UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civil Action
- against -	)	No. 72-344 (AGS)
INTERNATIONAL BUSINESS MACHINES CORPORATION,	)	
Defendant.	)	

MEMORANDUM ON PROTECTIVE ORDER ISSUES

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The United States submits this Memorandum in support of its motion for a protective order and in opposition to defendant International Business Machine Corporation's ("IBM") motion for a protective order.

I. OPEN ISSUES

The undersigned certifies that the Government and IBM have negotiated in good faith to agree on all aspects of a confidentiality stipulation and protective order, but despite our best efforts, three principal issues divide the parties:

A. IBM's business employees and in-house counsel should not obtain confidential information

The parties have been unable to agree on the appropriate designation of confidential information and the scope of disclosure. IBM's proposed protective order contains a two-tiered designation system. IBM would classify research and development information and trade secrets as "confidential" and would classify other information that, if disclosed, would "materially affect the producing party's business, commercial or financial interests" as "highly confidential." The Government's proposed protective order protects the identical information, but combines the information into a single "confidential" classification. (*Compare Gov't Protect. Ord.,* Ex.1 at ¶ 1(a) *with IBM Protect. Ord*., Ex. 2 at ¶ 1(a) & (b).) Under IBM's two-tiered classification system, nonparty research and development information and trade secrets designated "confidential" could be disclosed to an unknown and potentially unlimited number of IBM "directors, officers, and employees." Information designated "highly confidential" could be disclosed to an unknown number of unidentified IBM in-house litigation counsel.

To prevent competitive injury that would flow from disclosing another person's commercially-sensitive information to IBM, the Government's proposed protective order would deny IBM's business employees and in-house counsel access to all confidential information, whether classified "confidential" or "highly confidential" under IBM's proposal. The Government's proposed protective order, however, permits IBM's outside counsel and independent experts to have access to such confidential information.

(*Compare Gov't Protect. Ord.*, Ex. 1 at ¶ 7(c), (d), and (g) *with IBM Protect. Ord.*, Ex. 2 at ¶¶ 6(c)-(f) and 7(c)-(e).) The Government's proposed protective order strikes the appropriate balance between IBM's need for access to another person's confidential information against the risks and consequences of disclosure of such information to IBM's business employees and in-house counsel.

Resolution of IBM's motion to terminate the judgment will require an assessment of the likely competitive effect of judgment termination in markets for AS/400 and System/360 ... 390 products and services. This assessment will require the production of highly-sensitive commercial information from IBM and from IBM's competitors, customers and other persons who are not parties in this litigation. (*Brown Decl.* Ex. 3 at ¶ 2.)

The Government has initiated efforts to obtain relevant commercial information from IBM. Under the terms of an interim confidentiality agreement, IBM has produced a handful of its recent AS/400 and System/360 ... 390 marketing plans. IBM has characterized these plans as "constitut[ing] some of the most sensitive commercial information in the IBM company." (*IBM's Memorandum in Support of its Motion for Entry of an Appropriate Protective Order to Govern Confidential Information* ("*IBM Protect. Memo*.") at 1.) The Government's August 4, 1995, discovery request seeks from IBM additional information, including sales, marketing, advertising and research and development plans and strategies; price, profit and cost analyses and data; and customer information and other competitive information. IBM has characterized this additional information as "highly sensitive commercial information." *Id*.

The Government has informed third parties that it will need to obtain similarly "highly sensitive commercial information" from IBM's competitors, customers and other third parties. (*Brown Decl.* Ex. 3 at ¶ 2.) IBM's one-sided proposed protective order fails to adequately protect the rights and needs of those nonparties.

Because nonparty commercially-sensitive information is critical to the resolution of the issues raised by IBM's motion, the Government has described and provided copies, when time permitted, of

IBM's and its proposed protective orders to various IBM competitors and other parties from whom we will need to obtain information. In response, IBM's direct competitors in the United States and abroad in the following markets provided declarations: (1) large scale mainframe systems which are architecturally compatible with the IBM System/360 ... 390 (Amdahl Corporation, Hitachi Data Systems Corporation, and Fujitsu Limited); (2) repair and maintenance of IBM's AS/400 and System/360 ... 390 products (Bell Atlantic Business Systems Services ("BABSS")); (3) the sale of used IBM equipment (Nelco, Ltd.; AT&T Systems Leasing Corporation ("AT&T"); El Camino Resources; Computer Sales International, Inc.; and Meridian Leasing Corporation); and (4) financing of both new and used IBM equipment (Nelco, AT&T, El Camino, Meridian Leasing, and Computer Sales International). Several of these IBM competitors are also authorized IBM dealers (Nelco and El Camino). The Government also obtained a declaration from Computer Lessors and Dealers Association ("CDLA") and a letter outlining the expected testimony, after her recovery from illness, of the Executive Director of Independent Service Network International ("ISNI"), two industry trade associations. (*Brown Decl*. Ex. 3 at ¶ 3.)[1]

The nonparty declarants are unanimously opposed to IBM's proposal to allow IBM's business employees and in-house lawyers to have access to their commercially-sensitive information, whether classified "confidential" or highly confidential," and unanimous in their support of the Government's proposed protective order that limits disclosure to IBM's outside counsel and independent experts. (*Handschuh Decl.* Ex. 4 at ¶ 7; *Recker Decl.* Ex. 5 at ¶¶ 6-7; *Felice Decl.* Ex. 6 at ¶¶ 10-12; *Poisson Decl.*

The following persons submitted declarations in opposition to IBM's proposed protective order and in support of the Government's: Gregory Handschuh, Vice President and General Counsel of Amdahl Corporation (Ex. 4); James M. Recker, Vice President and Chief Counsel of AT&T (Ex. 5); Stephen J. Felice, Vice-President of Sales and Operations, BABSS (Ex. 6); David E. Poisson, President and Chief Operating Officer, CDLA (Ex. 7); Kenneth B. Steinback, Chairman and Chief Executive Officer, Computer Sales International, Inc. (Ex. 8); David E. Harmon, President, El Camino Resources (Ex. 9); Katsuro Yamaji, General Manager, Fujitsu Legal and Industry Relations Group (Ex. 10); Frederick W. Hansen, Executive Vice President of Hitachi Data Systems Corporation (Ex. 11); John Polster, Associate General Counsel, Meridian Leasing Corporation (Ex. 12); and Richard Nelson, President, Nelco, Ltd. (Ex. 13). The Government was unable to obtain a declaration from ISNI because of the severe illness of its Executive Director. James R. Eiszner, ISNI's outside counsel, discussed the issue of a protective order with the Executive Director before her illness and submitted a letter (Ex. 14) that reflects his understanding of ISNI's views. (*Brown Decl*. Ex. 3 at ¶ 3.)

