

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,)	
)	
Complainant,)	
)	
v.)	OSHRC Docket No. 20-1001
)	
Dura-Bond Steel Corporation,)	
)	
Respondent.)	
)	

**ORDER GRANTING RESPONDENT’S MOTION
FOR ENTRY OF A PROTECTIVE ORDER**

I. BACKGROUND

Respondent is a Pennsylvania corporation doing business at 2658 Puckety Drive, Export, PA. Ex. B to Resp’t’s Mot. for Entry of Protective Order ¶ 3. As part of its regular business, Respondent “fabricates steel and spray coats fabricated items, pipe, and other steel shapes.” *Id.* at ¶ 4. According to Jason Norris, Respondent’s President, Respondent is involved in a highly competitive industry wherein customers regularly solicit bids from Respondent as well as its competitors. *Id.* at ¶¶ 5-7. Because of the high degree of competition in Respondent’s industry, Respondent does not disclose any financial information, including information regarding profits and losses or tax returns, to anyone other than “select shareholders, as well as Respondent’s select accountants, attorneys, banks, and customers who require proof of financial strength as part of [their] bids.” *Id.* at ¶¶ 8-12.

As laid out in Respondent’s Corporate Disclosure Statement,¹ Respondent is a subsidiary

¹ Respondent filed a Corporate Disclosure Statement with its Answer on September 18, 2020, as required by Commission Rule 35, and a second Corporate Disclosure Statement on April 20, 2021. Respondent filed the second Corporate Disclosure Statement to clarify that “Respondent ... does not have any subsidiaries” and that all the entities listed in the Corporate Disclosure Statement [filed with the Answer] are subsidiaries of Dura-Bond Industries, Inc.” See App’x A to Corporate Disclosure Statement of Dura-Bond Steel Corporation, OSHRC Docket

company of another company called Dura-Bond Industries, Inc. *See* App’x A to Corporate Disclosure Statement of Dura-Bond Steel Corp., OSHRC Docket No. 20-1001 (filed April 20, 2021). Along with Respondent, Dura-Bond Industries has five other subsidiary companies: (1) Dura-Bond Pipe, LLC; (2) Dura-Bond Pipe I, LLC; (3) Dura-Bond Coating, Inc.; (4) D-B Air, LLC; and (5) Dura-Bond Development, Inc. Dura-Bond Industries and all of its subsidiaries, including Respondent, are “S Corporations.” Ex. B. to Resp’t’s Mot. for Entry of Protective Order ¶ 14. Generally speaking, this means Respondent and its related corporations are “corporation[s] whose income is taxed through [their] shareholders rather than through the corporation itself.” *Corporation – S corporation*, BLACK’S LAW DICTIONARY (11th Ed. 2019). The practical effect of this type of incorporation is that Respondent and its related corporations are generally not subject to federal or state taxation. *See generally In re Majestic Star Casino, LLC*, 716 F.3d 736, 742 (3d Cir. 2013); *In re Dobson’s Estate*, 417 A.2d 138, 143 (Pa. 1980); *see also Marshall v. Commonwealth*, 41 A.3d 67, 90 n.31 (Pa. Commw. Ct. 2012).

Following a series of inspections occurring between January 14, 2020 and April 14, 2020, the United States Occupational Safety and Health Administration (“OSHA”) issued to Respondent a six-item serious citation and a four-item other-than-serious citation (the “Citations”) alleging violations of various provisions of OSHA’s regulations.² The Citations

No. 20-1001 (filed April 20, 2021). The Court will therefore only reference Respondent’s second Corporate Disclosure Statement for purposes of this order.

² More specifically, the Citations alleged as follows:

Citation 1, Items 1a, 1b, and 1c related to spray finishing operations using flammable and combustible materials and alleged serious violations of 29 C.F.R. §§ 1910.107(a)(2), 1910.107(e)(4), and 1910.107(e)(5), respectively.

Citation 1, Items 2a, 2b, and 2c related to the employees’ use of equipment during spraying operations and alleged serious violations of 29 C.F.R. §§ 1910.107(m)(1), 1910.94(c)(2), and 1910.134(g)(1)(i)(A).

