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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION
14

15 UNITED STATES OF AMERICA,)
16)
17 Plaintiff,)
18 v.)
19 WALTER LIAN-HEEN LIEW,)
20 CHRISTINA HONG QIAO LIEW, USA)
PERFORMANCE TECHNOLOGY, INC.,)
21 and ROBERT MAEGERLE,)
22 Defendants.)
23

Case No. CR 11-0573-JSW (NC)
**E. I. DUPONT DE NEMOURS AND
COMPANY'S OPPOSITION TO
DEFENDANTS' JOINT MOTION FOR
PROTECTIVE ORDER**

**Date: June 20, 2012
Time: 11:00 a.m.
Place: Courtroom A – 15th Floor
Before: Hon. Nathanael Cousins**

24 **I. INTRODUCTION**

25 Protecting victims against further misappropriation and dissemination of their trade
26 secrets during prosecution of Economic Espionage Act violations was specifically identified by
27 Congress as an important principle; thus, the Act mandates that the Court enter a protective order
28 preserving the trade secrets' confidentiality. E. I. du Pont de Nemours and Company

1 (“DuPont”), the victim of defendants’ misappropriation scheme, has proposed a reasonable
2 protective order designed to ensure the protection intended by Congress is provided, while not
3 impairing defendants’ rights to a fair trial. The Court should adopt that protective order rather
4 than the one proposed by defendants.

5 Indeed, defendants’ proposed protective order wrongly assumes that only documents
6 “belonging to or obtained from” DuPont require the highest level of protection. This assumption
7 is false because, as DuPont has discovered, defendants have characterized DuPont’s documents
8 as their own. Moreover, defendants have copied DuPont’s confidential information from DuPont
9 documents and pasted it into documents not marked with DuPont’s indicia of ownership.
10 Accordingly, documents “directly derivative” of documents containing DuPont’s trade secrets
11 must also receive enhanced protection.

12 To ensure that such derivative documents are properly identified, DuPont must be
13 allowed to participate in the discovery process and review *certain* – not all – materials in the
14 government’s possession before they are produced to defendants. It is beyond dispute that
15 DuPont is in the best position to identify whether a document contains its confidential
16 information.

17 To further safeguard DuPont’s trade secrets, the Court should permit the government to
18 produce DuPont’s confidential information on an attorneys-eyes-only basis. There is precedent
19 for such discovery limitations where, as here, there exists a legitimate concern that defendants
20 might misuse the very material at issue.

21 The Court should also require that defendants provide notice to the government and
22 DuPont prior to disclosing any confidential DuPont information to a third party or expert witness.

23 The universe of individuals with expertise in TiO₂ is a small one (which is why the conspiracy to
24 misappropriate was so valuable) and the proposed notice provisions would help ensure that a
25 competitor of DuPont is not needlessly provided access to DuPont’s trade secrets.

26 Defendants object that each of these proposals violates their rights, but these objections
27 are largely unsupported by testimonial evidence or legal authority. In fact, the protective orders
28 submitted by defendants that have been adopted in other trade secret cases all contain at least one

1 of the provisions requested by DuPont. This is yet another indication that the provisions
2 proposed by DuPont are reasonable and workable. The Court should adopt DuPont's proposed
3 protective order.

4 II. FACTUAL BACKGROUND

5 A. DuPont is the Worldwide Leader in TiO₂ technology.

6 Since 1948 when DuPont developed the original chloride-route TiO₂ process, DuPont has
7 been a pioneer in the area of manufacturing TiO₂ pigments. DuPont is currently the largest
8 provider and the lowest cost producer of TiO₂ pigments. Annually, DuPont sells approximately
9 1 million tons of the total 5 million tons of TiO₂ pigment sold in the world. Furthermore,
10 DuPont has repeatedly been honored for the safety and health standards of its TiO₂ operations.
11 DuPont maintains its advantages in the area of TiO₂ pigment production, in part, through its
12 industry-leading process, the secrecy of which it carefully maintains. Case No. 3:11-cv-01665-
13 JSW, Dkt. #1, ¶ 20.