Ex. 7 at ¶¶ 12-13; *Steinback Decl.* Ex. 8 at ¶¶ 7-8; *Harmon Decl.* Ex. 9 at ¶¶ 10-11; *Yamaji Decl*. Ex. 10 at ¶ 7; *Hansen Decl.* Ex. 11 at ¶¶ 11-12; *Polster Decl.* Ex. 12 at ¶¶ 8-9; *Nelson Decl.* Ex. 13 at ¶¶ 10-11; *see also Letter from Eiszner to Brown* of 8/15/95, Ex. 14 at 2.) Gregory Handschuh, Amdahl's Vice President and General Counsel, succinctly states the position of all declarants:

> Amdahl has been advised that the Government has proposed a protective order in which disclosure of any information provided by Amdahl and designated as confidential and proprietary would be limited to outside counsel and outside experts, and has seen a copy of the proposed protective order as provided to IBM on August 4, 1995. Amdahl strongly endorses the limitations on disclosure contained in the proposed protective order as necessary to the adequate protection of any information provided by Amdahl which it considers to be proprietary and confidential.

(*Handschuh Decl.* Ex. 4 at ¶ 7.)

All declarants state that they expect the Government to request the production of information relating to sales and customers; business plans and strategies; research and development information and technology assessment studies; and sales, price and cost analyses and data. (*See*, e.g., *Felice Decl.* Ex. 6 at ¶ 5; *Harmon Decl*. Ex. 9 at ¶ 4.) The Government will indeed seek this information. (*Brown Decl.* Ex. 3 at ¶ 2.) Each declarant indicates that this type of information is "highly sensitive" or "highly confidential" and that disclosure to IBM would give IBM a significant competitive advantage and severely jeopardize its ability to compete in relevant AS/400 and System 360 ... 390 markets. (*See, e.g., Recker Decl.* Ex. 5 at ¶¶ 4-5; *Felice Decl.* Ex. 6 at ¶¶ 5, 8; *Nelson Decl.* Ex. 13 at ¶¶ 4, 6-7.) The danger of competitive harm is especially acute here because IBM is the dominant competitor in the manufacture of System/360 ... 390 compatible processors (*Handschuh Decl*. Ex. 4 at ¶ 3); the provision of repair and maintenance service for the AS/400 and System/360 ... 390 (*Felice Decl.* Ex. 6 at ¶ 2); the sale of used AS/400 and System/360 ... 390 equipment (*Nelson Decl*. Ex. 13 at ¶ 3); and the provision of financing for AS/400 and System/360 ... 390 equipment (*Id*.).

The concerns expressed by Stephen J. Felice, Vice President of Sales and Operations of BABSS, are representative:

> BABSS is opposed to disclosure of its confidential information to any employees of

> IBM, even if there were provisions in the applicable protective order that required the IBM employees to use BABSS confidential information solely for purposes of the consent decree termination proceedings. Assuming the *bona fides* intentions of IBM employees to comply with such a requirement, BABSS nevertheless believes that employees of IBM will be unable to comply with the order. As a practical matter, it is difficult for a person, who is given highly confidential information that is to be used for one purpose, not to use that information -- even if unintentionally or subconsciously -- for another purpose. Moreover, should this happen, enforcement of the protective order is nearly impossible.

(*Felice Decl.* Ex. 6 at ¶ 11.)

The declarants offer concrete examples of the competitive harm that could flow from disclosure of commercially-sensitive information to IBM business employees. David E. Harmon, President of El Camino, correctly surmises that the Government may ask for bid documents and explains that such documents appear to be the type of document IBM would classify as "confidential" and, therefore, be subject to disclosure to IBM business employees. (*Harmon Decl.* Ex. 9 at ¶ 6.) These documents, when viewed as a whole, will reveal El Camino's targeted customer base, its overall bidding strategy and pricing, and disclosure of this information "to the dominant market participant, IBM would be disastrous." (*Id.*) Similarly, research and development information appears to be the type of information IBM might classify as "confidential." Research and development information might include BABSS' proprietary advanced diagnostics services and tools and methodologies for use in servicing IBM equipment. This information, in the hands of IBM business employees, could be used to neutralize BABSS' attempts to differentiate its service from IBM's. (*Felice Decl.* Ex. 6 at ¶ 7.) Disclosure to IBM business employees might also place in jeopardy nonparty relationships with their customers because customer confidential information contained in nonparty documents might be disclosed. (*Recker Decl.* Ex. 5 at ¶ 5.) Certain competitors, such as Amdahl and Hitachi, are particularly susceptible to serious competitive injury because their customers are dependent on the System/360 ... 390 operating system and related software, which are controlled by IBM. (*Handschuh Decl.* Ex. 4 at ¶ 6; *Hansen Decl.* Ex. 11 at ¶ 7.)

The competitive concerns are not eliminated even if a nonparty's confidential information is

disclosed only to IBM's in-house counsel. Several declarants expressed concern that IBM intends to grant an unknown number of unnamed in-house litigators access to their confidential information. (*Poisson Decl.* Ex. 7 at ¶ 10; *Harmon Decl.* Ex. 9 at ¶ 8; *Nelson Decl.* Ex. 13 at ¶ 8.) Others expressed concern that IBM has failed to provide any assurance that IBM in-house litigators "will not later act in a business capacity for IBM or will not provide counsel in transactional matters at a later date." (*Nelson Decl*. Ex. 13 at ¶ 8; *accord*, *Felice Decl.* Ex. 6 at ¶ 12; *Handschuh Decl.* Ex. 4 at ¶ 8; *Poisson Decl.* Ex. 7 at ¶ 10; *Steinback Decl.* Ex. 8 at ¶ 6; *Harmon Decl.* Ex. 9 at ¶ 8; *Polster Decl.* Ex. 12 at ¶ 7.) Simply curing these defects, however, will not remove the risk that disclosure of confidential information could alter the current playing field on which the declarants compete with IBM. Several declarants have legally obtained IBM-related transactional data from IBM customers who have entered into confidentiality agreements with IBM. If this information were disclosed to IBM's in-house litigators, they would be in a better position to recommend the drafting of stricter or different confidentiality agreements, to the detriment of IBM's competitors. (*Harmon Decl*. Ex. 9 at ¶ 9; *Polster Decl.* Ex. 12 at ¶ 7; *Nelson Decl.* Ex. 13 at ¶ 9.)