Citation 1, Item 3 alleged a serious violation of 29 C.F.R. § 1910.244(b) for failure to have blast cleaning nozzle equipment with an operating valve which had to be held open manually.

Citation 1, Items 4a, 4b, and 4c related to the employees’ exposure to iron oxide fumes and alleged serious violations of 29 C.F.R. §§ 1910.1000(a)(2), 1910.252(c)(1)(iii), and 1910.1000(a), respectively.

Citations 1, Items 5a, 5b, 5c, and 5d related to measures and controls designed to limit employees’ exposure to respirable crystalline silica and alleged serious violations of 29 C.F.R. §§ 1910.1053(c), 1910.1053(d)(3)(iv),

proposed a total penalty of \$35,085 for the alleged violations.

On June 25, 2020, Respondent submitted its Notice of Contest. Following an extension of time, the Secretary filed his Complaint on August 28, 2020. On September 18, 2020, Respondent filed its Answer. Among other affirmative defenses, Respondent asserted that compliance with certain standards would be technically and economically infeasible. Answer ¶ 14.

The parties have since engaged in written discovery. On February 12, 2021, the Secretary served his First Set of Interrogatories and First Set of Requests for Production of documents to Respondent. In his interrogatories, the Secretary sought, as is relevant here, information regarding the gross and net income for Respondent and its related companies as set forth in Respondent's Corporate Disclosure Statement. *See* Ex. C to Resp't's Mot. for Entry of Protective Order. The Secretary also sought information regarding the identity of the officers and ownership information for Respondent and its related companies. *Id.* In his request for documents, the Secretary sought, as is relevant here, Respondent's federal tax returns for the years 2018, 2019, and 2020. *Id.* In its responses to the Secretary's discovery requests, Respondent objected to producing the requested information, arguing, *inter alia*, that the Secretary's requests would seek information that is proprietary or confidential business or

1910.1053(f)(1), and 1910.94(a)(3)(i), respectively.

Citation 1, Items 6a, 6b, 6c, and 6d related to the medical surveillance of employees exposed to respirable crystalline silica and alleged serious violations of 29 C.F.R. §§ 1910.1053(i)(2)(i), (ii), (iii), (v) and 1910.1053(i)(4), respectively.

Citation 2, Item 1 alleged an other-than-serious violation of 29 C.F.R. § 1910.134(c)(1)(vi) for the respiratory protection program failing to have procedures to ensure adequate air quality, quantity, and flow of breathing air for atmosphere-supplying respirators.

Citation 2, Item 2 alleged an other-than serious violation of 29 C.F.R. § 1910.1053(f)(2)(i)(B) for the failure of the respiratory crystalline silica exposure plan to address the ventilators used by employees.

Citation 2, Item 3 alleged an other-than-serious violation of 29 C.F.R. § 1910.1053(j)(2) for failure to post warning signs at the workplace regarding respiratory crystalline silica.

Citation 2, Item 4 alleged an other-than-serious violation of 29 C.F.R. § 1053(k)(1)(ii)(F) for the failure of the exposure measurement records to contain the type of respirator worn by employees.

commercial information or otherwise a trade secret. *Id.*

Following the Secretary's discovery requests and Respondent's opposition, the parties conferred on the possibility of the entry of a stipulated protective order. When the parties were unable to reach an agreement, Respondent filed a Motion for Entry of Protective Order on April 6, 2021. In its motion, Respondent seeks to have a protective order entered allowing it to designate certain documents and testimony as containing "confidential information." Respondent invokes Commission Rule 52(e)(7), which allows for the Court, upon a showing of good cause, to enter a protective order "[t]hat a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Respondent also invokes 29 U.S.C. § 664, which allows for the Commission to issue orders to protect trade secrets and which references 18 U.S.C. § 1905.³ Based on 18 U.S.C. § 1905, Respondent seeks an order protecting "the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or ... any income return or copy thereof." Respondent also argues that Pennsylvania state law's definition of trade secrets would protect this information. Finally, Respondent argues that even if the information subject to the protective order does not constitute trade secrets, it is

³ This section reads, in relevant part:

Whoever, being an officer or employee of the United States or of any department or agency thereof ... publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

nonetheless subject to protection as “other confidential research, development, or commercial information” under Commission Rule 52(e)(7).