14 DuPont's chloride-route process has a variety of advantages over the sulfate-route process
15 used by more conventional manufacturers. For example, the chloride-route process is a
16 continuous process, while the sulfate-route process is a batch process. Additionally, it is a
17 cleaner process that produces substantially less waste than the sulfate-route process. Finally, the
18 chloride-route process produces TiO₂ pigment in the rutile crystalline form, which is the
19 preferred form. The sulfate-route process inherently produces the anatase crystalline form, which
20 requires additional processing to convert to a rutile crystalline form. *Id.* ¶ 24.

21 Although a number of companies are capable of producing TiO₂ and some companies
22 have developed a chloride process, DuPont's competitors have been unable to create a
23 comparable chloride-route process that is as efficient, cost-effective, and safe as DuPont's or that
24 operates at the capacity or quality of DuPont's process. It is DuPont's superior process that
25 provides it a competitive advantage and allows it to sell more TiO₂ pigment than any company in
26 the world. *Id.* ¶ 58.

27 In this action, the government has identified five DuPont trade secrets defendants have
28 misappropriated, including "[t]he complete DuPont chloride-route process to manufacture TiO₂."

1 Dkt. # 64, ¶ 14. The enumerated trade secrets represent only a fraction of the trade secrets
2 DuPont possesses relating to its TiO₂ manufacturing process.¹

3 **B. DuPont Has a Substantial Interest in the Protective Order in this Action**

4 Recognizing that the safeguards provided by the protective order in this action are critical
5 to ensuring that DuPont's trade secrets are not further compromised, on May 16, 2012, counsel
6 for DuPont participated in the hearing to discuss matters related to the protective order.
7 Rejecting defendants' position that DuPont had no right to participate in such discussions
8 without moving to intervene, the Court observed that, as the victim, DuPont has rights, including
9 commenting on the proposed order governing discovery in this action. DuPont's counsel
10 submitted a draft protective order to the government. *See* Declaration of Clement L. Glynn ¶ 2,
11 Exhibit A (DuPont's proposed protective order). Subsequently, the government provided
12 DuPont's counsel with a copy of the protective order proposed by Walter Liew's counsel.

13 There are four principal areas of dispute between DuPont and the defense. First, DuPont
14 believes that it should be permitted to help determine whether material produced by the
15 government contains, or is derived of, DuPont's trade secrets so that this material may receive
16 enhanced protection. Second, DuPont objects to documents containing its trade secrets being
17 produced to defendants personally. Third, DuPont objects to non-expert third parties receiving
18 copies of its trade secrets. Fourth, DuPont believes that defendants should be obligated to
19 disclose when they intend to retain an expert witness employed by, or affiliated with, a
20 competitor of DuPont's.

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27 ¹ Defendants' claim that four of the DuPont trade secrets at issue "consist of a document"
28 (Mot. at 7:20-21) is obtuse. Merely because four of the trade secrets are reflected in the same
document does not indicate that these trade secrets consist of said document. *See* Declaration of
Doctor Austin Reid, Jr. ¶ 3.

1 More specifically, the following chart highlights the parties' disputes:

2 Provision	DuPont	Defendants
3 Definition of "Confidential- 4 1 Materials"	"Confidential-1 Material" defined to include confidential documents derivative of DuPont confidential documents	"Confidential-1 Materials" limited to materials belonging to or obtained from third parties, including DuPont
6 DuPont's Role in Discovery Process	Where government is producing party, prior to production DuPont may review any DuPont documents or documents potentially derivative of DuPont documents to determine appropriate confidentiality designation	No role
10 Limitations on Disclosure: 11 defendant and counsel	Confidential Material may be disclosed to only defense counsel and their staff	Confidential Material may be disclosed to defendants, who may retain copies
12 Limitations on Disclosure: 13 third parties	At least 7 days before any Confidential-1 Material may be disclosed to a third party, receiving party must notify government and DuPont, either of whom may object within 7-day period. Confidential-1 Material may not be disclosed to a competitor of DuPont	Confidential Materials may be disclosed to a third party who authored or had prior access to that information, and Confidential-1 Material may only be disclosed if defense counsel or the government deem it necessary. Third party may not retain Confidential-1 Materials
18 Limitations on Disclosure: 19 expert witnesses	At least 10 days before disclosing Confidential-1 Material to expert, defense must disclose expert's name and a copy of expert's resume to government and DuPont, either of whom may object within 10-day period	Upon retention of expert, defendants shall require experts to execute attached Acknowledgment, which they then shall submit to the Court <i>ex parte</i> and <i>in camera</i> .
22 Disclosure to the Court	All Confidential Material to be filed under seal; transcripts of proceedings at which Confidential Material is discussed shall be sealed and public access to those portions of the hearings restricted ²	All Confidential Material to be filed under seal