Declarants also note that IBM is represented by outside counsel with vast experience in handling IBM's antitrust litigation in the computer industry, thus minimizing any need for IBM's in-house litigators to review the confidential information of third parties. (*Felice Decl.* Ex. 6 at ¶ 12; *Poisson Decl.* Ex. 7 at ¶ 10; *Harmon Decl.* Ex. 9 at ¶ 8; *Nelson Decl.* Ex. 13 at ¶ 8; *see also Brown Decl.* Ex. 3 at ¶ 17.)

Most nonparty declarants have indicated their willingness to respond to reasonable requests for information to aid the Government's and the Court's consideration of IBM's motion to terminate if, at a minimum, any protective order restricts disclosure of their confidential information to IBM's outside counsel and independent experts. If such safeguards are not in place, these same declarants state that they may each separately intervene to prevent disclosure of their confidential information to IBM's business employees and in-house lawyers. (*Handschuh Decl*. Ex. 4 at ¶ 9; *Recker Decl.* Ex. 5 at ¶¶ 6-7; *Felice Decl.* Ex. 6 at ¶¶ 9-10; *Poisson Decl.* Ex. 7 at ¶¶ 12-13; *Steinback Decl.* Ex. 8 at ¶¶ 7-8; *Harmon Decl.*

Ex. 9 at ¶¶ 10-11; *Yamaji Decl.* Ex. 10 at ¶¶ 6-7; *Polster Decl.* Ex. 12 at ¶¶ 8-9; *Nelson Decl.* Ex. 13 at ¶¶ 10-11.) Moreover, two declarants with relevant information located outside the United States state that, without adequate safeguards, they will be less inclined to provide such information that may be beyond the Court's power to compel. (*Handschuh Decl*. Ex. 4 at ¶ 9; *Felice Decl*. Ex. 6 at ¶ 9.) Thus, IBM's proposed order would impede discovery and force the Court to act on numerous individual requests for additional protection. (*Brown Decl.* Ex. 3 at ¶ 4.)

B. The protective order should provide a mechanism to allow third parties to provide meaningful assistance

IBM's proposed protective order fails to provide a mechanism to allow third parties to gain access to IBM confidential information to assist the Government and the Court in analyzing the competitive effects of terminating the Final Judgment.[2]

The Government's proposed protective order expressly provides for the possibility that IBM's confidential information may have to be disclosed to third parties to allow them to assist the Government and permit their meaningful participation as *amicus curiae*. (*Gov't Protect. Ord.*, Ex. 1 at ¶ 7(i).) Just as the protective order must prohibit the inappropriate disclosure of nonparty confidential information to IBM, the Government is mindful that adequate safeguards must be in place to protect against the inappropriate disclosure of confidential information of IBM or other persons to any third parties who may assist the Government in this action. Accordingly, any disclosure of confidential information to third parties would be subject to the same terms as apply to IBM and, thus, would be limited to a third party's outside counsel and independent experts. *(Id.* at ¶ 7; *Brown Decl*. Ex. 3 at ¶¶ 9-10.) To further minimize any risk, no disclosure will be made to any third party assisting the Government or the Court as *amicus curiae* without first giving the protected party notice and the opportunity to object. (*Gov't Protect. Ord.*,

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IBM has consistently objected to any suggestion that a third party could have access to IBM's confidential information or have an opportunity to discuss the significance of such information with the Government. (*Brown Decl.* Ex. 3 at ¶¶ 12-13.)

Ex. 1 at ¶¶ 7(i), 8; *see Brown Decl.* Ex. 3 at ¶ 10.) If the protected party objects, the Government's proposed protective order would prohibit disclosure until after the Court has ruled. (*Id.*)[3] This is the same procedure that currently exists under the Interim Confidentiality Agreement. (*Brown Decl.* Ex. 3 at ¶ 14; *Barbur Decl.* Ex. F.)

The Government, in opposing intervention in this case, argued that some third parties may nonetheless assist in developing evidence on the competitive effects of judgment termination and might also assist the Court as traditional *amicus*, or in a more active role as "litigation *amicus curiae*." (*Consolidated Opposition of the United States to Motions to Intervene and Preliminary Recommendations Regarding Participation by Amicus Curiae* at 3, 18-20.)

The Government continues to believe that third-party assistance will be useful to development of an adequate record, in view of the complexity and unusual posture of this case and IBM's objections to an investigation with meaningful discovery. (*Brown Decl*. Ex. 3 at ¶¶ 5-8.) The Government has sought in the past, and anticipates it will continue to seek, information and analysis from at least two third parties, ISNI and CDLA. (*Id*. at ¶ 8.) The Government also anticipates that it may seek to disclose IBM confidential information to ISNI and CDLA to obtain their assessment of it. (*Id*.) ISNI and CDLA stand ready to participate in any way appropriate and, if granted access to IBM confidential information, agree to be bound by the terms of any protective entered by the Court. (*Poisson Decl*. Ex. 7 at ¶ 6; *Eiszner Letter*, Ex. 14 at 2.)

ISNI and CDLA also indicate that they will seek leave of the Court to participate in this case beyond the role traditionally exercised by *amicus curiae* and will seek access to IBM's confidential information in order to present expert testimony. (*Poisson Decl*. Ex. 7 at ¶¶ 2, 4; *Eiszner Letter*, Ex. 14 at 1-2.) Such expert testimony could facilitate the development of a more complete record for the Court,

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The Government's proposed protective order includes within the definition of "party" any third party who may be granted access to protected information pursuant to the terms of the order. Of course, including third parties in the definition does not confer upon them party status. They are included in the definition to make clear that, if they are authorized to review confidential information, they are bound by all of the terms of the protective order.

and ISNI's and CDLA's outside counsel and independent experts may need access to IBM confidential information to participate in a meaningful way. (*Brown Decl.* Ex. 3 at ¶ 11.)

The Court, in denying intervention, indicated that it would consider applications to participate in this action as *amicus curiae* and noted that the Government contemplated a more substantial role for some third parties as "litigating *amici*." *United States v. IBM*, No. 72-344 (AGS), slip. op. at 6-7 (S.D.N.Y. June 16, 1995) (Ex. 17). The Court mentioned "the Government's position because it further confirms that status other than that of formal intervenor will adequately protect the interests of the Proposed Intervenors." *Id*.

