reduction in Single-Piece rates would require

increasing the average Standard Mail rate by approximately 3.7 percent, or 0.75 cents per piece, *in addition to the increase that the Postal Service is proposing*. There would be little offsetting benefit to banks from any reduction in the Single-Piece First-Class rate, because Single-Piece mail represents such a small fraction of total First-Class mail entered by banks.

Dr. Clifton's proposal for GCA would also hurt the members of NAPM. Banks are the single largest source of mail for most presort bureaus. What hurts banks, hurts presort bureaus. See Declaration of Joel T. Thomas, *infra* ("Thomas Decl.") ¶ 7. Moreover, approximately half of all presort bureaus share common ownership with letter shops; and the output of letter shops consists primarily of advertising entered at Standard Mail rates. *Id.*

The conflict of interest created by Dr. Clifton's testimony for GCA presented NAPM and ABA with several unpalatable choices. Allowing Dr. Clifton to go forward simultaneously with both his NAPM/ABA and GCA testimony would place NAPM in the untenable position of asking the Commission to credit Dr. Clifton's testimony on one set of issues, while seeking to rebut, cross-examine or otherwise discredit his testimony on another set of issues. It is precisely for these reasons that expert witnesses, like lawyers, are forbidden from appearing simultaneously in the same litigation on behalf of adverse interests without the express consent of the parties. See, e.g., *Sells v. Wamser*, 158 F.R.D. 390, 393-94 (S.D. Ohio 1994).

The alternative of moving to disqualify Dr. Clifton from testifying for GCA, although supported by law,¹³ was also unattractive. If the Commission granted this draconian remedy, NAPM and ABA would be left with a hostile witness, and GCA could be left with no witness at all. Accordingly, NAPM and ABA decided that the least undesirable option was to withdraw Dr. Clifton's testimony, leaving Dr. Clifton free to proceed with GCA, and NAPM and ABA free to go forward with another witness if necessary on rebuttal.

Dr. Clifton seems to have had difficulty accepting this decision. Relying on a mislabeled pie graph in a seven-year-old ABA survey report, he has clung to the notion that the banking industry should be "pleased" by his proposal for GCA because "a majority of the banking industry's mail volume in First Class continues to be mailed at the full single piece rate."¹⁴ He has insisted that NAPM was informed of, and consented to, his rate proposal for GCA, and that any suggestion to the contrary is "false" and "demonstrably inaccurate." Clifton Motion (Oct. 27, 2006), Clifton Decl. ¶¶ 4, 7; *id.*, Exh. 1 at 2. And he has demanded additional payment for his work.

¹³ See *Sells v. Wamser*, *supra*. Moreover, Dr. Clifton's engagement contract with NAPM contained a provision, added when he began work for GCA, requiring his consulting firm to "make all reasonable and customary efforts to ensure that no business conflict or conflict of interest develops between its various clients"; "notify NAPM/ABA and the other affected intervenors in writing" if a potential conflict develops; and, if "such conflict cannot be resolved without ending WECG's representation of one or another intervenor," to "represent NAPM/ABA" rather than the adverse party. See Thomas Decl. ¶ 13.

¹⁴ Response of Dr. Clifton TO DMA/GCA-T1-3(b) (Sept. 15, 2006); *accord*, Revised Response of Dr. Clifton to USPS/GCA-T1-52 (filed Oct. 20, 2006) (same); Clifton Motion (Oct. 27, 2006), Attachment A, Exh. 1 at 2 (same).

NAPM disagrees with each of these claims. See Thomas Decl. ¶¶ 7, 13-17. But Dr. Clifton's engagement contract with NAPM calls for the resolution of any disputes by an arbitrator, not the Commission. *Id.* ¶ 22. Should Dr. Clifton file an arbitration claim, the arbitrator presumably will decide whether or not to require production of the March 2006 study in discovery, and whether to admit the study into evidence. There is certainly no reason why the Commission should divert its limited resources, in a major rate case with a tight statutory deadline, by attempting to prejudge a dispute that is not only "collateral" (as GCA concedes) but clearly outside the Commission's jurisdiction.