27 ² Defendants' moving papers do not address the proposed sealing of hearing transcripts and
28 restricting public access to hearings at which trade secrets are discussed; consequently DuPont
assumes that they do not object to the inclusion of this provision in the final protective order.

1 On May 21, 2012, DuPont's counsel met and conferred telephonically with counsel for
2 Walter Liew and USAPTI in an attempt to reach a compromise on certain of their disputes. As
3 discussed more fully below, DuPont's counsel proposed various compromises regarding
4 competing provisions in the protective order. Defendant's counsel, however, declined to move
5 on any area of disagreement.

6 **III. ARGUMENT**

7 **A. The Provisions Proposed by DuPont are Necessary to Protect its Rights as** 8 **Victim**

9 Congress recognized the importance of protecting the confidentiality of the victim's trade
10 secrets during the investigation and prosecution of criminal trade secret actions. For example,
11 the Economic Espionage Act contains a special provision to protect against the disclosure of
12 trade secret information during the criminal justice process:

13 The court shall enter such orders and take such other action as may be necessary and
14 appropriate to preserve the confidentiality of trade secrets, consistent with the
15 requirements of the Federal Rules of Criminal and Civil Procedure, the Federal Rules of
16 Evidence, and all other applicable laws. An interlocutory appeal by the United States
shall lie from a decision or order of a district court authorizing or directing the disclosure
of any trade secret.

17 18 U.S.C. § 1835; *see also* H. Rep. No. 788, 104th Cong., 2d Sess. 13 (1996) ("The intent of this
18 section is to preserve the confidential nature of the information and, hence, its value. Without
19 such a provision, owners may be reluctant to cooperate in prosecuting for fear of further exposing
20 their trade secrets to public view, thus further devaluing or even destroying their worth."); *U.S. v.*
21 *Hsu*, 155 F.3d 189, 197 (3d Cir. 1998) (observing "the confidentiality provision aims to strike a
22 balance between the protection of proprietary information and the unique considerations inherent
23 in criminal prosecutions.")

24 Rather than protecting the trade secrets at issue and balancing the rights of DuPont and
25 defendants, defendants' proposed protective order not only provides minimal protection for
26 DuPont's valuable TiO₂ trade secrets, but also places the proverbial fox in charge of the henhouse
27 by allowing defendants, their employees, and DuPont's competitors access to the very
28 confidential information defendants have misappropriated. In fact, not one of the protective

1 orders adopted in other trade secret cases, which were submitted by defendants in connection
2 with their moving papers, employ the dangerously lax approach to trade-secret protection that
3 defendants request here.

4 **1. DuPont should be allowed to play a limited role in the discovery**
5 **process to ensure its trade secrets are adequately protected**

6 To protect the confidentiality of its trade secrets, DuPont requests that it be permitted to
7 assist the government in determining whether documents it intends to produce are either DuPont
8 documents or directly derivative of DuPont documents. Such input is necessary not only because
9 DuPont is the foremost expert regarding its own trade secrets, but also because DuPont has
10 witnessed first-hand defendants' willingness to characterize DuPont's documents as their own,
11 thus making it difficult at best for someone other than DuPont to identify documents containing
12 DuPont work product and proprietary information. The government cannot be expected to
13 recognize all information now in its possession that originated with DuPont.