The Government's proposed protective order does not confer any rights on any third party, nor does it grant them access to confidential information. It simply establishes a procedure through which the Government or the Court may at some future date seek the assistance of third parties, in anticipation that some third parties may need access to confidential material to offer meaningful assistance. The propriety of any disclosure can be considered at the time a disclosure request is made. In contrast, IBM has refused even to include a mechanism in its proposed protective order for third parties to request access to confidential information.

C. Government's right to retain and use confidential information for law enforcement purposes

Guided by strong public policy, standard Department practice is to seek protective orders containing provisions that expressly grant the Government the right to use and maintain confidential information for law enforcement purposes. Thus, the Government proposes the inclusion of a savings clause to permit disclosure of confidential information, after taking appropriate steps to preserve the confidentiality of such information, to authorized representatives of the Executive Branch, in the course of legal proceedings to which the Government is a party, for securing compliance with the final judgment, and for law enforcement purposes or as otherwise required by law. (*Gov't Protect. Ord.* Ex. 1 at ¶ 10(b).) In any legal proceeding (other than this action or a grand jury proceeding) in which the Department intends to disclose confidential information, the Department will provide advance notice. (*Id*. at ¶ 11.)

Additionally, the Government could retain confidential information after termination of these proceedings for law enforcement purposes or as otherwise required by law. (Id. at ¶ 15.)

IBM would limit the Department's use of confidential information to final judgment proceedings or where expressly authorized by law. (*IBM Protect. Ord.* Ex. 2 at ¶¶ 10 & 15.) IBM offers no reasoned basis for opposing the Government's proposal, nor does it explain how its confidentiality concerns are not fully protected under that proposal.

The provisions proposed by the Government are essential to permit the Department to carry out its law enforcement mission of protecting competition. *(Brown Decl.* Ex. 3 at ¶ 18.)

D. IBM's remaining objections to the Government's proposed protective order are without merit

1. Inadvertent waiver of attorney-client privilege

The parties disagree as to whether the Court should enter a protective order that overrules established Second Circuit law regarding the inadvertent production of privileged documents. The Government agrees to be bound by the law of the Second Circuit and has proposed an appropriate mechanism to allow a producing party expeditiously to obtain the return of any inadvertently produced document without resort to the Court. The Government proposes that, upon receiving notice that a privileged document has been inadvertently produced, the receiving party thereafter will make no use of it and will preserve the status quo. If the producing party can establish that the document was inadvertently produced, for example, by providing an affidavit explaining the circumstance of the production, the document will be returned. IBM, on the other hand, demands the return of any document claimed to have been inadvertently produced and would deny the receiving party and the Court the right to inquire into the possibility of waiver based on the circumstances of the disclosure.[4] (*Compare Gov't Protect. Ord., Ex. 1 at ¶ 14 with IBM Protect. Ord., Ex. 2 at ¶ 14*.)

Moreover, IBM's proposed order seeks the return of inadvertently produced materials on any ground and is not limited to privileged information. Thus, it could permit demands for the return of information when further review might reveal that the information initially could have been withheld because, for example, it is not relevant or is merely cumulative of other information.

2. Advance disclosure of economic experts and persons who have had prior access to confidential information

IBM's proposed protective order would require the Government to give IBM notice before disclosing confidential information to independent economic experts or to any person whom counsel for any party in good faith believes to have been a participant in the confidential communication. The Government will not stipulate to requiring advance notice in these two situations, because such notice is not necessary to protect IBM's legitimate interests and serves only to give IBM an unfair litigation advantage. (*Compare Gov't Protect. Ord. Ex. 1 at ¶ 7(d), (f) with IBM Protect. Ord. Ex. 2 at ¶¶ 6(f), (h) and 7(e), (g)*.)

3. Confidentiality designations

The Government's proposed protective order contains two provisions to ensure that the producing parties are not over-inclusive in their designation of confidential information and that the public will have the greatest possible access to the proceedings consistent with the need to protect confidential information. The Government would require that all confidential designations be made in good faith. IBM refuses to make this commitment. (*Compare Gov't Protect. Ord., Ex. 1 at ¶ 2 with IBM Protect. Ord., Ex. 2 at ¶ 2*.) The Government also would require that confidential portions of documents be specifically marked where the entire document is not confidential. Again, IBM refuses to make this commitment. (*Compare Gov't Protect. Ord., Ex. 1 at ¶ 4 with IBM Protect. Ord., Ex. 2 at ¶ 3*.)

4. Separate ESO/TUO Investigation

IBM seeks entry of an "appropriate protective order" governing the handling of materials it produces in response to the Government's request for information and documents issued in an independent investigation of whether IBM has violated the judgment with its marketing practices for its Enterprise Server Offering (ESO) and Technology Upgrade Option (TUO). (*IBM Protec. Memo*. at 4 n.3.) This request should be denied for several reasons. First, Section XVIII of the Final Judgment contains provisions to which IBM has already consented for treatment of the information IBM produces

in the ESO/TUO investigation. Second, making discovery in the ESO/TUO investigation a part of the discovery in this proceeding will needlessly interfere with and delay the independent ESO/TUO investigation. IBM has made it clear that it opposes unilateral Government investigative discovery and will refuse to produce additional information or allow any depositions in this proceeding unless it is able to conduct simultaneously equivalent bilateral discovery of the Government. (*IBM Protect. Memo.* at 3; *Brown Decl*. Ex. 3 at ¶¶ 6 & 7.) This would substantially delay the ESO/TUO investigation. Finally, the separate ESO/TUO investigation is not properly before this Court. If IBM seeks to have the Government's ESO/TUO judgment violation investigation collapsed into this proceeding, the Court should require that IBM file a motion that would permit a full briefing on the issues. The Government respectfully requests that the Court refrain from reaching any decision on the scope or conduct of the ESO/TUO investigation on the basis of claims tangentially raised by IBM in its papers in this proceeding.

II. DISCUSSION

A. To prevent the harm that would result from disclosure, the Court should deny IBM's business employees and in-house lawyers access to nonparty confidential information

IBM's proposed protective order exploits the fact that its competitors, who must produce commercially-sensitive information in this action, are not now before the Court to protect their interests. Entry of IBM's protective order will chill third-party participation and give IBM a competitive advantage because its directors, officers, employees, and in-house litigators would have access to competitively sensitive nonparty information, while its competitors would be denied equal access to IBM's competitively sensitive information. This would be an ironic result in an action that is intended to ensure that competition is not suppressed in the AS/400 and System/360 ... 390 markets that are now dominated by IBM.

