

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

CERTAIN UNDERWRITERS AT LLOYD’S, LONDON, <i>et al.</i> ,)	
)	
)	ECF Case 14 Civ. 4717-FB
Plaintiffs,)	
v.)	[PROPOSED]
)	PROTECTIVE ORDER
NATIONAL RAILROAD PASSENGER CORPORATION, <i>et al.</i> ,)	REGARDING DISCOVERY
)	MATERIAL
Defendants.)	

The Court, having found that good cause exists for issuance of an appropriately tailored Confidentiality Order governing the pre-trial phase of this litigation that will balance the goals of protection of confidential information, efficiency in discovery, and public access to information, finds that the terms set forth herein (i) will allow parties and other persons subject to compulsory discovery to designate disclosed documents and information as subject to certain limited protections without further orders of the Court; (ii) will serve to protect genuinely sensitive information from disclosure; (iii) will increase the efficiency of discovery and reduce disputes over production of documents and information; (iv) will not interfere with the investigation of claims and defenses and the conduct of the litigation; (v) will not bar any person from seeking to remove a confidentiality designation from any specific document or information; and (vi) will not bar any person from seeking greater protection than that afforded by this Order for any specific document or information; and therefore:

IT IS HEREBY ORDERED that any person subject to this Order, as hereinafter defined, shall adhere to the following terms:

1. The following persons are subject to this Order:
 - a. The parties, including their officers, directors, employees, consultants, agents and representatives;
 - b. Counsel of record in this action and their law firms, the employees of those firms, and contractors or vendors to those firms to the extent they provide services related to this litigation; and
 - c. Persons who have read and signed the attached Non-Disclosure Agreement, but only to the extent of its terms.

2. “Discovery Material” means information provided pursuant to any initial disclosures, interrogatories, document requests, requests for admission, subpoenas, depositions, or orders of this Court, or of any other Court providing assistance to this Court in this matter, whether in the form of documents, testimony, images, or electronically stored information.

3. Any persons, including non-parties to this litigation, who produce or provide Discovery Material may, themselves or through their counsel, designate such material in whole or part as “Confidential Discovery Material” insofar as it contains non-public business, commercial, financial, or personal information, the public disclosure of which could, in the good faith opinion of the producing person and his or her counsel, adversely affect any person’s privacy obligations or their commercial or financial interests, or in the good faith opinion of counsel, be restricted by law. A “good faith opinion” as that term is used in this Order may be formed only after particularized review of each document or material in accordance with applicable principles of law.

4. No material that has been created by, provided to, or received from a government entity, and no summary of such material, shall be designated as Confidential Discovery Material

unless counsel has made a good faith determination that the material would not be producible pursuant to a request under the federal Freedom of Information Act, the New York Freedom of Information Law, or other applicable law. For purposes of this paragraph, the National Railroad Passenger Corporation is deemed to be a government entity.

5. Nothing shall be designated as Confidential Discovery Material if it is or appears on its face to be in the possession of another person, unless:

- a. Said person is or was an employee, director, representative, agent, consultant, contractor, insurer, or reinsurer of the designating person, and the designating person has a good faith belief that the person has maintained and will maintain the confidentiality of the material;
- b. Said person provided the information to the producing party in a context that implied an understanding that confidentiality would be maintained, and the producing party has a good faith belief that said person has maintained and will maintain the confidentiality of the material;
- c. Said person received the material as part of negotiations between the parties pursuant to a standstill agreement, or
- d. The producing party has determined that said person is obligated by contract or law to maintain the confidentiality of the material and has not breached that obligation.

6. Confidential Discovery Material shall not include material that any person possesses, or comes to possess, from any source other than production by the designating person in the course of discovery in this litigation, even if copies of such material have been designated as Confidential Discovery Material.

7. A producing person or that person's counsel may designate all or a portion of a document as Confidential Discovery Material by marking the document with the words "CONFIDENTIAL MATERIAL," "PROTECTED MATERIAL," or substantially equivalent language on the face of the writing and each page so designated (or, in the case of a tangible item, on the face of the item) in a manner that does not interfere with legibility of the document. The designation should additionally include the title or action number of this action where feasible.

8. Deposition testimony may be designated as Confidential Discovery Material either on the record during the deposition or within seven days of receipt of the transcript. Any person with an interest in the maintenance of confidentiality of the testimony may designate it as Confidential Discovery Material. If practicable, the designating person may conduct his or her review of a "rough" version of the transcript and may advise the court reporter of additional sections to be marked as Confidential Discovery Material prior to the creation of the final version of the transcript.

9. At any time up to 90 days prior to the trial of this action, any Discovery Material inadvertently produced without a confidentiality designation may thereafter be designated by the producing person as confidential by informing all parties in writing that the Discovery Material should be treated as confidential under this Order and by making a production of the material properly marked as confidential, provided, that no such retroactive designation shall be effective with respect to Discovery Material that has previously been filed openly with the Court or disclosed to prospective or actual deponents, witnesses, or other non-parties.

10. Any person who objects to any designation of confidentiality of any Confidential Discovery Material may at any time serve upon the designating person a written objection to the

designation stating the grounds of the objection. If the designating person and the objecting person cannot reach agreement respecting the objection within one week, either may seek a ruling at any time from the Court regarding the designation.

11. Failure to make a written objection to a designation of confidentiality or a ruling from the Court respecting the designation is not a waiver of the right to seek to use such Confidential Discovery Material in connection with motions, at trial, or otherwise in this proceeding.

12. Each person who has access to Confidential Discovery Material shall take all reasonable precautions to prevent the unauthorized or inadvertent disclosure of such material.

