

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

BALFOUR BEATTY RAIL, INC.

Plaintiff,

v.

VINCENT V. VACCARELLO and
CHARLES B. BYERS,

Defendants.

CASE NO.: 3:06-cv-551-J-20MCR

**PLAINTIFF BALFOUR BEATTY RAIL, INC.'S MOTION TO COMPEL
DEFENDANTS VACCARELLO AND BYERS TO RESPOND TO WRITTEN
DISCOVERY REQUESTS & MEMORANDUM IN SUPPORT**

Plaintiff Balfour Beatty Rail, Inc. (“Balfour Beatty”) requests that this Court order Defendants Vaccarello and Byers to comply with Fed. R. Civ. P. 33 and 34 and to respond to Balfour Beatty’s Interrogatories and Requests for Production of Documents. After several months of diligent effort on the part of counsel for both parties, Defendants have withdrawn all objections to the requests at issue other than those objections based upon confidentiality. (See November 1, 2006, letter from David Burns to Will Brumbach, attached hereto as Exhibit A, at 3-9).¹ Balfour Beatty contends that those objections are invalid in light of this Court’s recent holding that “the Amended Protective

¹ The undersigned received the attached letter in response to a letter regarding several discovery issues and after a lengthy teleconference regarding those same issues. As quoted below, the November 1 letter restated the Defendants’ objections to Document Requests 11 and 21 to Byers; Document Requests 5, 11, and 22 to Vaccarello; and Interrogatories 8, 9, and 10 to Vaccarello. The restated objections relied solely upon the confidentiality of the information sought. For several other requests at issue, the Defendants never asserted any objection other than one based upon confidentiality.

Order is sufficient to protect any confidential information” that Balfour Beatty sought in a document request from several non-parties. (Doc. 32 at 8). Balfour Beatty submits that the Court should arrive at the same holding that it arrived at last week – that the Amended Stipulated Protective Order Governing Confidential Materials and Information (“Amended Stipulated Protective Order”) (Doc. 22-2) adequately protects any interest that Vaccarello and Byers may have in protecting the confidentiality of the information at issue. Therefore, Balfour Beatty respectfully requests that the Court compel Vaccarello and Byers to respond to the written discovery requests discussed below.

I. FACTUAL AND PROCEDURAL HISTORY

A. Balfour Beatty’s Allegations

In the Complaint (Doc. 1), Balfour Beatty alleges that Defendants Vincent Vaccarello and Charles Byers, while employed at Balfour Beatty and shortly thereafter, engaged in and carried out a conspiracy to

(1) damage Balfour Beatty’s computers and destroy the information stored on those computers, (Complaint, ¶¶ 30-49, 69-72),

(2) steal equipment that Balfour Beatty uses to maintain vegetation around rail lines, (*Id.*, ¶¶ 59, 87-90), and

(3) set up a competing enterprise staffed by Balfour Beatty’s employees to serve Balfour Beatty’s customers.

(*Id.*, ¶¶ 23-29, 50-68, 83).

More specifically, Balfour Beatty alleges that “[w]hile they were still employed and getting paid by Balfour Beatty, Vaccarello and Byers decided that they would leave the company together to start their own competitive vegetation business,” All Railroad Services Corp. (“ARS”). (*Id.*, ¶ 51). Balfour Beatty further alleges that the Defendants

“solicited and induced the other 18 Vegetation employees to resign from Balfour Beatty with them so that they could all leave as a group and work together at a new company,” (*id.*, ¶ 27), and that the work crews for ARS “are or will be staffed with the employees who resigned together en masse from Balfour Beatty at the end of May 2006.” (*Id.* ¶ 63). Balfour Beatty also alleges that “Vaccarello and/or Byers have solicited vegetation maintenance business from CSX and other Balfour Beatty clients” and that the Defendants began that solicitation while still employed at Balfour Beatty. (*Id.*, ¶ 65). Knowing that the computers that Balfour Beatty had issued them contained evidence of the disloyal and illegal activities described above, both Defendants took steps to destroy the information stored on Balfour Beatty’s computers before leaving the company. (*Id.*, ¶¶ 30-49).

B. The Stipulated Protective Orders Governing Confidential Information

In an effort to facilitate discovery without compromising the confidential and trade-secret information of Balfour Beatty or ARS, the parties agreed to a Stipulated Protective Order Governing Confidential Materials and Information (“Stipulated Protective Order”), which the Court entered on October 5, 2006. (Doc. 17-2). After the Stipulated Protective Order was entered, the Defendants took the position that it did not sufficiently protect all of the material that Balfour Beatty requested. Accordingly, the parties entered into an Amended Stipulated Protective Order, which the Court adopted on November 21, 2006. (Doc. 22-2). The purpose of that Order was to protect “confidential and trade secret information that may be produced or otherwise disclosed during the course of this action.” (Amended Stipulated Protective Order at 1). The Amended

Stipulated Protective Order provides procedures by which the parties may (1) protect information from public disclosure by designating it as “Confidential” and (2) further protect information from disclosure to opposing parties by designating it as “Confidential—Attorneys’ Eyes Only,” in which case the attorneys representing the opposing party may view the material but may not share or discuss the material with their clients. (*Id.*, 2-4).