IBM seeks to justify disclosure of confidential information to IBM personnel with the conclusory and unsupported statement that it needs to disclose nonparty confidential information to its directors, officers, employees, and in-house litigators to pursue its pending motion to terminate. (*IBM Protec.*

Memo. at 10-11.) Balanced against these self-serving remarks by counsel are declarations from 10 nonparties who may be called upon to provide confidential information that IBM would then have the right to disclose to its business employees and in-house counsel. Each declarant objects to IBM's proposed protective order on the ground that disclosure to IBM employees would cause irreparable competitive harm. Each strongly endorses the Government's proposed protective order that would limit disclosure to IBM's outside counsel and independent experts.

Fed. R. Civ. P. 26(c) (7) provides, in pertinent part, that, upon motion by a party or by the person from whom discovery is sought and for "good cause" shown, the court "may make any order which justice requires to protect a party or person" so "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." The grant or denial of a protective order rests within the sound discretion of the trial court. *Dove v. Atlantic Capital Corp*., 963 F.2d 15, 19 (2d Cir. 1992).

In exercising its discretion, the Court must balance the need of IBM's business employees and inside counsel for the information against the injury that might result if disclosure is ordered. *Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1470 (9th Cir.) cert. denied sub nom. BB Asset Management v. Symantec Corp., 113 S. Ct. 198 (1992); Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co., 107 F.R.D. 288, 293 (D. Del. 1985); Heublein, Inc. v. E & J Gallo Winery, Inc., 1995 WL 168846 at 2 (S.D.N.Y. April 4, 1995). The Government recognizes that courts sometimes allow in-house counsel access to confidential information. Where disclosure would present risks of competitive harm, however, courts have not hesitated to deny in-house counsel access to confidential information. See, e.g., F.T.C. v. Exxon Corp., 636 F.2d 1336, 1349-51 (D.C. Cir. 1980); Brown Bag Software, 960 F.2d at 1471; Heublein, Inc., 1995 WL 168846 at 3. Courts are cautious when granting in-house counsel access to confidential information because they frequently interact with business attorneys and other employees outside the litigation setting. Courts do not question the integrity of in-house counsel, but recognize that an in-house lawyer cannot "lock-up trade secrets in his mind, safe*

from inadvertent disclosure to his employer once he had read the [confidential] documents." Brown Bag Software, 960 F.2d at 1471.[5]

IBM's proposed protective order and Mr. Rosenberg's declaration would permit IBM to disclose confidential information to a "group" of unnamed in-house litigators. (IBM Protect. Ord., at ¶¶ 6 (c), 7(c); Rosenberg Decl. at ¶ 3.) Moreover, IBM fails to describe in detail any specific attorney's past, current and anticipated future duties and activities. IBM simply asserts that all IBM's in-house litigators are not involved in "competitive decision making." (Rosenberg Decl. at ¶ 3.) IBM offers no explanation of this term or any factual basis on which this Court can evaluate the claim. IBM does state that in-house litigators "serve as liaison between IBM's outside litigation counsel and IBM management." (Id.) This phrase, without explanation, raises a concern of inadvertent disclosure.

Even if IBM were belatedly to identify a specific attorney and fully detail the attorney's duties, the risk of inadvertent use or disclosure of confidential information remains a major concern. During negotiations to narrow our differences, IBM identified Anthony Clapes and Donald Rosenberg as two in-house attorneys who might receive nonparty confidential information. Although IBM indicates that these gentlemen represent the company in litigation matters (Rosenberg Decl. at ¶ 3), one competitor believes Mr. Clapes, who supervises Mr. Rosenberg, may play a broader role, including "advocating business and legal policy on behalf of IBM, particularly as they relate to intellectual property and antitrust matters." (Handschuh Decl. Ex. 4 at ¶ 8.) The Government is further concerned if IBM's in-house counsel obtained confidential information from a competitor and then the two companies became involved in litigation. IBM's in-house counsel would be placed in a serious conflict situation if counsel had obtained confidential information that could be used to defend the company.

The balance of interests tipped in favor of allowing IBM's in-house litigation support staff access to confidential information. IBM represented that it routinely uses in-house clerical support staff and those individuals are not in a position to inadvertently misuse confidential information. Although IBM's support personnel will have to report to outside counsel, this should not present a hardship because outside counsel maintains offices at IBM's litigation unit in White Plains. (*Brown Decl.* Ex. 3 at ¶ 17.)

Three factors support the conclusion that the risk of injury to the producing party outweighs IBM's need to disclose confidential information to its business employees and inside counsel: (1) the confidential information sought to be disclosed belongs to nonparties; (2) IBM's role as the dominant competitor in the relevant AS/400 and System/360 ... 390 markets; and (3) the lack of prejudice to IBM due to the availability of experienced outside experts and counsel.

In exercising its discretion, the Court should recognize that nonparties are the real parties in interest with respect to this information and it is their interests that the Court must protect. See United States v. GAF Corp., 596 F.2d 10, 14 (2d Cir. 1979) ("real party in interest" in protecting disclosure of documents is the party who provided the documents). Courts routinely provide greater protection to confidential documents and information obtained from nonparties than that afforded to a party's own confidential information. In Dart Indus., Co. v. Westwood Chemical Co., 649 F.2d 646, 649 (9th Cir. 1980), the Court stated:

> *While discovery is a valuable right and should not be unnecessarily restricted, Kyle Engineering Co. v. Kleppe, 600 F.2d 226, 232 (9th Cir. 1979), the "necessary" restriction may be broader when a nonparty is the target of discovery. As one district court has noted, "[t]here appear to be quite strong considerations indicating that . . . discovery would be more limited to protect third parties from harassment, inconvenience, or disclosure of confidential documents." Collins and Aikman Corp. v. J.P. Stevens & Co., Inc., 51 F.R.D. 219, 221 (D.S.C. 1971).*

Nonparties are entitled to even greater protection where, as here, a nonparty's confidential information will be disclosed to a direct competitor. United States v. CBS, Inc., 103 F.R.D. 365, 368 (C.D. Cal. 1984). As we described earlier, the declarants offered numerous ways in which competitive harm could flow from the disclosure of nonparty confidential information.