Respondent asserts it has established “good cause” for a protective order based on the Third Circuit’s test set forth in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d. Cir. 1994) (“*Pansy*”). Respondent argues that disclosure of the information sought by the Secretary could threaten Respondent’s business and place it at a competitive disadvantage and would reveal the full financial health of what is essentially a family business. Respondent further argues that a document-by-document request for protection will promote the sharing of information between the parties. Respondent further argues that, because the information sought by the Secretary relates to a privately held corporation, it does not directly impact public health or safety and that its proposed order is limited to disclosure of information that does not impact public health or safety.

On April 19, 2021, the Secretary filed his Response in Opposition to Respondent’s Motion for a Protective Order. The Secretary requests that Respondent’s Motion for Entry of Protective Order be denied. The Secretary emphasizes that there is a common law presumption of access to judicial records. The Secretary goes on to note that it is Respondent’s “high” burden to establish the need for a protective order. The Secretary further argues that Respondent has initially proposed a broad protective order when it has a burden to demonstrate the need for a protective order on every document it seeks to be protected. The Secretary takes issue with Respondent’s proposed order to the extent it grants Respondent a unilateral ability to designate as confidential any document it believes to be of a proprietary, confidential, or sensitive nature.

Regarding the Secretary’s request for income, tax, and ownership information for Respondent and its related companies, the Secretary argues this information is relevant with

regard to Respondent's affirmative defense of economic infeasibility. Particularly, the requested financial and ownership information may factor into Respondent's ability to offset the cost of abatement measures for the identified hazards. The Secretary argues that Respondent has not substantiated its allegations of harm from the disclosure of this information.

The Secretary further argues that the affidavit of Jason Norris accompanying Respondent's Motion for Entry of Protective Order fails to establish a specific and concrete need for a protective order. Mr. Norris' assertions that revelation of the requested information to Respondent's competitors would put it at a competitive disadvantage are unavailing because there is no assertion that competitors are actually seeking this information or any detail as to how Respondent's competitors could use it to put Respondent at a competitive disadvantage.

Finally, the Secretary argues that, even if the Court issues a protective order, the part of Respondent's proposed order governing worksite visits with a non-government expert is unnecessarily restrictive. This section of Respondent's proposed order would require the Secretary to inform Respondent's counsel of his intention to disclose documents to a potential interviewee, give Respondent's counsel a chance to object, and allow for Respondent's counsel to be present for any such interview. In the Secretary's view, this does not comport with the Commission's decision in *Owens-Illinois, Inc.*, 6 BNA OSHC 2162 (No. 77-648, 1978).

On April 29, 2021, Respondent filed its Reply in Support of Motion for Entry of Protective Order. In its reply, Respondent argues that its initially proposed protective order is explicitly authorized by Commission Rule 52(e)(7). Respondent argues that the Secretary's argument that the originally proposed protective order is a blanket order is unfounded. Respondent points to 18 U.S.C. § 1905 and OSHA's own Field Operations Manual ("FOM") as guidance for the type of information that would be protected as a "trade secret." Respondent

also points out that the proposed order provides a mechanism for the Secretary to dispute Respondent's designation of information as confidential and to resolve the dispute with the Court if necessary. It asserts that this type of protective order is routinely entered by courts.

Response also argues that the Secretary has not disputed Respondent's good cause analysis under *Pansy*. Nor has the Secretary contradicted Mr. Norris' affidavit that disclosure of certain trade secrets could cause harm to Respondent, which operates in a highly competitive industry where bidding is the norm. Respondent argues that Mr. Norris' affidavit demonstrates that without a protective order, the Secretary can electronically file all information and disclose it to his experts. Such information would be of great interest to Respondent's competitors, would give Respondent's competitors a full picture of Respondent's financial health, and would give its competitors an advantage of sharing this information in the market and underbidding Respondent. In any event, Respondent argues that its originally proposed protective order was drafted to be streamlined by only addressing discovery, not any admissibility issues at the hearing. Finally, Respondent agrees with the Secretary any protective order in this case should be in accordance with *Owens-Illinois*.⁴