C. This Court’s Order Issued on December 12, 2006

In resolving a recent dispute over the production obligations of Michael Heridia and Robert Flacco, this Court held that “the Amended Protective Order is sufficient to protect any confidential information [that Heridia and Flacco] would need to produce” in response to a document request from Balfour Beatty. (Doc. 32 at 8). The Court also cautioned Vaccarello and Byers “against opposing the production [of certain] information for any reason already presented” in the motions on which the Court ruled last week. (*Id.* at 9).

II. ARGUMENT AND CITATION OF AUTHORITY

A. The Defendants’ Confidentiality Objections are Without Merit.

All of the Defendants’ objections to the discovery requests at issue are based upon their assertion that Balfour Beatty is seeking confidential information that the Defendants should not be compelled to produce. As the Court indicated last week, that objection is invalid because the Amended Stipulated Protective Order allows Defendants to respond to all discovery requests without compromising the confidentiality of any information. (Doc. 32 at 8 (“The Court is also convinced the Amended Protective Order is sufficient to

protect any confidential information the Investors would need to produce.”).

1. **The Amended Stipulated Protective Order adequately protects any interests that the Defendants may have in preserving confidentiality.**

As explained above, the parties initially entered into a Stipulated Protective Order that would allow a party to respond to discovery requests with the assurance that the information provided would not be disclosed to the public. Upon the request of the Defendants, the parties asked and the Court agreed to amend that Stipulated Protective Order. The Amended Stipulated Protective Order allows the responding party to prevent anyone (even parties to this litigation) other than attorneys from gaining access to the responsive information. As such, the Defendants’ interests in protecting confidential business materials have already been addressed, and their objections based upon confidentiality are without merit. (Doc. 32 at 8 (“The Court is also convinced the Amended Protective Order is sufficient to protect any confidential information the Investors would need to produce.”); *see also Floeter v. City of Orlando*, No. 6:05-cv-400-ORI-22KRS, 2006 WL 1000306, at *2 (M.D. Fla. Apr. 14, 2006) (holding that objections based on confidentiality “are better resolved through a confidentiality order”); *In re: Sahlen & Assocs., Inc.*, No. 89-6308-CIV-HOEVELER, 1990 WL 284508, at *1 (S.D. Fla. 1990) (holding that “confidentiality concerns raised by [the objecting party] can be remedied by the entry of an appropriate protective order.”).

2. **The Defendants should be compelled to respond to all requests at issue.**

For seven requests at issue, the Defendants never asserted an objection other than one based upon confidentiality. As required by Local Rule 3.04(a), Balfour Beatty will

quote each of these requests and the Defendants' objections thereto:

Request No. 12 to Byers: Produce any and all Documents constituting or pertaining to a bid for work (oral or written) submitted by ARS to a customer or potential customer.

Objection: Byers objects to Request No. 12 in that it calls for confidential information from ARS.

Updated Request No. 22 to Byers:² Produce the hard drive of any computer that you used for ARS or Balfour Beatty business purposes at any time during 2005, or 2006.

Objection: Byers objects to Request No. 22 because the request calls for confidential business information of ARS. Byers does not have a hard drive he used for Balfour Beatty business purposes.

Updated Request No. 23 to Byers: Produce all documents (including without limitation expense reports or credit card receipts) related to trips you have taken during 2005 or 2006. Balfour Beatty does not seek documents related to purely personal trips (i.e., those during which Byers neither conducted nor attempted to conduct business on behalf of Balfour Beatty or ARS, nor met with any persons affiliated with those companies or their potential customers or vendors.

Objection: Byers maintains objection to Request No. 23 because the request calls for confidential business information of ARS Corp. Byers does not have any documents in his possession, custody or control responsive to Request No. 23 that do not contain the confidential business information of ARS.

Updated Request No. 3 to Vaccarello: Please produce any and all documents pertaining to the planning or formation of ARS, ARS efforts to recruit customers, or ARS efforts to recruit employees.

Objection: Vaccarello objects to Request No. 3 because the request calls for confidential business information of ARS.

Request No. 12 to Vaccarello: Produce any and all Documents constituting or pertaining to a bid for work (oral or written) submitted by ARS to a customer or

² After counsel for the parties had conferred on numerous occasions in an attempt to resolve their discovery disputes, counsel for Balfour Beatty agreed to modify several discovery requests. Balfour Beatty styled these new requests as "updated" discovery requests and served them on the Defendants. The Defendants agreed to respond to some of the modified requests but maintained their objections to others.

potential customer.