14 Among the documents seized by the government are DuPont technical drawings bearing
15 DuPont's logo or other indicia of DuPont's ownership. Reid, Jr. Decl. ¶ 4. These documents
16 would be designated "Confidential-1 Material" pursuant to the protective orders submitted by
17 both DuPont and defendant and thus entitled to enhanced protection. In addition to documents
18 that are clearly authored by DuPont, the government also possesses documents – for example,
19 emails – that communicate highly proprietary information culled from DuPont source documents.
20 *See id.* ¶ 5. Only a reviewer with a sophisticated understanding of DuPont's TiO₂ technology
21 would be able to identify that these documents too contain DuPont trade secrets, and thus require
22 the highest level of protection available. Without DuPont's insight, documents containing trade
23 secrets could be erroneously designated Confidential-2 Material, which pursuant to defendants'
24 proposal would allow third parties and experts to retain copies of such documents. More
25 troubling still, if DuPont were prohibited from participating in the review, documents containing
26 its trade secrets may not be designated Confidential at all, thus compounding the damages
27 defendants have already caused. Such an outcome would subvert the important protections
28 intended to apply in Economic Espionage prosecution.

1 Defendants object to DuPont's participation in the discovery process on three grounds.
2 First, they contend that DuPont would obtain access to USAPTI's confidential information.
3 Second, they argue that DuPont's involvement is unnecessary because the government is better
4 equipped to identify DuPont's trade secrets. Third, they claim that were DuPont allowed to
5 participate, the review process would take too long.

6 Without support, defendants claim that the discovery materials "consist primarily of
7 documents seized from USAPTI's own servers that represent years of independent development
8 by USAPTI's engineers." Dkt. # 148 ("Mot.") at 7:21-24. This is false. USAPTI is a non-player
9 in the TiO₂ arena, holds no patents, and Walter Liew had bounced from scheme to scheme before
10 embarking on the one leading to his present incarceration. Reid, Jr. Decl. ¶ 7. To put it bluntly,
11 even suggesting that USAPTI is a "competitor" of DuPont (Mot. at 7:25-26) reveals a profound
12 lack of knowledge regarding the TiO₂ industry.³ Also unsupported is defendants' claim that if
13 DuPont were a party to the discovery process here it would receive "far more discovery than
14 would ever be permitted through the Rules of Civil Procedure." *Id.* at 2:10-11. In reality,
15 DuPont has neither the need nor the desire to obtain any USAPTI "technology."⁴ Its sole interest
16 is in protecting its valuable trade secrets from further misappropriation and dissemination.

17 Like defendants' claim that DuPont is interested in USAPTI's "technology," the assertion
18 that "a neutral expert is much better situated than DuPont to categorize the discovery [as
19 confidential]" (Mot. at 8:8-9) is not persuasive. DuPont enjoys a competitive advantage in the
20 TiO₂ industry *precisely because* no one else is privy to its trade secrets. Indeed, it is for this very
21 reason that Walter Liew's misappropriation conspiracy depended on soliciting former DuPont
22 employees. *See* Dkt. #64, ¶ 19. Also wrong is defendants' assertion that "DuPont already has
23 decided that it intends to designate all USAPTI materials referring to TiO₂ as at least

24 _____
25 ³ To the extent that defendants seek to rely on the pretextual counterclaims filed in the civil
26 litigation (Mot. at 4:2-11), that pleading has already been the subject of one motion to strike, and
27 DuPont will disprove the remaining, spurious contentions at the appropriate time.

28 ⁴ Defendants' suggestion that DuPont needs USAPTI to complete a TiO₂ plant in China
(Mot. at 7:24-8:1) is ridiculous. DuPont has yet to build a plant in China not because it lacks the
requisite technology, but rather because the PRC was more interested in stealing DuPont's
technology than allowing it to compete with Chinese-owned plants. *See, e.g.,* Dkt. # 64, ¶¶ 1, 2,
18.

1 Confidential-2 Materials.” Mot. at 8:12-13. DuPont has no interest in how the government
2 chooses to designate documents seized from USAPTI that are unrelated to DuPont’s trade
3 secrets. It seeks only to prevent further harm to its legitimate competitive advantage.

