

FILED

NOV 05 2018

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

**CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____
DEPUTY CLERK**

JOHN A. PATTERSON, et al.,)
)
Plaintiffs,)
)
v.)
)
DEFENSE POW/MIA ACCOUNTING)
AGENCY, et al.,)
)
Defendants.)

No. 5:17-CV-00467- XR

PROTECTIVE ORDER

Defendants served a subpoena on one of Plaintiffs' designated expert witnesses, Jonathan Davoren, Director of Applied Research at Bode Cellmark Forensics, seeking documents regarding certain matters referenced in Mr. Davoren's expert report and in his declaration in this case. The Parties agree that certain categories of information responsive to the subpoena should be treated as confidential, protected from disclosure outside this litigation, and used only for purposes of prosecuting or defending this action and any appeals. The parties jointly request entry of this proposed Protective Order to limit the disclosure, dissemination, and use of certain identified categories of confidential information that may be disclosed in discovery.

The Parties assert in support of their request that protection of the identified categories of confidential information is necessary because genetic information and confidential business information are both categories of sensitive information that should be protected.

Upon consideration of the Joint Motion for Entry of a Protective Order by the Parties, the Court finds that such an order will expedite the production of discovery material in the above-captioned matter (the "Litigation"), facilitate the prompt resolution of disputes over

confidentiality, and protect discovery material entitled to be kept confidential. Therefore, pursuant to Fed. R. Civ. P. 26(c), it is hereby ORDERED that the parties' Joint Motion for Protective Order is GRANTED, and it is FURTHER ORDERED that the following provisions shall govern the use and disclosure of documents and information covered by this Order:

1. Documents and Information Covered by this Order

(a) This Order shall govern the use and disclosure of any document or information in connection with this Litigation that constitutes:

- (i) genetic information regarding the subjects of DNA testing by Bode Cellmark Forensics and regarding any persons used as family references in such testing; and/or
- (ii) records from Bode Cellmark Forensics regarding testing conducted at the request of History Flight, Inc.

(b) Documents that are reasonably determined to be within the scope of paragraph 1(a) by a Producing Entity are hereinafter referred to as "Covered Documents." Covered Documents shall be marked by the Producing Entity prior to production as "SUBJECT TO PROTECTIVE ORDER" or with a similar marking in a way that brings its attention to a reasonable examiner. For any Covered Documents, such as computer data, whose medium makes such a marking impractical, the compact disc case and any accompanying paper or e-mail cover letter shall be marked "SUBJECT TO PROTECTIVE ORDER" or with a similar marking in a way that brings its attention to a reasonable examiner. Designation and marking of Covered Documents in accordance with this paragraph shall be deemed effective to bring information contained in such documents under the protection of this Order unless and until the Court orders otherwise.

2. Use and Disclosure of Covered Documents and Covered Information

Unless otherwise ordered by a court, administrative agency, or other governmental or regulatory body of competent jurisdiction, or otherwise provided in this Order, Covered Documents and Covered Information received by a Party during the course of this Litigation may

be used only in connection with the prosecution or defense of this Litigation. Except upon the prior written consent of the Producing Entity originally designating a Covered Document as containing information within the scope of paragraph 1(a) of this Order, or as otherwise expressly provided in this Order, Covered Documents and Covered Information may be disclosed only to the following persons:

- (a) Counsel who are engaged in the conduct of this Litigation on behalf of the named parties, along with such counsel's supervisory attorneys;
- (b) Partners, associates, legal assistants, secretaries, and clerical staff of any person described in subsection 2(a), but only to the extent necessary to render professional services in connection with this Litigation;
- (c) The Court, its staff, and court officials involved in this Litigation (including court reporters or persons operating video equipment at depositions), and any mediators and their staff appointed by the Court or agreed to in writing by the parties in the Litigation;
- (d) Expert witnesses designated in this Litigation, including other professional and clerical staff at the expert's company or agency, to the extent necessary to assist counsel in this Litigation;
- (e) Witnesses in preparation for and at deposition or trial to the extent necessary for that purpose.

3. Filing of Covered Documents or Covered Information

(a) Redaction or Filing Under Seal: Those portions of pleadings, motions, affidavits, briefs, exhibits, and other papers filed with or submitted to the Court that contain Covered Documents or Covered Information shall be redacted or filed separately with a motion for filing under seal in accordance with Local Rule 5.2. If filed under seal, the filing shall remain under seal (i) unless otherwise ordered by this Court upon notice to the Parties, or (ii) unless the Producing Entity who originally designated the information included or used in the filing as being within the scope of paragraph 1(a) of this order consents in writing to its unsealing, in which case the contents of the filing shall be unsealed to the extent of such consent.

(b) Except at trial, prior to using any Covered Documents or Covered Information in open court, counsel for the Parties shall confer regarding such procedures as are necessary to protect the nondisclosure of the subject discovery material.

4. Use of Covered Documents and Covered Information at Trial

Nothing in this Order shall be construed as limiting the right of either party to introduce Covered Documents or Covered Information into evidence at trial, subject to the Rules of Evidence and such privacy protections as the presiding Judge may deem appropriate. Either party may approach the Court before trial to propose a plan for the use of Covered Documents or Covered Information at trial. Nothing herein, however, shall prevent a Party from opposing any such plan.

5. Termination of Litigation

The provisions of this Order shall continue to be binding after final termination of this Litigation. Within forty-five (45) days after final conclusion of all aspects of this Litigation, including any appeals, any party or person who received designated documents or information described in paragraph 1(a) must certify to the Court that those documents or materials, and all copies of them, (i) have been returned to Producing Entity or (ii) have been destroyed. Exempt from this return or destruction requirement are counsel's copies of exhibits filed under seal with the Court, counsel's file copies of papers prepared in connection with this action (*e.g.*, pleadings, court papers and other papers served in this Litigation), and counsel's file copies of expert reports, depositions and trial transcripts.

6. Order Not To Be Construed As a Waiver

In addition, each Party reserves the right to move to modify the terms of this Order at any time. By consenting to this Order, no Party hereto shall be deemed to have waived its right to

seek a Protective Order with respect to any documents or information, regardless of whether such documents or information fall within the scope of this Order, and each Party reserves the right to oppose any motion to modify the terms of the Order. Nothing in this Order shall be construed as a waiver of a Party's right to challenge by motion a Party's designation of materials as "Covered Documents" subject to this Protective Order or to challenge a motion to file a document under seal or move to unseal documents so filed. Nothing in this Order is intended to constitute an agreement regarding the scope of discovery. This Order does not constitute a ruling on the question of whether any particular document or category of information is properly discoverable and does not constitute a ruling on any potential objection to the discoverability, relevance, or admissibility of any documents or other material sought in discovery, and the parties reserve their right to object to discovery on any appropriate ground.

7. Producing Entities' Reliance on Order

Production of Covered Documents and Covered Information will be made in express reliance upon the terms of this Order.

8. Protections Extended to Third-Party

The Parties agree to extend the provisions of this Protective Order to Covered Documents and Covered Information produced in this case by Jonathan Davoren and/or Bode Cellmark Forensics.

9. Use of Own Information

Nothing in this Order shall impose any restriction on the use of or disclosure by a Party of its own information. Nor shall this Order be construed to prevent a Party from disclosing a Covered Document to any person whom the document clearly identifies as an author, addressee, or carbon copy recipient of such document.

10. Binding on Parties

Execution of this Protective Order by counsel for a Party shall constitute a representation by counsel that they, all persons employed by their firm who have access to Covered Documents and Information, and the party or parties they represent will abide by the terms of this Protective Order and will subject themselves to the jurisdiction of this Court for purposes of enforcement and disciplinary action.

AGREED TO BY:

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Counsel for Defendants

ORDERED this 5th day of November, 2018.


UNITED STATES DISTRICT JUDGE