On May 17, 2021, the Court heard oral argument on Respondent's Motion for Entry of Protective Order. At the conclusion of oral argument, the Court indicated its intention to grant Respondent's Motion for a Protective Order and directed the parties to reach agreement on a proposed protective order.⁵

On June 11, 2021, the parties submitted a "[Revised Proposed] Protective Order" which the Court hereby approves and is hereinafter referred to as the "Dura-Bond Protective Order" in

⁴ Due to Respondent's concession, the Court does not address the Secretary's arguments on this subject.

⁵ The parties were given first until June 4, and then June 11, 2021, to fashion an order acceptable to both parties. .

this case.

The Court now issues this order to substantiate its ruling made at oral argument. For the reasons that follow, the Court grants Respondent's Motion for Entry of Protective Order to the extent indicated below.

II. ANALYSIS

There is a common law right to access of judicial records and materials.⁶ *See In re Cendant*, 260 F.3d 183, 192 (3d Cir. 2001); *Littlejohn v. BIC Corp.*, 851 F.2d 673, 677-78 (3d Cir. 1988). However, a party may overcome this right and be granted a protective order by demonstrating "that the material is the kind of information that the courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure." *In re Cendant*, 260 F.3d at 194.

Respondent has invoked Commission Rule 52(e)(7) for its requested protective order, which empowers the Court, "where a showing of good cause has been made," to issue an order "[t]hat a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." 29 C.F.R. § 2200.52(e)(7). The proponent of the protective order bears the burden of justifying the necessity of the order through a showing of good cause. *Pearson v. Miller*, 211 F.3d 57, 72 (3d Cir. 2000). The proponent can demonstrate good cause by showing that "disclosure [of the information sought to be protected] will work a clearly defined and serious injury" on the party. *Pansy*, 23 F.3d at 786. "The injury must be shown with specificity. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing." *Id.* (internal citation omitted).

⁶ Likewise, with certain exceptions, documents filed with the Commission via E-file may be available to the public. *See* Commission Rule 8(c)(5) (detailing those documents which are not to be filed in the Commission's E-filing system, including those under a protective order).

Under Third Circuit precedent,⁷ the touchstone of the Court’s analysis is the Circuit’s decision in *Pansy*. In *Pansy*, the court set out a “non-exhaustive” list of factors to consider in determining whether a party has demonstrated “good cause” for a protective order to issue.

Pansy, 23 F.3d 787-89. The factors set out by the *Pansy* court were as follows:

- 1) whether disclosure will violate any privacy interests;
- 2) whether the information is being sought for a legitimate purpose or an improper purpose;
- 3) whether disclosure of the information will cause a party embarrassment;
- 4) whether confidentiality is being sought over information important to public health and safety;
- 5) whether the sharing of information among litigants will promote fairness and efficiency;
- 6) whether a party benefitting from the order of confidentiality is a public entity or official; and
- 7) whether the case involves issues important to the public.

E.E.O.C. v. Kronos Inc., 620 F.3d 287, 302 (3d Cir. 2010), citing *Pansy*, 23 F.3d at 787-91.

While some protective orders protect specific, previously identified documents, others, such as the order Respondent has proposed, allow a party to designate documents or other information as confidential while also allowing the opposing party to challenge that designation.

Dura-Bond Protective Order ¶¶ 1, 12-13, 16(d)-17. The Third Circuit endorsed this approach in *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108 (3d Cir. 1986), holding:

[A] party seeking the protective order must [not] necessarily demonstrate to the court in the first instance on a document-by-document basis that each item should be protected. It is equally consistent with the proper allocation of evidentiary burdens for the court to construct a broad “umbrella” protective order upon a threshold showing by one party (the movant) of good cause. Under this approach, the umbrella order would initially protect

