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| Lisa mackin and  CHRISTOPHER MACKIN, wife and husband,  Plaintiffs,  v.  PUBLIC SERVICE ELECTRIC & GAS COMPANY;  HENKELS & McCoy, inc.  John Does #1-10(fictitious names of  individuals, professional associations, partnerships, corporations or other entities involved in service to the South Fork Community) and  ABC CORPORATION #1-10 (fictitious names of  individuals, professional associations, partnerships, corporations or other entities who employed or had agency relationship with any of the above named defendants.); j/s/a  Defendants. | SUPERIOR COURT OF NEW JERSEY  LAW DIVISION: CAMDEN  DOCKET NO: CAM-L-2826-15  **PLAINTIFFS’ OPPOSITION TO**  **DEFENDANTS’ MOTION FOR**  **A CONFIDENTIALITY**  **PROTECTIVE ORDER** |

**I.**

**Introduction**

Defendants PSE&G and Henkles & McCoy seek the entry of a Confidentiality Protective Order pursuant to R. 4:10-3. In support of the protective order, they cite two New Jersey trial court opinions and two Appellate Division cases, the most recent of which is over twenty years old.[[1]](#footnote-1)

The first line of the comment to R. 4:10-3 says: “This rule follows the text of F.R.Civ.P. 26 (c).” As such, the many more recent federal cases that deal with confidentiality and the New Jersey Supreme Court decision in Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356 (1995), as discussed below, are of greater relevance and should be given greater weight in deciding this issue.

The case law clearly demonstrates that defendants fail to provide a valid legal basis upon which to justify a need for confidentiality. Their broad statement that “good cause exists to protect the private, non-public, confidential material of the parties to this consolidated action” widely misses the mark of what is required and is plainly insufficient. Defendants’ motions should be denied in their entirety and discovery should be allowed to proceed without the additional burdens defendants seek.

**II.**

**Factual and Procedural Background**

Plaintiffs adopt most of the factual and procedural background set forth in PSE&G’s brief, with few exceptions.

It is important to note that the only case filed in Philadelphia was the Morley matter, which was dismissed and refiled in New Jersey Superior Court shortly thereafter. Following its refiling, more than thirty additional cases have been filed in New Jersey and all are now consolidated in Camden County. Whatever agreement was entered into by counsel in the Philadelphia Morley matter cannot now be binding on the multiple, otherwise unrelated, New Jersey cases that have followed. The same is true of any agreement made by plaintiff Morley’s counsel when the case was refiled in New Jersey. It is instructive to note, as defendants admit, that Judge Pugliese declined to enter the requested Protective Order prior to the consolidation of these matters as he found it could limit documents filed with the Court.

At this point, no Philadelphia or New Jersey Protective Order exists that is binding on any parties.

PSE&G’s application to the New Jersey Board of Public Utilities (“BPU”) to block public access is addressed in detail by Janine Bauer, Esquire, counsel for plaintiffs Fort, Hedstrom, Arne and J.S., in her opposition to defendants motions and is adopted by reference as if set forth more fully herein. It is worth mentioning as it further illustrates PSE&G’s efforts to make certain the public is hindered in its right to know details of this tragedy. The fact that BPU agreed, at PSE&G’s request, to keep information concerning incident timelines confidential is outrageous.

**III.**

**Legal Argument**

**A.**

**No Good Cause Exists to Enter a Confidentiality Protective Order**

“Common sense tells us that the greater motivation a corporation has to shield its operations, the greater the public’s need to know.” Brown & Williamson Tobacco Corp. v. FTC, 710 F. 2d 1165, 1180 (6th Cir. 1983).

It is widely known and accepted that it is the moving party’s burden to prove why a protective order is required. Defendants bear the burden of showing that specific prejudice or harm will result if no order is entered for each document they seek to protect. Hammock at 382. See also, Foltz v. State Farm, 331 F.3d 1122, 1130 (9th Cir. 2003). However, at no point have either PSE&G or Henkels & McCoy made any broad demonstration of “good cause” to enter a protective order as they request, much less a particularized, fact-based demonstration of the harms from which they seek protection. From the outset, this failure is fatal to their motion.

In addressing “good cause”, defendants rely primarily upon Catalpa Inv. Grp. v. Franklin Township Zoning Bd. Of Adjustment, 254 N.J. Super. 270 (Law Div. 1991) in which the trial judge reviewed the “good cause” requirement of R. 4:10-3 and concluded that there is no New Jersey case that discusses what factors should be considered. As such, he set forth a list of factors he felt should be considered in the determination. Of the nine factors the trial judge cites, reiterated by both defendants in their respective motions, all weigh in favor of plaintiffs and the denial of the protective order sought.