4 Lastly, defendants’ argument that allowing DuPont to review certain discovery before it is
5 produced would cause undue delay (Mot. at 8:23-9:2) is unfounded speculation. As an initial
6 matter, DuPont has no interest in reviewing documents unrelated to its TiO₂ technology;
7 presumably documents relating to TiO₂ manufacturing comprise only a subset of the documents
8 the government possesses. Defendants’ assertion that DuPont wants to review *all* discovery does
9 not accurately present the issue to the Court. Indeed, DuPont’s counsel made this position clear
10 to defendants’ counsel during their meet-and-confer telephone call. Glynn Decl. ¶ 4. More
11 significantly, Walter Liew’s review of the information while incarcerated will necessarily be
12 limited by the resources at his disposal.⁵ There is no reason DuPont could not conduct its review
13 on a rolling basis without significantly impacting Mr. Liew’s ability to review the produced
14 material.

15 Each of defendants’ claimed concerns regarding DuPont’s participation in the discovery
16 process is supported solely by the *ipse dixit* of their counsel; substantiating evidence is wholly
17 absent.⁶ In truth, DuPont’s review of documents potentially containing its trade secrets is both
18 necessary and appropriate and will not delay the discovery process to any significant degree. In
19 any event, the Court would retain the ability to modify the protective order should future events
20 warrant.

21 DuPont’s review of the potential trade secrets is necessary because otherwise documents
22 could be unwittingly miscategorized as Confidential-2 Materials, or not designated as

23 _____
24 ⁵ In fact, if the Court adopts the government’s requested provision requiring that
Confidential-1 Material may only be reviewed in the presence of counsel, all defendants will be
required to review these documents in bite-size chunks. Mot. at 11:19-23.

25 ⁶ Defendants’ assertion that courts in this district have barred victims from participating in
26 the discovery process (Mot. at 9:3-4) is misleading. In *U.S. v. Shan Yan Ming*, CR 02-20127, the
victim, 3DGeo Development, Inc., was barred from obtaining copies of documents produced *by*
27 *defendants*. See Ragland Decl., Ex. D, p.1. In *U.S. v. Zhang*, the Court left open the possibility
of disclosure to third parties, if it deemed such disclosure appropriate. Ragland Decl., Ex. F at
28 2:12-13. In any event, none of the submitted material relates to a request by the victim to help
the government appropriately designate documents potentially containing its trade secrets.

1 Confidential at all. Thus, as an alternative to the dual-category Confidentiality approach, DuPont
2 would be willing to compromise by agreeing to a protective order pursuant to which all
3 documents are designated Confidential initially, provided that the custody and notice provisions
4 discussed below are adopted. It should be noted that the proposed protective orders submitted by
5 both defendants and DuPont provide for a de-designating procedure the parties could use if
6 public access to certain documents were appropriate.

7 **2. Defendants' access to DuPont's confidential information must be**
8 **restricted.**

9 DuPont's proposed protective order restricts access to Confidential-1 Material to
10 defendants' counsel and their staff. Defendants complain that such restriction violates their
11 rights under the Confrontation Clause (Mot. at 7:15-16), but there is precedent for discovery in
12 criminal actions being provided on an attorneys'-eyes-only basis. *See In re Terrorist Bombings*
13 *of U.S. Embassies in East Africa*, 552 F.2d 93, 127 (2d Cir. 2008) (affirming that it was not
14 abuse of discretion for District Court to allow government to limit production of classified
15 information to defendant's attorneys: "Our understanding that production of materials to a
16 party's attorney alone falls within the common meaning of 'discovery' further strengthens our
17 conviction that the discovery restrictions imposed by the District Court were perfectly
18 appropriate and valid in light of the standard by which our Court determines when the
19 government's privilege 'must give way ... to a criminal defendant's right to present a meaningful
20 defense'"); *U.S. v. Vaughn*, 2008 WL 4615030, at *3 (E.D. Cal. Oct. 17, 2008) (in action
21 alleging sex trafficking offenses involving minors, disclosures involving witness information
22 were ordered on attorneys'-eyes-only basis). Such a restriction is appropriate where, as here,
23 defendants cannot be trusted with the discovery materials. *See id*; *see also United States v. Hsu*,
24 185 F.R.D. 192, 193 (E.D. Pa. 1999) (denying defendants' request for production of unredacted
25 documents that contained victim's trade secrets).