⁷ The employer or the Secretary may appeal a Commission order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the District of Columbia Circuit. *See* 29 U.S.C. §§ 660(a) and (b). Here, the violation occurred in Pennsylvania, in the Third Circuit, where Respondent’s office is also located. *See* 29 U.S.C. § 660(b). The Commission has held that “[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission’s precedent.” *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96- 1719, 2000). The Court therefore applies the precedent of the Third Circuit in issuing this order, which precedent was also largely relied upon by the parties in their respective arguments.

all documents that the producing party designated in good faith as confidential. After the documents delivered under this umbrella order, the opposing party could indicate precisely which documents it believed to be not confidential, and the movant would have the burden of proof in justifying the protective order with respect to those documents. The burden of proof would be at all times on the movant; only the burden of raising the issue with respect to certain documents would shift to the other party.

Id. at 1122.

The Court finds Respondent has shown good cause for the Court to issue a protective order. As noted above, the class of documents Respondent is seeking to protect from disclosure are “trade secrets,” as defined by 29 U.S.C. § 664 and 18 U.S.C. § 1905. *See Dura-Bond Protective Order* ¶ 1. Respondent is particularly concerned about the disclosure of certain financial information. Mr. Norris’ affidavit accompanying Respondent’s motion has demonstrated with sufficient specificity the type of injury from which it is seeking protection. Namely, Mr. Norris has averred that the financial information Respondent is seeking to protect is not normally disclosed except to a small group of individuals. Ex. B. to Resp’t’s Mot. for Entry of Protective Order ¶ 10. Because Respondent is involved in a “highly competitive industry,” its jobs are “subject to competitive bidding directly with Respondent’s competitors.” *Id.* at ¶¶ 6 & 7. If Respondent’s financial information became publicly available, it “would give competitors a full picture of the financial health and business of Respondent and pricing and bidding information to understand how to better compete and improve their position in the market, to the detriment of Respondent.” *Id.* at ¶ 23. The Court finds Respondent has supported its allegation of harm with “articulated reasoning” to warrant to the issuance of the kind of protective order it seeks. *Pansy*, 238 F.3d at 786.

The Court further finds several of the remaining *Pansy* factors, which are “neither

mandatory nor exhaustive,”⁸ favor the issuance of a protective order here. With regard to whether the information would violate any privacy interests, the OSH Act, Commission Rules, and the Secretary’s own FOM recognize that trade secret information should be protected as confidential. *See* 29 U.S.C. § 664 (“All information reported to or otherwise obtained by the Secretary or his representative in connection with any inspection or proceeding under this chapter which contains or which might reveal a trade secret referred to in section 1905 of Title 18 shall be considered confidential for the purpose of that section ...”); 29 C.F.R. § 2200.52(e)(7) (“In connection with any discovery procedures and where a showing of good cause has been made, the Commission or the Judge may make any order including, but not limited to, one or more of the following: ... (7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way ...”); FOM (CPL 02-00-164), Ch. 3, VII(E)(1) (eff. April 14, 2020) (“CSHOs and OSHA personnel shall preserve the confidentiality of trade secrets.”). Although workplace safety is a matter of public importance, Respondent is not a public entity and its financial information does not directly impact public health or safety.⁹ Indeed, this information is generally not disclosed to anyone from the public, including federal and state taxing authorities. *See In re Majestic Star Casino, LLC*, 716 F.3d at 742; *In re Dobson’s Estate*, 417 A.2d at 143; *see also Marshall*, 41 A.3d at 90 n.31. Finally, the Court finds that, if Respondent is assured that its financial information will not immediately be subject to public filing and disclosure, the protective order will promote the sharing of information between the parties during the discovery process.

⁸ *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995).

⁹ The Court notes that *some* financial information will be relevant and discoverable as it relates to Respondent’s defense of economic infeasibility. As addressed in a separate order, the Court compels Respondent to provide some of this information in response to the Secretary’s interrogatories.