Our courts have had significant difficulty defining “good cause” factors and give broad discretion to the trial courts and specific facts of each case. Hammock at 380. Defendants cite Ullman, supra, arguing that “practical convenience” is the leading determiner of “good cause” when seeking a protective order. However “practical convenience” as discussed in Ullman was highlighted by the ability of the party opposing the protective order to obtain the information sought “with little difficulty” through other methods. Ullman at 415. This is simply not true of the matters before this court. Plaintiffs seek information and documents available only to the defendants.

Defendants further fail to address the “good cause” standard necessary for confidentiality set forth by our Supreme Court four years following Catalpa in Hammock, supra. [[2]](#footnote-2) Hammock held that good cause cannot be determined in a vacuum and must be weighed against the strong presumption of public access. In fact, because this case involves issues of public safety, Hammock further supports the denial of a confidentiality protective order. Id. at 381-382.

Between them, defendants seek to protect five broad categories of documents, specifically addressed below. None of the areas sought to be hidden involve trade secrets such as the recipe for Coke, Coca-Cola Bottling Co., Inc. v. Coca-Cola Co., 107 F.R.D. 228 (D. Del. 1985). None of them are so proprietary that their need for protection outweighs the right to public access in litigation. In short, none of defendants’ requested subject areas are proper matters for a confidentiality protective order.

1. PSE&G’s Insurance Policies

R. 4:10-2(b) specifically addresses this issue. It says, in part, that a party may obtain discovery regarding the existence and contents of any insurance agreement. To broadly seek confidentiality because it is otherwise a “non-public” document is insufficient. Further, PSE&G’s concerns are without merit because R. 4:10-2(b) specifically says that an application for insurance shall not be treated as part of an insurance agreement.

Here, with claims by multiple parties, the amounts of coverage available are relevant. PSE&G contends the insurance policies contain private financial data, but disclosure of financial data should be of no concern to PSE&G since they are a publically traded firm (NYSE: PEG). However, Plaintiffs are only seeking the policies that provide coverage and not any of PSE&G’s financial data. Further undermining the claim of confidentiality is the fact that co-defendant Henkels & McCoy have already provided insurance policies as requested without request for protection.

1. Gas and electric facility drawings

In support of this request PSE&G says the drawings depict the location of numerous utility facilities. At first blush one may think it is important to keep these confidential to keep them safe from potential terrorists. However, that blanket statement does not meet the required threshold of confidentiality. This is especially true when PSE&G must concede that their “as built” plans are on file in every municipality where they are located and the information is readily available on the web for this publically traded company.

1. The governing contract between PSE&G and Henkels & McCoy

Defendants claim that the contract between them contains information of a financial and commercial nature. What they fail to provide is any reason why this information requires confidentiality.

Almost every negligence action involving property, including those that implicate business owners, landlords, tenants, management companies, maintenance companies, or other contractors, all include contracts between the parties. All of those contracts, including ones that deal with contribution and indemnification, are always discoverable without confidentiality orders under the broad standards set forth in R.4:10-2(a).

1. Drug and alcohol test reports relating to PSE&G and Henkels & McCoy employees

With regard to this category, defendants broadly state that records relating to drug and alcohol testing of PSE&G employees contain confidential information relating to their employees. How is this any different from blood alcohol tests in drunk driving cases or the testing of AMTRAK engineers or ship captains after an accident?

These tests are routinely done and routinely turned over without entry of confidentiality orders. Plaintiffs acknowledge that PSE&G and Henkels & McCoy have thousands of employees between them. But plaintiff is not seeking the drug and alcohol testing of all of those employees. It only seeks the protocols of how the testing is done and the specific testing of any of defendants’ employees who were in any way involved with this tragedy. The captain of the Exxon Valdez was drunk. Everyone was entitled to know that fact. Should any testing of the employees involved in this project be positive, there is absolutely no reason to keep that fact confidential. The public has a right to know, and bad publicity stemming from public reaction to the facts giving rise to liability does not qualify as good cause. Vassiliades v. Israely, 714 F. Supp. 604, 605 (D. Conn. 1989).

1. PSE&G’s proprietary training information

Finally, PSE&G contends that their training materials are proprietary and confidential in nature, but this fact alone is insufficient to show good cause. Though our courts have held that a true “trade secret” is sufficient good cause for entry of a protective order, no “trade secrets” exist in this case, nor are defendants claiming such. In fact, our courts have specifically held that “confidential information and proprietary information are not entitled to the same level of protection as trade secrets.” Hammock at 383 citing Littlejohn v. BIC Corp., 851 F.2d. 673 (3d Cir. 1988); Restatement of Torts §757 (1939). It is clear, based on Hammock and Littlejohn that company training materials are simply not protectable trade secrets entitled to a confidential protective order without further justification. Again, co-defendant Henkels & McCoy have already provided their training manuals and handbooks without need for confidentiality, cutting against defendants claim that documents such as these are so proprietary as to require further protection from disclosure.