26 Notwithstanding the appropriateness of an attorneys'-eyes-only provision, were the Court
27 inclined to permit defendants to review DuPont's confidential information, there is no reason that
28 defendants such as these, who are charged with misappropriating trade secrets, should be

1 permitted to retain custody of the very trade secrets that they have allegedly stolen and sold.
2 They face a dire situation, and desperate people do desperate things. Discovery should not be
3 permitted to enable further mischief.

4 Curiously, despite defendants fighting aggressively against any restrictions on defendants'
5 access to DuPont's trade secrets, two of the three protective orders submitted by defense counsel
6 themselves – and claimed to be representative of the treatment of confidentiality concerns by
7 other courts in this District (Mot. at 6:17-7:6) – precluded defendants in those cases from
8 retaining custody of confidential documents. *See* Declaration of Steven P. Ragland (Dkt. # 151),
9 Ex. A, ¶ 3 (providing that confidential material is to be retained by counsel, kept in counsels'
10 office, and, if defendants are incarcerated, may be brought to the jailhouse but not left with
11 defendants); Ex. E, ¶ 3 (Federal Public Defender may bring Confidential Material to jail but
12 “shall not leave any Confidential Material with the defendant.”). In fact, during the meet-and-
13 confer process, defense counsel represented to DuPont's counsel that he was involved in
14 negotiating the *Lee* protective order (Ex. A) on behalf of the victim in that case. Glynn Decl. ¶ 6.
15 Counsel there succeeded in obtaining the same protection DuPont seeks here. The
16 reasonableness of such a solution is not dependent on whom one represents.

17 DuPont's concerns regarding the defendants continued misappropriation and
18 dissemination of its trade secrets are warranted in light of the facts giving rise to this action.
19 Such concerns require that the Court prohibit, or at minimum restrict, defendants' access to
20 DuPont's confidential information. Moreover, were the Court inclined to allow defendants to
21 review Confidential-1 Material, DuPont respectfully requests that the Court explicitly prohibit
22 defendants from taking notes from the documents or copying the material in any way.

23 **3. The notice provisions proposed by DuPont are essential to the**
24 **protection of its trade secrets**

25 The TiO₂ universe is extremely small and most knowledgeable individuals are associated
26 with either DuPont or one of its competitors. Reid, Jr. Decl. ¶ 6; *see also* Mot. at 11:12-13.
27 Consequently, DuPont's concerns that third parties and retained experts who gain access to its
28 trade secrets will use their new-found knowledge after this litigation cannot be overstated. It

1 would be naïve to think that an expert in this case who is later employed by a competitor of
 2 DuPont could compartmentalize and sequester knowledge gleaned from DuPont’s confidential
 3 documents.⁷

4 To address these concerns, DuPont’s proposed protective order requires that defendants
 5 provide notice to the government and DuPont of the identity of any person to whom they propose
 6 disclosing Confidential-1 Materials: seven days before disclosure to a third-party witness; and ten
 7 days before disclosure to a potential expert witness. Glynn Decl., Ex. A, ¶¶ 6, 8. In both cases,
 8 DuPont or the government would be permitted to object to the proposed disclosure during the
 9 applicable time frame. *Id.* ¶¶ 6(a), 8(a). Moreover, disclosure to a non-expert third-party
 10 competitor of DuPont is expressly prohibited. *Id.* ¶ 6(b). Such mechanisms for regulating third-
 11 party and expert access to confidential documents are not uncommon; indeed, they too appear in
 12 the protective orders submitted by defense counsel as models. *See* Ragland Decl., Ex. A
 13 (confidential discovery shall be furnished “**to no one other than**” defendants, defense counsel,
 14 and defense counsel staff to whom disclosure is necessary (emphasis in original)); Ex. C, ¶ 4
 15 (notice of intent to disclose to third party required, and government may object to proposed
 16 disclosure based on, *inter alia*, concerns raised by victim); Ex. E, ¶ 4 (notice of intent to disclose
 17 to third party required), ¶ 10 (parties may object to disclosure to certain experts, including
 18 experts employed by victim’s competitor).