The Secretary's main contention in opposing the protective order is that Respondent's originally proposed protective order is overly broad, "covering broad categories of information and an unknown universe of documents." Sec'y's Resp. in Opp'n to Resp't's Mot. for Entry of Prot. Order 5. The Secretary also takes issues with Respondent being able to "unilaterally identify *any* document or discovery material" as protected by the order. *Id.* However, the Third Circuit specifically endorsed this type of "umbrella" protective order in *Cipollone*. The Court also notes that the Dura-Bond Protective Order is limited in scope to "trade secrets," as defined by 29 U.S.C. § 664, 18 U.S.C. § 1905, and Pennsylvania law. *See Dura-Bond Protective Order* ¶ 1. Any designation made by Respondent that information is subject to protection under the Dura-Bond Protective Order must be made in good faith, subject to the threat of sanctions. *Cipollone*, 785 F.2d at 1122 n.17. Finally, in the event the Secretary believes Respondent has marked information as confidential that does not properly fall under the Dura-Bond Protective Order, the order allows the Secretary to challenge the designation with the Court. Dura-Bond Protective Order ¶¶ 13, 16(d). In such an instance, the burden will be on Respondent to justify the protection of the specific information. *See Cipollone*, 785 F.2d at 1122.

The Secretary also argues that Respondent has not demonstrated good cause with specificity. The Court disagrees. Respondent's allegations of harm to its bidding process from the disclosure of certain financial information are specific enough to warrant protection of the information. *Cf. Glenmede Tr. Co.*, 56 F.3d at 483 (generalized accusation of "potential economic harm" from disclosure of information was insufficient to support motion for a protective order). Should a challenge to a specific document or discovery material be brought before the Court, Respondent will have to demonstrate with greater particularity that good cause supports protection of the information. *Cipollone*, 785 F.2d at 1122.

Based on the foregoing, the Court finds Respondent has demonstrated good cause for the issuance of the Dura-Bond Protective Order. Accordingly, the Court approves and enters the Dura-Bond Protective Order submitted by the parties to the Court on June 11, 2021, contemporaneously with this Order. *See* 29 C.F.R. §2200.52(e).

III. ORDER

WHEREFORE IT IS ORDERED that Respondent's Motion for Entry of Protective Order is GRANTED, to the extent indicated herein, and

IT IS FURTHER ORDERED that the Dura-Bond Protective Order submitted by the parties to the Court on June 11, 2021 is approved and entered into the record.¹⁰

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: June 14, 2021
Washington, D.C.

Attachment
Court Approved Dura-Bond Protective Order.

¹⁰ The Court approved Dura-Bond Protective Order is attached hereto.

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,

Complainant,

v.

DURA-BOND STEEL CORPORATION,

Respondent.

OSHRC No. 20-1001

Inspection No. 1455579

Judge Dennis Phillips

DURA-BOND PROTECTIVE ORDER

AND NOW, this 14th day of June, 2021, upon consideration of Respondent Dura-Bond Steel Corporation's Motion for Entry of Protective Order, and any response thereto or argument thereon, it is hereby ORDERED that Respondent's Motion is GRANTED. It is further ORDERED that all parties to this action shall abide by the terms set forth in this Protective Order.

1. This Protective Order governs the use, handling, and potential disclosure of any correspondence, document, or other discovery material in this matter, including testimony or deposition transcripts, which are believed by the producing party to be of a proprietary, confidential, or sensitive nature and which are so designated or marked as "CONFIDENTIAL INFORMATION." For purposes of this Protective Order, "Confidential Information" shall include information that concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of a party or any income return or copy thereof. This includes financial information regarding profits, losses, or profitability (including net and gross income); tax returns or records; and information regarding bidding, costs, and pricing (such as customer

information and pricing information for products and services, customer lists, quotes, estimates, orders, and payment information) which is produced or obtained in this matter for any purpose, including settlement or discovery. The Confidential Information includes documents themselves and the information therein.

2. All such Confidential Information shall be treated as confidential by all parties and persons acting on behalf of a party, and shall not be used for any purpose except settlement, defense, or prosecution of the above-captioned case.