Beyond the documents defendants currently seek protection and confidentiality for, the order they propose be entered would allow any party to designate any document or discovery confidential. This manner of designating confidential discovery inappropriately shifts the burden from the party seeking confidentiality to party seeking the discovery. Not only does this disrupt the purpose of R. 4:10-3 (and its predecessor FRCP 26 (e)), it prevents the Court from satisfying the duty of making a fact based finding of “good cause” for the protection sought. See Lawrence E. Jaffe Pension Plan v. Household Int’l, Inc, 2004 WL 2663241 (N.D. Ill. Sept 29, 2004).

The bottom line here is that defendants simply have not demonstrated good cause for entry of any protective order, let alone the blanket order they currently seek.

**B.**

**Not a Single Case Cited by Defendants Provides Authority for the Relief They Seek**

A careful review of each of the cases cited by defendants reveals none of them actually support the entry of a confidentiality protective order as they contend. In fact, the only relevant portions of the case law they cite actually support a broad denial of their motions.

First, Alk Assoc., Inc. v. Multimodal Applied Sys., Inc., 276 N.J. Super. 310 (App. Div. 1994), dealt with a computer program owned by MIT in a case where former employees left to start a new company. The court held the protective order was appropriate because the case at hand dealt with the theft of trade secrets between competitors. We agree with that opinion and feel not only does it fail to support defendants’ request for relief, but rather highlights that none of PSE&G’s five topics are at all analogous to the true trade secrets addressed in Alk.

Defendants go on to cite Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317 (Ch. Div. 1981), which dealt with a pro se plaintiff who failed his real estate exam and sought to get his test regraded or to gain access to ETS’s tests. He also wanted ETS’s questions and answers for the purpose of future study. Though the court acknowledged the need for protective orders in our judicial system, no decision was made on the merits in that case, as the motion judge invoked forum non conveniens in order for plaintiff to refile in Pennsylvania. Similarly, Brady v. Dept. of Personnel, 149 N.J. 244 (1997) which overruled Martin, addressed a police sergeant who felt he did not receive a fair score on his test to be promoted to captain. Neither of these cases have any relevance to the issues in dispute in this motion.

As discussed above, defendants also rely on Catalpa, supra, and Ullman, supra in addressing the “good cause” requirement of R. 4:10-3, but fail to show how the factors and standards espoused in those cases apply to the present requests for a confidentiality protective order. Defendants simply do not meet their burden.

Conversely, there are many cases interpreting F.R.C.P. 26 (the basis for New Jersey’s own rule, R. 4:10-3) that are relevant and support denying defendants’ motions. For example, Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1184 (9th Cir. 2006) held simply mentioning a general category of privilege is not enough to demonstrate good cause under Rule 26(c). Further, broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test. Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986). “Blanket” protective orders require the particularly “heavy burden” of showing that disclosure will cause a “clearly defined and very serious injury.” Waelde v. Merck, Sharp & Dohme, 94 F.R.D. 27, 28 (E.D. Mich. 1981).

**C.**

**Defendant’s Requested Confidentiality Protective Order Is a Violation of Public Policy**

The specific protective order defendants request would prevent matters from being shared outside the litigation. Defendants hang their argument on the fact that the order they seek would not limit the use of material in this litigation and would cause no harm to plaintiffs. However, secrecy is no longer acceptable in our civil justice system, and protective orders like the one sought here are against public policy due to the harms they pose not just to the immediate parties in litigation, but the public at large.

Defective Firestone tires caused Ford Explorers to roll over causing significant injuries and death. In the decade that Ford and Firestone were aware of the defect, each case settled on condition that the documents showing that the tires had safety defects be returned and hidden from the public and the press. Despite knowledge of this serious danger by its manufacturers, secrecy practices allowed continued death and injury to consumers that could have otherwise been avoided if the public was aware. Of course, Firestone is only one among many countless other examples: Bic lighters, children’s car seats, all-terrain vehicles, asbestos, and breast implants. All products and litigation were subject to protective orders just like the one requested here that left countless consumers at continued risk of injury or serious harm long after the defects were discovered. Though this case does not necessarily involve a defective product, discovery may reveal that it does involve defective training or hiring such that it raises similar concerns of public health and safety.

The Confidentiality Protective Order sought by defendants is specifically detrimental. Not only do blanket protective orders stating that “confidential material may not be disseminated outside the litigation” harm consumers by subjecting them to risks they cannot otherwise be aware of, there are additional costs to the justice system as a whole. A practice of secrecy makes discovering the truth more difficult and costly overall. The rules of civil procedure, both federal and state, envision sharing and collaboration between parties and their counsel. Cooperation among similarly situated litigants promotes speed and efficiency in the determination of similar actions. Without this foundation, judicial resources are overused, forcing judges to decide the same discovery disputes repeatedly and dragging out litigation that would otherwise resolve if the truth was known.