Disclosure of confidential information to IBM's business employees poses even greater concerns. Initially, IBM's proposal for a two-tiered confidentiality system is irrational because the tiers are ambiguous and provide less protection for trade secrets than other commercially sensitive business information. In Safe Flight Instruments Corp. v. Sundstrand Data Control, Inc., 682 F. Supp 20, 22 (D. Del. 1988), the Court cites a long list of federal and state cases for the proposition that courts "often

afford fuller protection to technological information than that extended to ordinary business information." The great weight of precedent favors heightened protection of trade secrets because "of the threat of serious economic injury to the discloser of scientific information." Id.

For this reason, courts routinely deny a party's business employees access to confidential information. Safe Flight Instrument Corp., 682 F. Supp at 22; Chesa Inter., Ltd. v. Fashion Assoc., Inc., 425 F. Supp. 234, 237 (S.D.N.Y. 1977); Quotron Systems v. Automatic Data Processing, 141 F.R.D. 37, 40 (S.D.N.Y. 1992); Culligan v. Yamaha Motor Corp., 110 F.R.D. 122, 125-26 (S.D.N.Y. 1986). Furthermore, IBM makes no evidentiary showing that its "need" to disclose confidential information to its business employees outweighs the competitive risk.

The protective orders entered in Amsted Indus. Inc. v. National Castings, Inc., 1988 WL 90022 (N.D. Ill. 1988) and United States v. Microsoft, Corp., No. C-95-139 WHO (N.D. Calif., May 11, 1995) (Ex. 20) are instructive. In Amsted Industries, a patent infringement case involving two direct competitors, the plaintiff sought provisions in a protective order to allow disclosure of defendant's confidential information to two of its business employees and one in-house lawyer. The defendant objected on the ground that disclosure of confidential materials to its competitor's employees would result in irreparable harm. Amsted Indus. Inc, 1988 WL 90022 at 1. In rejecting the plaintiff's request, the Court stated that "the need for disclosure of even highly relevant information to a competitor may be outweighed by the irreparable harm that can result to the disclosing party." Id. The Court further recognized that, while the plaintiff might benefit from the assistance of its own employees, its outside counsel "should be able to gain the technical advice it needs from outside experts (to whom the parties agree disclosure may be made)." Id. at 2.

In the litigated protective order entered in Microsoft, the Court reached the identical result in a case involving nonparty confidential information. In Microsoft, the parties agreed to an Interim Confidentiality Stipulation and Protective Order dated May 2, 1995, which prohibited disclosure of confidential information except to outside counsel and independent experts. (Ex. 21 at ¶ D.2, 7; Brown

Decl. Ex. 3 at ¶ 15.) Thereafter, Microsoft moved for a permanent protective order that would have established two categories of confidential information, permitting disclosure of all nonparty confidential information to two designated inside counsel, and "less" confidential trade secrets to certain business employees of the two defendant companies. (Brown Decl. Ex. 3 at ¶ 16.) Numerous nonparties who had produced confidential information to the Government intervened, seeking to prevent disclosure to defendants' business employees and inside counsel. (Id.) After considering these third-party complaints, the Court rejected Microsoft's proposal and entered a protective order limiting disclosure to outside counsel and independent experts. (Id.; Microsoft Pretrial Order Number 3, Confidentiality and Protective Order (Ex. 20).)[6]

IBM's proposal contains no useful criteria for distinguishing between the various levels of confidentiality and that ambiguity presents the risk that third parties will make the wrong designation. Further, IBM proposes no safeguards for the confidential information that it would disclose to an unspecified number of unidentified business persons and in-house lawyers. It offers no explanation as to how it plans to bar recipients of confidential information from later participating in matters in which the information may be relevant. Under these circumstances, third parties who produce confidential materials could have no confidence that the information will not be inappropriately or inadvertently disclosed to their disadvantage. We have shown earlier how these problems would impede discovery.

Finally, IBM is well represented by a prominent firm who has been representing IBM in this case since before the complaint was filed in 1952. The individual outside counsel for IBM's outside law firm who have appeared in this case have significant experience with the products and competitive issues that

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The stipulated protective orders cited by IBM (*Barbur Decl.* ¶ 12, Exs. I and J) provide no support for IBM's broad proposal to disclose confidential information to all IBM in-house litigation counsel in this case. Because the protective orders in those cases were consensual, no decision was made as to the merits of disclosure to any inside counsel. Moreover, the orders in those two cases primarily involved treatment of the parties' confidential information and not treatment of the confidential information that may be produced by third parties. Most importantly, the orders in both cases allowed disclosure to only one designated inside counsel, which presented substantially fewer risks than IBM's current proposal for the right to disclose confidential information to any number of unspecified persons who currently happen to work in its in-house litigation department.

are the subject of these proceedings. (Brown Decl. Ex. 2 at ¶ 17.) Under the Government's proposed order, IBM's more detailed work with nonparties' confidential information would be handled by able and informed outside counsel and independent experts. Of course, under the order, IBM's inside counsel and business employees would still be able to advise and strategize; they just would be unable to review the confidential information of IBM's competitors and customers.

For the foregoing reasons, disclosure to IBM's business employees and in-house counsel should not be permitted. IBM has failed to make any showing of need for the information that outweighs the competitive damage that would result from disclosure. Such disclosure is unnecessary and would undermine competition in the AS/400 and System/360 ... 390 markets involved in the litigation, an ironic consequence, if permitted by the Court.

B. Third party requests for access to confidential information are foreseeable and therefore the protective order should include a mechanism to consider such requests

IBM objects to the Government's proposal that a protective order contain a mechanism to allow third parties who assist the Government access to IBM protected material on the grounds that it would create a "loophole" in the protective order and would permit the Government to freely disclose IBM confidential information. (IBM Protect. Memo. at 21-22.) IBM offers the seemingly simple solution that the order be left silent on the issue, thus allowing the Government to later seek a modification to allow disclosure to third parties. (Id. at 22.)

But, no "loophole" is created. The Government's proposal simply creates a mechanism to permit third parties to seek access to confidential material (produced by IBM or any other person). Confidential information can be disclosed only with the permission of the producing party or by order of the Court. Should access to confidential information be granted, any third parties will be bound to the terms of the protective order and therefore be subject to the same conditions as are applicable to IBM. This hardly strips the protective order of "any meaning" or allows disclosure to "unidentified third persons." (Id. at 21-22.)