3. Confidential Information may only be copied, disclosed, disseminated, discussed, or inspected, in whole or in part, for purposes of this proceeding and only by the following persons:

- a. the parties to this proceeding (for Respondent, its officers/principals);
- b. counsel representing any party in this proceeding and counsel's employees;
- c. the author/drafter of the specific Confidential Information;
- d. the Commission and any persons employed by the Commission working on this proceeding (collectively, the "Commission");
- e. court reporters, including stenographers and video technicians;
- f. independent document production services;
- g. experts and consultants, and their staff, retained by a party, or a party's counsel, to assist in the preparation and trial of this proceeding; and
- h. interviewees, potential witnesses, deponents, hearing or trial witnesses, and any other similar person, where counsel for a party to this action in good faith determines the individual should be provided access to the Confidential Information for counsel to more effectively prosecute or defend this action, and

the Confidential Information is relevant to the person's role and testimony in this proceeding.

4. Disclosure of any Confidential Information shall not be made to any person other than those described in Paragraph 3 above. If disclosure of Confidential Information is to a person described in Paragraph 3.g or 3.h above, including any experts or consultants retained by a party in this proceeding, disclosure shall not be made unless and until the party intending to disclose such Confidential Information to such person shall have first advised the person of this Protective Order and that such disclosure is being made pursuant and subject to this Protective Order. For any experts, consultants, and/or other persons not a party to this proceeding described in Paragraph 3.g above which are consulted or retained by a party for purposes of this proceeding, prior to disclosing any Confidential Information to such person(s), the party disclosing Confidential Information to such person(s) shall ensure such expert, consultant, or other person signs a written oath that provides as follows, which the disclosing party shall also incorporate into any contract between the disclosing party and such person(s) for this matter as a nondisclosure provision:

I, _____, HAVE READ A COPY OF THE ATTACHED PROTECTIVE ORDER ENTERED IN THIS PROCEEDING, AND I AM FAMILIAR WITH ITS TERMS. I HEREBY ACKNOWLEDGE THAT DURING MY PARTICIPATION IN THIS PROCEEDING I MAY HAVE OCCASION TO OBTAIN ACCESS TO, OR BECOME AWARE OF, CONFIDENTIAL INFORMATION AS DEFINED IN THE PROTECTIVE ORDER.

I CERTIFY MY UNDERSTANDING THAT THE CONFIDENTIAL INFORMATION IS BEING PROVIDED TO ME PURSUANT TO THE TERMS AND RESTRICTIONS OF THE PROTECTIVE ORDER. I CLEARLY UNDERSTAND THAT THE CONFIDENTIAL INFORMATION AND MY COPIES AND NOTES RELATING THERETO MAY ONLY BE DISCLOSED TO OR DISCUSSED WITH THOSE PERSONS PERMITTED BY THE PROTECTIVE ORDER TO RECEIVE SUCH MATERIAL.

I AGREE TO USE ANY SUCH CONFIDENTIAL INFORMATION SOLELY IN CONNECTION WITH MY PARTICIPATION IN THIS PROCEEDING. I AGREE TO ABIDE BY SAID PROTECTIVE ORDER IN EVERY RESPECT.

I WILL RETURN ON REQUEST ALL DOCUMENTS CONTAINING CONFIDENTIAL INFORMATION AND ANY COPIES THEREOF TO COUNSEL FOR THE PARTY THAT PROVIDED ME WITH SUCH CONFIDENTIAL INFORMATION.

I MAKE THE ABOVE STATEMENTS UNDER PENALTY OF PERJURY. I UNDERSTAND THAT THE EXPRESS INTENT OF MY STATEMENTS IS THAT THE PARTY ENTITLED TO PROTECTION OF THE CONFIDENTIAL INFORMATION IS A THIRD-PARTY BENEFICIARY OF THE STATEMENTS AND IS GRANTED A RIGHT TO ENFORCE THE PROVISION AND PROTECTIVE ORDER.

PRINTED NAME: _____
SIGNATURE: _____
DATE: _____

5. Breach of the oath in Paragraph 4 is a direct violation of this Protective Order.

6. Upon request, a true and correct copy of each executed oath in Paragraph 4 above shall be provided to the party originally producing the Confidential Information consistent with discovery deadlines in this matter, including for expert disclosures.