Dr. Clifton gains nothing from the prospect that NAPM's "use of [the] March 31, 2006 study in my current dispute with them could be harmful to me in that dispute" (Clifton Decl. ¶ 7). Dr. Clifton's concern about the report is undoubtedly well-founded. The timing of the report, which Dr. Clifton concedes was essentially an earlier version of his September 2006 testimony for GCA,¹⁵ raises serious questions about his good faith in later dealings with NAPM. Thomas Decl. ¶ 31. But the facts of the study are what they are. Dr. Clifton concedes that the study "is relevant, or otherwise potentially relevant to his collateral dispute with NAPM and ABA." Clifton Motion at 1. If so—and NAPM has no reason to disagree—NAPM and ABA would be entitled to discover the March 2006 report anew in any litigation initiated by Dr. Clifton, regardless of whether the Commission enters a protective order here. Thomas Decl. ¶ 33. In any event, as noted above, determining the admissibility of the study in any subsequent litigation brought by Dr. Clifton is a task that the Commission need not, and should not, undertake.

¹⁵ See Clifton Decl. ¶ 7 (the "March 31, 2006 Elasticity study contains similar, if not identical, arguments to those contained in my testimony for GCA").

B. Alleged Injury To The Resale Potential Of Dr. Clifton's Cross-Elasticity Analyses And Estimates

Dr. Clifton's suggestion that NAPM, ABA and various other entities are somehow conspiring to deprive him of the commercial value of his "analyses and estimates of cross elasticities for worksharing mail that did not appear in my testimony" (Clifton Decl. ¶ 7) is equally bizarre. First, it is unclear whether Dr. Clifton even has standing to assert a commercial interest in the resale of his March 2006 study. On its face, the study was work for hire by GCA: as the cover page of the study states, it was "Prepared for The Greeting Card Association." Under federal copyright law, the copyright owner of a work made for hire is the party that commissioned the work—here, GCA—absent an express written agreement to the contrary among the parties. See 17 U.S.C. § 201(b). Dr. Clifton seems to concede in his Declaration that GCA retains an intellectual property interest in the March 2006 study. Clifton Decl. ¶ 7 (asserting that no third party should have access to his analysis "without prior compensation to GCA and/or WECG") (emphasis added). As noted above, however, GCA has disclaimed any "basis for a protective order on its own behalf." Clifton Motion at 2.

Second, and in any event, Dr. Clifton has offered no credible evidence that this analysis, severed from his role as a professional witness, has any significant commercial value. Dr. Clifton's study for GCA is a typical example of the highly specialized advocacy pieces that consultants generate for clients in regulatory litigation. Outside the litigation context, the commercial value of such documents is ordinarily limited. Thomas Decl. ¶ 28.

While the Postal Service is undoubtedly interested in estimating the cross-elasticities of demand for its services, the Service has its own stable of experts, and is

hardly likely to be interested in subsidizing the research of a consultant who is publicly at loggerheads with the Service. Likewise, it is difficult to imagine that any member of NAPM, or any bank, would be willing to underwrite Dr. Clifton's research, now that he has become so prominent a spokesman for the GCA proposal. Public advocacy of regulatory schemes that would take millions of dollars from the pockets of longstanding clients is ordinarily not an effective way to solicit new business.

It is telling that, despite the passage of almost seven months since the completion of the March 2006 study, Dr. Clifton is unable to identify anyone other than GCA that has actually offered to pay for the cross-elasticity analysis. Likewise, no one—not ANM, or NAPM, or ABA, or any individual bank or presort bureau—has communicated to the undersigned counsel any expression of commercial interest in the resale rights to the study, or in any other intellectual work product of its author. Furthermore, it is telling that Dr. Clifton never attempted to market his cross-elasticity data to NAPM before the breakup of his relationship with his client. Thomas Decl. ¶ 30.

In short, the alleged resale value of the March 2006 GCA study is nothing more than a castle in the air. This is not the stuff of which protective orders are made.

CONCLUSION

For the foregoing reasons, Dr. Clifton's request for a protective order should be denied, and the temporary protective order entered on October 30 should be vacated.

Respectfully submitted,

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