The public policy of access to information has been widely upheld by the courts in New Jersey as well as throughout the country. See Hammock at 376 citing Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392 (1995). Legislative “sunshine acts” which curtail secrecy in litigation have been proposed at the federal level and in a number of states, including New Jersey, and enacted by about half of those, with the broadest of protections provided in Texas, Florida and Virginia. The public has a right to, and an interest in, broad access to judicial proceedings. Our courtrooms are seen as the societal means of establishing truth and justice but are too often being used as a means of hiding the truth.

**D.**

**Defendants’ Requested Confidentiality Protective Order May Violate New Jersey Rules of Professional Conduct**

In addition to being against public policy, protective orders like the one requested here are arguably unethical under New Jersey Rules of Professional Conduct. RPC 3.4(f) states in relevant part that an attorney “may not request a person other than a client refrain from voluntarily giving relevant information to another party”. Id. Here, defendants’ counsel is requesting that plaintiffs do just that.

Though defendants claim denial of the protective order they request will lead to delays in discovery, that could only be the case if defendants planned to willfully disregard its obligations under R.4:10-2 and under RPC 3.4(a) which states that an attorney may not unlawfully obstruct another party’s access to evidence. Here, should Your Honor deny entry of the protective order defendants seek, the currently discoverable information they have withheld must be provided to plaintiff without further obstruction.

**IV.**

**CONCLUSION**

Defendants have failed to demonstrate any good cause for entry of a protective order, let alone sufficient cause to enter one against the weight of public interest. As such, defendants’ motions should be denied in their entirety and defendants should be ordered to produce the non-protected and relevant documents they have withheld to date.

Respectfully submitted,

THE FERRARA LAW FIRM, LLC

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| Lisa mackin and  CHRISTOPHER MACKIN, wife and husband,  Plaintiffs,  v.  PUBLIC SERVICE ELECTRIC & GAS COMPANY;  HENKELS & McCoy, inc.  John Does #1-10(fictitious names of  individuals, professional associations, partnerships, corporations or other entities involved in service to the South Fork Community) and  ABC CORPORATION #1-10 (fictitious names of  individuals, professional associations, partnerships, corporations or other entities who employed or had agency relationship with any of the above named defendants.); j/s/a  Defendants. | SUPERIOR COURT OF NEW JERSEY  LAW DIVISION: CAMDEN  DOCKET NO: CAM-L-2826-15  **ORDER DENYING**  **DEFENDANTS’ MOTION FOR**  **A CONFIDENTIALITY**  **PROTECTIVE ORDER** |

This matter having come before the Court upon motions filed by defendants PSE&G and Henkels & McCoy, and being opposed by The Ferrara Law Firm, LLC, on behalf of plaintiffs, Christopher and Lisa Mackin and the Court having considered the moving papers and arguments of the parties;

IT IS on this \_\_\_\_\_ day of May 2016 ORDERED that

1. Defendants’ motions are hereby DENIED;

2. Defendants will provide copies of all discovery identified and withheld pending disposition of this motion to all parties within \_\_\_\_ days of this order.

FURTHER ORDERED that a copy of this order be sent to all counsel within \_\_\_\_\_ days of its execution.

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Stephen Orlofsky, J.S.C. (ret.)

Special Master

\_\_X\_\_\_ Opposed

\_\_\_\_\_\_ Unopposed

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The within Opposition and supporting documents has been filed with Special Master Stephen Orlofsky, J.S.C. (retired) via email and overnight carrier to Blank Rome LLP, 301 Carnegie Center, 3rd Floor, Princeton, NJ 08540

On April 18, 2016 I served the within Opposition and proposed form of Order via email and New Jersey Lawyers Service on Defendants as follows:

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The opposition has also been served on counsel to all parties in the consolidated actions as identified on the attached counsel list.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

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Megan P. Gable

Dated: April 18, 2016

1. Alk Assocs., Inc. v. Multimodal Applied Sys., Inc., 276 N.J. Super. 310 (App. Div. 1994).

   Catalpa Inv. Grp. V. Franklin Township Zoning Bd. Of Adjustment, 254 N.J. Super. 270 (Law Div. 1991).

   Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317 (Ch. Div. 1981), overruled on other grounds, Brady v. Dep’t of Pers., 149 N.J. 244 (1997).

   Ullman v. Hartford Fire Ins. Co., 87 N.J. Super. 409 (App. Div. 1965). [↑](#footnote-ref-1)
2. Though not directly on point, the Hammock case deals generally with the entire issue of confidentiality and the competing interests of public policy, providing guidance in factors to be considered when making an order of confidentiality. [↑](#footnote-ref-2)