7. All Confidential Information is considered confidential and sensitive and, therefore, shall not be filed electronically pursuant to Commission rules, including 29 C.F.R. § 2200.8. If a party wishes to file Confidential Information in this proceeding, the party shall file the Confidential Information directly with the assigned Judge under seal (see 29 C.F.R. §§ 2200.8(b)-(c)(5)(i), 2200.52(e)). Notwithstanding the foregoing, if a version of the filing must be electronically filed for any reason, then all Confidential Information shall be omitted or redacted before filing.

8. No copies of Confidential Information shall be made unless necessary in connection with this proceeding. Upon completion of this proceeding, only one copy of any Confidential

Information may be retained by counsel, and the provisions of this Protective Order shall remain in effect after the termination of this matter unless otherwise agreed by the parties in writing or pursuant to Commission order. Within thirty (30) days after a final order in the above-captioned proceeding, or in the event of appeals, within thirty (30) days after appeals are exhausted, the parties, upon request by the originally producing party, shall either destroy (and certify destruction) or return all copies of all documents and other materials not entered into the record, including nonprivileged notes, which contain any Confidential Information, except for one copy that may be retained by counsel pursuant to this Paragraph.

9. Any party may file a motion for a further protective order to further address the use, handling, and potential disclosure of Confidential Information before, during, or after hearing.

10. If any party desires to request that any Confidential Information be subject to further protective order, the party shall file an appropriate motion separately seeking such an order.

11. Either party may expressly consent in writing that a document produced by it pursuant to discovery may be removed from the scope of this Protective Order. Such consent shall be clearly indicated in writing addressed to the other party.

12. Documents and information drafted or developed by either party, including its experts and consultants, that contain Confidential Information shall likewise be designated and treated as Confidential Information pursuant to this Protective Order.

13. If either party considers any documents not to be Confidential Information as defined in this Protective Order and desires the removal of such designation, the party shall discuss the matter with counsel for the party producing the documents to ascertain if confidentiality by agreement may be lifted or narrowed. In the event the parties disagree over a confidential designation, either party may file a motion seeking a ruling on the confidential designation.

14. This Protective Order shall not preclude or limit the offering or presentation of evidence (including testimony) during any hearing in this matter, except as provided in this Paragraph. Notwithstanding the foregoing, during portions of any hearing that involve presentation of evidence or testimony involving Confidential Information, the hearing shall be closed and limited to only those participants necessary for such presentation of evidence or testimony. If the parties disagree regarding whether any participant is necessary during hearing, a party may request that the Court decide during hearing, consistent with the provisions of this Protective Order and any other protections afforded by law. The parties reserve all rights to apply to the Court for protection with respect to the confidentiality of exhibits, testimony, or other evidence during any hearing in this matter.

15. The termination of proceedings in this action shall not relieve any person to whom Confidential Information has been disclosed in this matter from the obligations of this Protective Order, unless required otherwise by law or Commission order.

16. Producing or receiving information designated as Confidential Information or otherwise in accordance with the terms of this Protective Order shall not:

- a. Prejudice in any way the rights of Complainant or Respondent to object to the production of documents they consider not subject to discovery;
- b. Operate as an admission by any party that the restrictions and procedures set forth herein constitute adequate protection for any particular document or information deemed by any party to be confidential;
- c. Prejudice in any way the rights of any party to object to the authenticity or admissibility into evidence of any document, testimony, or other evidence subject to this Protective Order;

- d. Prejudice in any way the rights of Complainant or Respondent to seek a determination by the Commission whether any document should be subject to the terms of this Protective Order;
- e. Prejudice in any way the rights of Complainant or Respondent to petition the Commission for a protective order relating to any purportedly Confidential Information or seek any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Confidential Information; or
- f. Prevent Complainant and Respondent from agreeing to alter or waive the provisions or protections provided herein with respect to any particular information.

17. This Protective Order shall be interpreted with the understanding that each party does not intend to restrict its own ability to use documents or information where that party is the author and has designated the document as a Confidential Information.

18. The terms of this Protective Order are subject to modification, extension, or limitation as may be hereinafter ordered by the Commission.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: June 14, 2021
Washington, D.C.