13. If, in connection with this litigation, a party discloses or makes available information later identified to be subject to a claim of attorney-client privilege or work-product protection such disclosure shall not constitute or be deemed a waiver or forfeiture of any claim of privilege or work-product protection with respect to the privileged or work-product information or its subject matter, unless the producing party attempts affirmatively to use any such information in any motion, pleading, or otherwise in this case. This Paragraph 13 shall constitute an order pursuant to Fed. R. Evid. 502(d), but nothing contained herein shall be deemed to waive the right of any party to review documents for privilege or work product before producing them to opposing parties.

14. If a disclosing party makes a claim of inadvertent disclosure, the receiving party shall use its best efforts to, within five business days, return or destroy all copies of the Inadvertently Disclosed Information, to the extent reasonably feasible, and shall advise the disclosing party in writing if all such information has been returned or destroyed. A receiving party may move the Court for an Order compelling production of the Inadvertently Disclosed

Information, in which case the receiving party shall seek an order permitting the motion to be made under seal. The motion shall not assert as a ground for production the fact or circumstances of the inadvertent production.

15. Any person subject to this Order who receives any Confidential Discovery Material shall not disclose such Confidential Discovery Material to anyone else, except that it may be disclosed to the following persons:

- a. The parties to this action, including agents, claims administrators, officers, directors and employees of said parties;
- b. Counsel of record in this action, and other attorneys and legal or clerical assistants employed by such counsel or their firms and assigned to this matter, and, provided such person has first executed a Non-Disclosure Agreement in the form attached as Exhibit A to this Order, or has orally agreed to abide by the terms of the Non-Disclosure Agreement, contractors or vendors to such firms the extent they provide services in connection with this matter.
- c. The author or addressee of a document, or any other person indicated on the face of a document as having received a copy;
- d. Any witness not included in any other subparagraph called to testify at trial or deposition or any person whom counsel for a person in good faith believes may be called to testify at trial or deposition in this action, provided such person has first executed a Non-Disclosure Agreement in the form attached as Exhibit A to this Order, or has orally agreed to abide by the terms of the Non-Disclosure Agreement;

- e. Any person retained by a party to serve as an expert consultant or witness or otherwise to provide specialized advice to counsel in connection with this action, provided such person has first executed a Non-Disclosure Agreement in the form attached as Exhibit A to this Order or has orally agreed to abide by the terms of the Non-Disclosure Agreement;
- f. Court reporters or stenographers engaged to transcribe depositions conducted in this action;
- g. Mediators and their staff;
- h. Insurers or reinsurers of any party to the extent that that party reasonably determines that disclosure is required under the terms of its insurance or reinsurance contract(s) or will facilitate a request for payment under such contract(s);
- i. Regulators; or
- j. The Court and its staff and support personnel.

16. When a party makes a filing (including any pre-motion letter) with the Court that discloses any information designated as Confidential Discovery Material, the filing party shall seek an order permitting filing under seal in accordance with the provisions of the Court's "Steps for E-Filing Sealed Documents – Civil Cases," found at:

<https://www.nyed.uscourts.gov/forms/steps-e-filing-sealed-documents-civil-cases>

At the same time, the filing party shall publicly file, via ECF, a copy of the papers with those portions that contain or reflect the contents of confidential discovery materials redacted, and shall add the words [Redacted Version] to the name of the document.

17. If the Court issues an order denying a filing under seal, the filing party may make its filing openly, provided that the designating party may promptly seek review by the District Judge of any such order made by the Magistrate Judge, and may promptly seek appellate review of any such order made by the District Judge, and may ask the filing party or the Court to delay the filing to permit such review.

18. Any material filed openly with the Court by the party that designated it as Confidential Discovery Material in accordance with the terms of Paragraphs 16 and 17 of this Order shall lose its designation as Confidential Discovery Material.

19. The protections provided to Confidential Discovery Material by the terms of this Order do not apply to the use of Confidential Discovery Material at trial. If any party reasonably determines that it will be necessary to exclude any materials from use at trial, or to maintain their confidentiality at trial, the party or parties may seek an order to that effect. Any Confidential Discovery Material introduced in open court at trial by the party that designated it as Confidential Discovery Material shall lose its designation as Confidential Discovery Material.

20. All Confidential Discovery Material shall remain subject to this Order following disposition of part or all of this action, including following any appeals.

Roanne L. Mann, U.S.M.J.

Dated: _____

EXHIBIT A – FORM OF NON-DISCLOSURE AGREEMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

_____)	
CERTAIN UNDERWRITERS AT LLOYD’S,)	
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	v.)	
)	
NATIONAL RAILROAD PASSENGER)	
CORPORATION, <i>et al.</i> ,)	
	Defendants.)	
_____)	

NON-DISCLOSURE AGREEMENT

I, _____, agree to maintain the confidentiality of any documents or information marked as “Confidential Discovery Material” in accordance with the terms of this Agreement.

1. I will not disclose any Confidential Discovery Material to anyone except as advised by counsel that it is permissible to do so. I understand that all Confidential Discovery Material shall remain confidential following disposition of part or all of this action, including following any appeals.
2. If I am an expert witness or consultant, I may disclose Confidential Discovery Material to members of my staff only to the extent necessary to assist me in performing my work and only after they have executed a Non-Disclosure Agreement identical to this one, or have orally agreed to abide by the terms of the Non-Disclosure Agreement.
3. I consent to the jurisdiction of the Court solely with regard to a proceeding concerning the disclosure of Confidential Discovery Material. This consent does not subject me to the jurisdiction of the Court for any other purpose.

Dated: _____

Print name: