

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:)	Case No. 16-cv-8637
)	
BROILER CHICKEN ANTITRUST)	Judge Thomas M. Durkin
LITIGATION)	Magistrate Judge Jeffrey T. Gilbert
)	
<i>This Document Relates to All Actions</i>)	

**UNITED STATES' UNOPPOSED MOTION
TO AMEND THE AGREED CONFIDENTIALITY ORDER**

The United States respectfully files this unopposed motion to amend the Agreed Confidentiality Order [Dkt. 202] for the purpose of enabling the United States to use and disclose materials in related criminal litigation. The proposed amendment would establish a meet-and-confer process for written and document discovery materials that the United States has received because it is a party to this action. This process would need to be completed prior to the materials being disclosed in criminal litigation. This approach strikes a reasonable balance between affording the United States flexibility for its criminal litigation including to address discovery issues that may arise, and protecting producing parties' confidentiality expectations. As a result of conferring with the other parties to this action, this motion is unopposed.¹

¹ The United States is not filing a notice of presentment and not providing courtesy copies of this motion because the Court has suspended the operation of those court rules. *See* Eighth Amended General Order 20-0012 at ¶¶ 5-6 (Nov. 13, 2020).

A. Background

In June 2019, the United States moved to intervene in this action, and sought a limited stay of discovery on the defendants. The Government sought to intervene in order to protect a grand jury investigation into the broiler chickens industry. United States' Mot. To Intervene and Stay Discovery [Dkt. 2268] at 1. The Court granted the motion and stayed discovery until late September [Dkt. 2302], and later, extended the stay to the end of March 2020 [Dkt. 3356].

The investigation to date has resulted in the indictment by a grand jury empaneled in the District of Colorado of ten individuals for their roles in a conspiracy to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. *See* Superseding Indictment, *United States v. Penn et al.*, Criminal Action No.: 20-cr-00152-PAB (D. Col. Oct. 6, 2020). The defendants have pleaded not guilty; trial is scheduled to commence on August 2, 2021, in Denver.

The Government possesses discovery materials that it obtained because it is a party to this civil action. The Agreed Confidentiality Order prohibits the Government from using or disclosing in a criminal matter any of the materials designated Confidential or Highly Confidential that it obtained in this action. The Agreed Confidentiality Order protects the parties' Confidential and Highly Confidential Information from disclosure "for any purpose whatsoever other than the prosecution or defense of claims in, or the settlement of, this litigation." Agreed Confidentiality Order, ¶ 6.a. A significant portion of the materials exchanged in discovery contain information designated as Confidential or Highly Confidential. Because the Government may seek

to disclose and use some of these materials in the criminal litigation, including to address discovery issues that may arise, but is presently prohibited from doing so by operation of the Agreed Confidentiality Order, the Government now seeks an amendment to the Order that would establish a way in which to disclose and use such materials.

B. The Proposed Amendment.

The Government proposes to amend the Agreed Confidentiality Order to enable certain materials in the Government's possession to be used in the Government's prosecution of persons charged as a result of the Government's investigation into the broilers chicken industry. For purposes of this proposed amendment, the materials that the Government seeks to qualify for disclosure and use in the criminal cases are written discovery including answers to interrogatories and responses to RFAs, documents or data productions, or explanatory materials.

The Government's proposed amendment establishes a procedure for parties that produced materials designated Confidential or Highly Confidential to be notified of potential disclosure or use of the materials in a criminal case. The proposed amendment requires notification to the producing party of the specific material it seeks to disclose or use in the criminal case. The producing party would then have five business days in which to respond. If the producing party provides an objection within the time allotted, the Government and the producing party would conduct a meet-and-confer to address the objection. If the objection is not resolved, the Government may file a motion, with leave granted to file the motion papers under seal.

C. Legal Standard

A court may modify a protective order, such as the Agreed Confidentiality Order, upon a showing of good cause. See *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 881 F.3d 550, 556 (7th Cir. 2018). When assessing whether there is good cause to modify a protective order “the court must weigh that party’s need for modification against the other party’s need for protection, and ought to factor in the availability of alternatives to better achieve both sides’ goals.” *Murata Mfg. Co., Ltd. v. Bel Fuse, Inc.*, 234 F.R.D. 175, 180 (N.D. Ill. 2006).

D. Good cause exists.

Good cause exists because the Government may seek to use and disclose materials in its criminal litigation that the Agreed Confidentiality Order presently prohibits from being used or disclosed.

The good cause consideration implies a changed circumstance from the time that the protective order was initially entered. See *In re Application of Heraeus Kulzer GmbH*, 3:09-CV-530 RLM-MGG, 2017 WL 214322, at *3 (N.D. Ind. Jan. 18, 2017). The pendency of this criminal litigation is a changed circumstance from what prevailed at the time that the Agreed Confidentiality Order was entered. At the time that the Agreed Confidentiality Order was entered, in November 2016, the Government was not a party to this litigation, and the criminal litigation did not exist.

Given this good cause, modification of a confidentiality order should occur unless the modification would prejudice the substantial rights of a party opposing modification. *Wilk v. Am. Med. Ass’n*, 635 F.2d 1295, 1299 (7th Cir. 1980)(permitting

modification where good cause of avoiding duplicate discovery was established).

Modification prejudices substantial rights when it undermines a party's reliance interest. *See Griffith v. Univ. Hosp., L.L.C.*, 249 F.3d 658, 662–63 (7th Cir. 2001) (denying modification of confidentiality order on eve of settlement because modification would undermine reliance on order).

The Government's proposed amendment avoids prejudice altogether, by establishing a notice-and-opportunity-to-be-heard process addressing confidentiality issues ahead of use and disclosure in criminal litigation. This process preserves the parties' reliance interests in their confidentiality designations and the resulting confidentiality protections that the Agreed Confidentiality Order affords. These interests are preserved because the proposed modification: (1) contains a notice and meet-and-confer requirement, with judicial review for any unresolved disputes; (2) requires the Government to identify specific materials it seeks to use or disclose in its criminal litigation, rather than a blanket license to use all materials it has received from this civil action; and (3) the use or disclosure of any material in the criminal litigation will occur subject to the protective order entered in the criminal litigation, *see* Second Amended Protective Order, *United States v. Penn*, Criminal Action No.: 20-cr-00152-PAB (D. Col. Nov. 10, 2020). The criminal protective order states, in relevant part, that "[a]ll discovery materials produced by the government are being produced [to defense counsel] . . . only for the purpose of representing their client in this criminal case and must be used solely for the purposes of conducting pretrial, trial, and appellate proceedings in this case and for no other purposes." *Id.* at ¶ 1. Additionally, the

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