19 Defendants complain that the proposed notice restrictions violate their rights under the
 20 Fifth Amendment, and run afoul of Federal Rules of Criminal Procedure and the attorney-client
 21 privilege. Mot. at 10:7-17. The authority relied on by defendant, however, fails to substantiate
 22 these complaints. *Jones v. Superior Court*, 58 Cal.2d 56, 60-61 (1962), stands for the

23 _____
 24 ⁷ Furthermore, under defendants’ proposal, third-parties who “authored and/or had prior
 25 access” to DuPont’s confidential material would be permitted review DuPont’s Confidential-1
 26 Material if defense counsel deems it necessary. Mot. at 5:23-26; Ragland Decl. Ex. B ¶6(d).
 27 This provision is unacceptable, considering that such individuals would include USAPTI
 28 employees who were privy to misappropriated DuPont information and USAPTI clients to which
 the material was sold; in other words, defendants’ co-conspirators. At minimum, defendants’
 proposed protective order must be modified to preclude such individuals from viewing DuPont’s
 Confidential-1 Material **at all**.

1 unremarkable proposition that the prosecution is not entitled to reports made by a defendant's
2 expert physicians, as these are protected by the attorney-client privilege. The *names of the*
3 *witnesses*, however, were afforded no such protection. *Id.* at 61. *Ruiz v. Superior Court*, 275
4 Cal.App.2d 633, 634-36 (1969), also cited by defendants, *affirms* that the prosecution is entitled
5 to the names of defense witnesses, but not "all statements of any witnesses interviewed by
6 defense counsel, whether or not the defense intends to introduce such statements." *Id.* at 635.

7 Equally unpersuasive is defendants' argument that Federal Rule of Criminal Procedure 16
8 mandates that they be permitted to show DuPont's confidential documents to an expert witness
9 without disclosing whether the expert is a competitor of DuPont. The plain language of Federal
10 Rule of Criminal Procedure 16(b)(1)(C) relates only to the disclosure of expert *testimony* (Mot. at
11 11:3-4) and defendants cite no authority expanding the scope of this Rule to govern disclosures
12 of an expert's name and *curriculum vitae*. The potential testimony of defendants' experts is of
13 no consequence to DuPont. But ensuring that competitors are not free to access its
14 commercially-valuable trade secrets is. Requiring defendants to disclose the affiliation of their
15 expert witnesses is necessary to ensure the protection of DuPont's rights.

16 The protection requested by DuPont is not unique or unwarranted. A protective order
17 modeled after those used in other Economic Espionage cases would require notice prior to
18 defendants disclosing the information to third parties or retained experts. Again, if such a
19 procedure proves unwieldy, the Court has the ability to modify the order for good cause shown.

20 **IV. CONCLUSION**

21 DuPont respects the rights of the defendants, even though they have disregarded
22 DuPont's intellectual property rights. The provisions DuPont has proposed are reasonable and
23 have been implemented in other cases. We respectfully request that the Court enter a form of
24 protective order that includes such protections.

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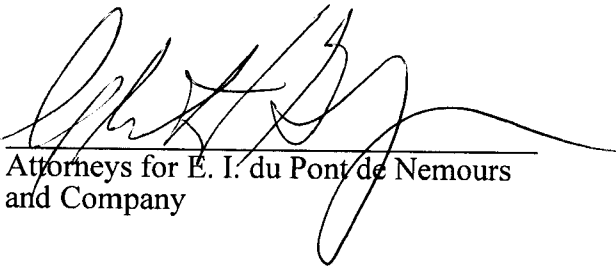
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Dated: June 6, 2012

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