Objection: Vaccarello objects to Request No. 12 in that it calls for confidential information from ARS.

Updated Request No 23. to Vaccarello: Produce the hard drive of any computer that you used for ARS or Balfour Beatty business purposes at any time during 2005 or 2006.

Objection: Vaccarello objects to Request No. 23 because the request calls for confidential business information of ARS. Vaccarello does not have a hard drive he used for Balfour Beatty business purposes.

Updated Request No. 24 to Vaccarello: Produce all documents (including without limitation, expense reports or credit card receipts) related to trips you have taken during 2005 or 2006. Balfour Beatty does not seek documents related to purely personal trips (i.e. those during which Vaccarello neither conducted nor attempted to conduct business on behalf of Balfour Beatty or ARS, nor met with any persons affiliated with those companies or their potential customers or vendors.

Objection: Vaccarello maintains objection to Request No. 24 because the request calls for confidential business information of ARS Corp. Vaccarello does not have any documents in his possession, custody or control responsive to Request No. 24 that do not contain the confidential business information of ARS.

As explained above, the Amended Stipulated Protective Order protects whatever interest the Defendants may have in preserving the confidentiality of the requested information.

(Doc. 32 at 8 (“The Court is also convinced the Amended Protective Order is sufficient to protect any confidential information the Investors would need to produce.”); *see also Floeter v. City of Orlando*, No. 6:05-cv-400-ORI-22KRS, 2006 WL 1000306, at *2 (M.D. Fla. Apr. 14, 2006) (holding that objections based on confidentiality “are better resolved through a confidentiality order”); *In re: Sahlen & Assocs., Inc.*, No. 89-6308-CIV-HOEVELER, 1990 WL 284508, at *1 (S.D. Fla. 1990) (holding that “confidentiality concerns raised by [the objecting party] can be remedied by the entry of an appropriate protective order.”). As such, the Defendants should be ordered to respond in full.

For the eight additional requests at issue, the Defendants initially asserted objections based upon confidentiality and other grounds but withdrew all objections other than those based upon confidentiality. (Exhibit A at 3-9). Those eight requests, along with the Defendants' objections and revised objections read as follows:

Request No. 11 to Byers: Produce any and all Documents constituting or pertaining to a contract or agreement (oral or written) between ARS and a third party (including but not limited to a customer, vendor, or employee).

Initial Objection: Byers objects to Request No. 11 in that it is vague and ambiguous. Byers additionally objects to Request No. 11 in that the request calls for confidential information of ARS.

Objection as Modified in November 1 Letter: Byers objects to Request No. 11 because the request calls for confidential business information of ARS.

Request No. 21 to Byers: Produce all documents showing equipment owned or used by ARS, including records and receipts indicating when and by whom that equipment was purchased.

Initial Objection: Byers objects to Request No. 21 in that it calls for irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence and requests confidential information of ARS.

Objection as Modified in November 1 Letter: Byers objects to Request No. 21 because the request calls for the confidential business information of ARS. Byers does not have any documents reflecting any property or equipment owned or used by ARS that was once owned or used by Balfour Beatty.

Request No. 5 to Vaccarello: Produce any and all Documents (including without limitation correspondence and electronic mail messages) pertaining to any communication with one or more current or former Balfour Beatty employee or customer.

Initial Objection: Vaccarello objects to Request No. 5 as vague and ambiguous as well as overly broad and burdensome.

Objection as Modified in November 1 Letter: Vaccarello will produce all responsive documents to the extent they do not divulge confidential business of ARS Corp.

Request No. 11 to Vaccarello: Produce any and all Documents constituting or pertaining to a contract or agreement (oral or written) between ARS and a third

party (including but not limited to a customer, vendor, or employee).

Initial Objection: Vaccarello objects to request No. 11 in that it is vague and ambiguous. Vaccarello additionally objects to Request No. 11 in that the request calls for confidential business information of ARS.

Objection as Modified in November 1 Letter: Vaccarello objects to Request No. 11 because the request calls for confidential business information of ARS.

Request No. 22 to Vaccarello: Produce all documents showing equipment owned or used by ARS, including records and receipts indicating when and by whom that equipment was purchased.

Initial Objection: Vaccarello objects to Request No. 22 as overly broad and calling for irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence and requests confidential business information of ARS.

Objection as Modified in November 1 Letter: Vaccarello objects to Request No. 22 to the extent that it seeks confidential business information of ARS. Vaccarello does not have any documents in his possession, custody or control that reflect ARS having or using any equipment owned by Balfour Beatty.