Moreover, the Government may not later be able to obtain a modification of the protective order under the stricter standards that govern changes, as opposed to the inclusion of initial provisions, in such orders. Courts place a heavy burden on a party who seeks to modify a stipulated provision of a protective order. Richard Wolf Medical Instruments Corp. v. Dory, 130 F.R.D. 389, 392 (N.D. Ill. 1990). Courts consider whether the need for the modification was foreseeable at the time the parties negotiated the original protective order. Jochims v. Isuzu, 145 F.R.D. 499, 502 (S.D. Iowa 1992) ("[n]ot surprisingly, a party's oversight in not negotiating a provision . . . concerning a matter which should have been reasonably foreseeable at the time of the agreement has been held to not constitute good cause for relief from the protective order.")[7]

ISNI and CDLA have stated that they intend to seek leave of the Court to participate as amicus curiae, to present expert testimony to aid the Court, and to obtain access to confidential information. (Poisson Decl. Ex. 7 at ¶¶ 2, 4, 6; Eiszner Letter, Ex. 14 at 1-2.) In addition, the Government may ask ISNI and CDLA for analysis or information responsive to an IBM submission that will require disclosure of confidential information. (Brown Decl. Ex. 3 at ¶ 8.) Although the Government has not firmly decided to disclose IBM confidential information to ISNI or CDLA, the possibility is clearly foreseeable and indeed has been foreseen. It is preferable that this issue be resolved now so that all concerned, including IBM, know that disclosure of their confidential information to third parties is conceivable and understand the procedures governing such disclosures and for objecting thereto.

Finally, the issue of whether ISNI or CDLA should be given access to confidential information is not now before the Court need not be addressed now. In the absence of agreement of the parties, that question is best presented to the Court in the context of a specific request to disclose confidential

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The Second Circuit decisions on the standard to be applied for modification by a party or an intervening nonparty are not altogether clear and have caused considerable confusion in the lower courts. *See Bayer AG v. Barr Laboratories, Inc., 1995 WL 334727 at 9 (S.D.N.Y., June 6, 1995) (the Court weighed various factors, including whether the order was entered by stipulation and whether the requested modification was foreseeable); Maryland Cas. Co. v. W. R. Grace & Co., 1994 LEXIS 11141 at 3 (S.D.N.Y., August 10, 1984) (the Court applied an "extraordinary circumstances or compelling need" test).*

information to a third party. At that time, the parties and the Court will be able to devote their attention to the merits of the request without a needless digression into issues surrounding modification of a protective order.

C. Established Department practice and statutes recognize the Department's right to use and maintain documents for law enforcement purposes

IBM objects to the provision of the Government's protective order that specify additional conditions under which the Government may use and disclose confidential information, subject to taking appropriate steps to preserve the confidentiality of the information. (Gov't Protect. Ord., Ex. 1 at ¶ 10(b).) These provisions permit the Government to preserve its ability to retain and use pertinent information for law enforcement purposes and to make reports to appropriate Executive Branch officials. (Brown Decl. Ex. 3 at ¶ 18.)

The provisions serve to implement U.S. Department of Justice Antitrust Division Directive ATR 2710.1 (revised April 17, 1992) (Ex. 23), promulgated pursuant to the Federal Records Act, 44 U.S.C. § 3101, et seq. Section 13.b(2) of the directive sets out five criteria under which government attorneys are required to retain documents after the completion of an investigation or case. Two of those provisions contemplate that the Government will use retained materials for other law enforcement purposes:

> *(b) The documents are relevant to a current or actively contemplated Department investigation or case ...*
>
> * * *
>
> *(e) Copies of such documents will be of substantial assistance in the Division's continuing enforcement responsibilities ....*

U.S. Dep't of Justice Antitrust Division Directive ATR 2710.1 ¶ 13.b(2)(b), (e).

The provisions are also consistent with statutes governing the Department's right to retain and use documents. The Antitrust Civil Process Act ("ACPA"), 15 U.S.C. §§ 1311-1314, authorizes the Department to keep copies of documents obtained during civil investigations. Specifically, the ACPA provides that the Department's document custodian shall "upon written request of the person who

produced such material, return to such person any such material (other than copies thereof . . . made by the Department of Justice pursuant to subsection (c) of the section)." 15 U.S.C. § 1313(e) (emphasis added). The House Committee Report described how the public interest would be harmed if the Department were required to return copies (as opposed to originals) of documents in its files:

> *Retention of copies in these instances will avoid needless future "rounds" of CIDs. Such information is also important for consistent evenhanded enforcement: It details business practices that have survived scrutiny, as well as those that have not, and by referring to them, the Division may easily be able to vindicate similar practices that come under investigation at some future time. Such equitable treatment may be impossible if the Division is immediately stripped of all such information once it closes an investigation.*

H.R. Rep. No. 94-1343, at 15 n.41, 1976 U.S. Code Cong. & Admin. News at 2610.

Similarly, requiring the return of documents is inconsistent with the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), 15 U.S.C. § 18a. In promulgating the Act's implementing regulations, the Department and the Federal Trade Commission rejected proposals to require the return of information submitted pursuant to the HSR Act, finding that

> *Nothing in the language or legislative history of the act appears to prohibit the use of data submitted under the act for subsequent challenge to a reported acquisition or, in fact, for any other law enforcement purposes. . . . To return materials after the waiting period expires could seriously hinder later enforcement efforts.*

Statement of Basis and Purposes, 43 Fed. Reg. 33,450, 33,518 (July 31, 1978) (emphasis added).

IBM has offered no principled explanation for its request that the Court enter an order inconsistent with established Department policy and Congressional mandates and that would hamper the Government's continuing law enforcement and reporting obligations.

D. <u>IBM offers no principled basis for objecting to the Government's other proposals</u>

1. <u>The Government will not agree to overrule established Second Circuit law regarding the inadvertent production of privileged documents</u>

The parties are unable to agree on the treatment of inadvertently produced privileged documents. The Government agrees that the protective order should contain a process for restoring the privilege for inadvertently disclosed documents, but will not agree to IBM's proposal to overrule controlling legal

principles.