Interrogatory No. 8 to Vaccarello: Identify (as that term is defined in the Definitions and Instructions above) each and every person or entity with an investment, ownership interest, or other financial interest in ARS, and state the amount of money the person or entity has invested, as well as his, hers, or its ownership interest in ARS, as measured as a percentage of the outstanding shares of ARS stock.

Initial Objection: Vaccarello objects to Interrogatory 8 to the extent that the Interrogatory calls for irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence and to the extent that the information sought is confidential business information of ARS. Without waiving these objections, the individuals with an ownership interest in ARS are:

Robert Flacco
44 Fink Drive
Ottsville, PA 18942
(610) 847-0121

Michael Heridia
44 Fink Drive
Ottsville, PA 18942
(610) 847-0121

*Vincent Vaccarello
c/o Tanner Bishop*

Objection as Modified in November 1 Letter: Vaccarello objects to Interrogatory Nos. 8, 9, and 10 because the interrogatories call for confidential business information of ARS.³

Interrogatory No. 9 to Vaccarello: Identify (as that term is defined in the Definitions and Instructions above) each and every person employed by ARS, and state his or her job title, supervisor, first date of employment, the date on which he or she received an offer to join ARS, and the ARS representative who extended a job offer to him or her.

Initial Objection: Vaccarello objects to Interrogatory 9 because the information responsive is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Further, Vaccarello objects as the question seeks confidential business information of ARS that is not subject to discovery.

Objection as Modified in November 1 Letter: Vaccarello objects to Interrogatory Nos. 8, 9, and 10 because the interrogatories call for confidential business information of ARS.

Interrogatory No. 10 to Vaccarello: Identify (as that term is defined in the Definitions and Instructions above) each and every entity that has entered into a contract or agreement (oral or written) with ARS, each and every representative of that entity who communicated with ARS regarding the contract or agreement, and each and every representative of ARS who communicated with that entity regarding the contract or agreement; and state whether that entity was a client or customer of Balfour Beatty during 2005 or 2006; the date of the ARS contract or agreement, and the terms of the ARS contract or agreement.

Initial Objection: Vaccarello objects to Interrogatory 10 as overbroad and ambiguous as well as calling for irrelevant information that is not reasonably calculated

³ Balfour Beatty acknowledges that the Court found that responsive information to a similar request was not discoverable from ARS investors who are not parties to this lawsuit. (Doc. 32 at 4). However, Balfour Beatty contends that Vaccarello, as a party to this lawsuit, should be compelled to respond to the request in full, invoking the Amended Stipulated Protective Order as necessary. Additionally, Balfour Beatty submits that an individual's incentive to aid in the defense of this lawsuit, and, consequently, the credibility of his testimony, depends more upon the amount of money that he has invested in ARS than it depends upon the percentage of ARS stock that he owns. Consequently, Balfour Beatty requests that Vaccarello be compelled to respond in full.

to lead to the discovery of admissible evidence. Further, Vaccarello objects to Interrogatory 10 because the Interrogatory seeks confidential business information of ARS.

Objection as Modified in November 1 Letter: Vaccarello objects to Interrogatory Nos. 8, 9, and 10 because the interrogatories call for confidential business information of ARS.

Since the Defendants' only remaining objections are based upon the confidentiality of the information sought, those objections are rendered invalid by the provisions of the Amended Stipulated Protective Order. (Doc. 32 at 8 ("The Court is also convinced the Amended Protective Order is sufficient to protect any confidential information the Investors would need to produce."); *see also Floeter v. City of Orlando*, No. 6:05-cv-400-ORI-22KRS, 2006 WL 1000306, at *2 (M.D. Fla. Apr. 14, 2006) (holding that objections based on confidentiality "are better resolved through a confidentiality order"); *In re: Sahlen & Assocs., Inc.*, No. 89-6308-CIV-HOEVELER, 1990 WL 284508, at *1 (S.D. Fla. 1990) (holding that "confidentiality concerns raised by [the objecting party] can be remedied by the entry of an appropriate protective order."). As such, the Defendants should be ordered to respond in full.

III. CERTIFICATE OF COUNSEL

In accordance with Local Rule 3.01(g) the undersigned counsel certifies that counsel for all parties have conferred on numerous occasions in a good-faith attempt to resolve the issues presented in this Motion. Counsel have succeeded in resolving numerous issues but have been unable to resolve the issues presented in this brief.

IV. CONCLUSION

For the reasons set forth above, Balfour Beatty submits that the Defendants

should be Ordered to respond to each discovery request listed above.

Respectfully submitted this 27th day of December, 2006.

s/ William K. Brumbach

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2006, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will automatically send notice to:

Thomas E. Bishop
Tanner Bishop
1 Independent Drive
Suite 1700
Jacksonville, FL 32202

s/ Will Brumbach
Will Brumbach