In this District, the inadvertent production of privileged documents does not generally result in a waiver of the privilege. Stratagem Dev. Corp. v. Heron Int'l. N.V., 153 F.R.D. 535, 542-43 (S.D.N.Y. 1994). Whether a waiver has occurred depends on the circumstances of the production and the reasonableness of the precautions taken. Id. IBM's protective order would allow it to inundate the Government with requests for the return of any allegedly inadvertently produced document, not just privileged documents. (IBM Protect. Ord. Ex. 2 at ¶ 14.) The Government and the Court would be precluded from inquiring into the facts and circumstances of the alleged inadvertent production as a means for testing whether the privilege or any other objection to production has been waived.[8]

IBM has cited no case where the court, over the other party's objection, entered a protective order requiring the return of inadvertently produced documents without even allowing an inquiry into the facts and circumstances of the production. The protective orders entered in Comdisco and Phoenix Computer Associates (Barbur Decl. at ¶ 12, Exs. I and J) were both entered by stipulation, as was the inadvertent disclosure provision in the protective order at issue in In re Independent Serv. Org. Antitrust Litig. 1995 WL 151739 at 4 (D. Kan. March 9, 1995), cited in IBM's brief. (IBM Protect. Memo. at 17.)

The Government agrees to be bound by Second Circuit precedent and to establish an appropriate process for restoring the privilege in the event of truly inadvertent disclosure. The Government will stipulate to no more, nor should the Court set in place, over the Government's objection, a process that does not provide for challenge and review of spurious claims of privilege.

2. <u>The Court should deny IBM the unfair advantage it seeks to gain by requiring advance disclosure of the identity of economic experts and investigative contacts</u>

IBM would require the Government to give notice before disclosing confidential information to

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The Government gives no weight to IBM's argument that entry of its proposed inadvertent production provision is needed to expedite discovery. (*See IBM Protect. Memo.* at 16, 18-19.) IBM should expect its outside law firm to institute appropriate and reasonable procedures to protect its privileged information with or without a provision regarding inadvertent disclosure of such information.

economic experts and consultants and persons who have, or whom counsel "in good faith believes to have had prior access to confidential information, or who have been participants in a communication that is the subject of the confidential information." (IBM Protect. Ord. Ex. 2 at ¶¶ 6(h), 7(g).) In the case of persons in the latter group, both protective orders require that counsel verify that the person had access to the confidential information before making any disclosure. The Government's protective order, however, does not require advanced notice be given because such notice is not necessary to protect IBM's confidentiality interests and would give IBM an unfair litigation advantage. (Gov't Protect. Ord. Ex. 1 at ¶ 7(f).)

The parties' inability to reach agreement on this issue stems from our basic disagreement over the nature of this proceeding. The Government has requested the opportunity to conduct an investigation to obtain information necessary to take a position on the merits of IBM's motion as it applies to the AS/400 and System/360 ... 390 family of products. Thereafter, the parties could conduct any limited bilateral discovery that may be necessary to prepare for an expedited hearing on any aspect of the judgment as to which the Government concludes termination would not serve the public interest in competition. IBM would force both the Government and the Court into making a hasty decision on the merits of IBM's motion without the information necessary to assess the competitive issues.

The Government, during any investigation, does not advise the subject of the nature and scope of its investigative activities. The same rule should apply here because IBM can make no showing that it will be harmed by the disclosure of confidential information to economic experts and persons who have already had access to the information. Economic experts and consultants for the Government must execute an agreement certifying that they understand and agree to abide by the terms of the protective order. As to any person who has had prior access to confidential information, once that fact is in good faith established by counsel, there is no confidentiality interest to protect. In contrast, during the parties' discussions to reach agreement on the terms of a stipulated protective order, IBM argued that in the past technical/industry experts have misused IBM confidential information. Given this representation, the

Government agreed to give IBM advance notice before disclosure to technical or industry experts. In the absence of a similar showing, the Government should be permitted to conduct its investigation without undue interference allowed by IBM's premature discovery of economic experts and investigative contacts.

Moreover, identifying economic experts and consultants will give IBM a litigation advantage. Generally, a party is not entitled to learn the identity of the other party's non-testifying experts. See Fed. R. Civ. P. 26(b)(4)(B). Testifying experts need not be identified until bilateral discovery commences, and the Local Rules contemplate that discovery of experts take place at or near the conclusion of discovery. Local Rule 46(c). This Court should not allow IBM to use a protective order as a device to gain a litigation advantage.

3. <u>The protective order should protect against over-inclusive confidentiality designations</u>

IBM has refused to include in its proposed protective order the requirement that a producing party make a confidential designation in good faith and has objected to the requirement that portions of a document be marked confidential where the entire document cannot, in good faith, be designated confidential. (IBM Protec. Memo. at 19 n.6.)

Fed. R. Civ. P. 26(c) places the burden of establishing "good cause" for protecting confidential information squarely on the party seeking protection. The Government presumes IBM does not intend to misuse confidentiality designations and is, therefore, surprised that IBM will not acknowledge its obligation to make "good cause" designations in good faith. Similarly, IBM cannot meet its good cause burden if it stamps an entire document confidential where only a portion of that document is entitled to such designation.

IBM's suggestion that the Government has the right to challenge any confidentiality designation improperly shifts the burden to the Government. (IBM Protect. Memo. at 19 n.6.) The procedure for challenging a designation create a means for a party to challenge a designation in violation of the protective order; it does not relieve a designating party of its initial duty to designate only information that falls within the scope of the order.

IBM's refusal to include provisions to prevent the over-designation of confidential information is inconsistent with the strong public interest that designation of confidential information not have the effect of closing judicial proceedings to public inspection. Levy v. Weksel, 143 F.R.D. 54, 55-56 (S.D.N.Y 1992). The provisions proposed by the Government are necessary to prevent over-designation of materials as "confidential" and to ensure that these proceedings, which already will be closed in large part to public scrutiny due to the vast amount of properly designated information likely to be involved, will be as open as possible.[9]

Given the clear directive of Rule 26(c) and the need for open proceedings, the Government can see no principled reason for IBM's refusal to agree to make only appropriate confidentiality designations in good faith.

III. CONCLUSION

For the reasons outlined, the Court should reject IBM's protective order and grant the Government's motion for entry of its proposed protective order.

To ensure public access, the Government insisted, and IBM agreed, to include a provision requiring the parties to publicly file all pleadings with confidential information redacted. (*Gov't Protect. Ord.*, Ex. 1 at ¶ 13; *IBM Protect. Ord.*, Ex. 2 at ¶ 13.)

Respectfully submitted,

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August 21, 1995

CERTIFICATE OF SERVICE

This is to certify that, by agreement of the parties, the United States' Memorandum on Protective Order Issues was made available for pick-up at the Antitrust Division's New York Field Office, 26 Federal Plaza, Room 3630, New York, New York, on August 21, 1995.

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James J. Tierney (JT-7842)