IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

CARLA AHRENDT,	*	
	*	
Plaintiff,	*	
	*	
v.	*	CIVIL ACTION FILE
	*	NO. 11-A-4554-2
HOME DEPOT U.S.A., INC., and	*	
JEFFREY GEORGE HANSEN,	*	
	*	
Defendants.	*	

PLAINTIFF'S RESPONSE TO DEFENDANT HOME DEPOT U.S.A., INC.'S MOTION FOR ENTRY OF PROTECTIVE/CONFIDENTIALITY ORDER

Defendant Home Depot has moved this Court to enter an overly restrictive non-sharing protective order that would prohibit Plaintiff from sharing the documents that Home Depot produced in this litigation with *anyone* outside this case—even attorneys with similar actions against Home Depot—despite the fact that *courts across the country* and particularly in Georgia have acknowledged the benefits of document sharing between counsel. Home Depot's motion should be denied, and this Court should enter Plaintiff's Proposed Sharing Protective Order because Home Depot has failed to establish with particularity why the documents it must produce should be protected as confidential and because the sharing protective order that Plaintiff proposes protects Home Depot's confidential information while also promoting efficiency, minimizing discovery costs, ensuring full and fair disclosure, and promoting judicial economy.

I. INTRODUCTION.

Home Depot claims that a non-sharing protective order is necessary to protect Home Depot's confidential business information. That argument is a ruse. As an initial matter, Home Depot has failed to meet its heavy burden of establishing with particularity why any of the documents relating to its policies for securing customer cargo actually deserve confidential status. It is important to note at the outset that this is *not* a case involving a secret recipe, confidential customer lists, or the design and manufacture of complex products. Instead, the documents at issue are related to how Home Depot secures cargo to customers' vehicles.

The real reason Home Depot seeks a non-sharing protective order is to drive up the costs of litigation for each plaintiff with a claim against it and to stymie future plaintiffs' access to justice by forcing every plaintiffs' counsel to expend considerable time and resources fighting for discovery and even more time and resources searching through mountains of irrelevant documents to find those key documents that are actually relevant to prosecuting plaintiffs' claims. Aside from the futility of forcing every plaintiff to reinvent the wheel in discovery, non-sharing protective orders facilitate the potential for discovery abuse by allowing defendants to selectively withhold documents without fear that plaintiffs will discover their abuse by locating relevant, responsive documents that defendants have produced in previous litigation.

Sharing protective orders, on the other hand, level the playing field between powerful defendants and individuals by minimizing discovery costs and improving individuals' access to justice. Sharing protective orders also promote speedy and efficient litigation by facilitating and controlling the dissemination of discovery material necessary to prosecute a case without repetitious discovery battles and without compromising defendants' truly confidential documents. Allowing the dissemination of information amongst counsel also keeps defendants

honest by forcing them to consistently produce relevant, responsive documents requested in discovery or face the consequences of hiding such documents. Finally, sharing amongst plaintiffs' counsel promotes judicial economy by conserving judicial resources that would otherwise be expended refereeing discovery disputes, adjudicating motions to intervene, or modifying overly restrictive non-sharing protective orders like the one proposed by Home Depot.

Allowing sharing amongst lawyers does *not* allow Home Depot's competitors to gain access to its confidential business information. Rather, the sharing protective order proposed by Plaintiff sets forth specific and stringent procedures governing the limited sharing of confidential information. (*See* Paragraph Two of Plaintiff's Proposed Sharing Protective Order, attached as Ex. A.)[1] Specifically, only attorneys with similar claims against Home Depot may obtain confidential materials. Before any attorney with a similar claim against Home Depot may gain access to the confidential information produced in this action, that attorney must first acknowledge in writing that he or she will be bound by the terms of the protective order in this action and that he or she will not release any information contained in the confidential documents to competitors of Home Depot. *Id.* Accordingly, this Court should deny Home Depot's motion for a non-sharing protective order and should enter Plaintiff's Proposed Sharing

[1] Plaintiff's Proposed Sharing Protective Order is identical to the protective order it proposed to Home Depot months ago except that Plaintiff has additionally narrowed the sharing provision in a further attempt at compromise. (*See* Plaintiff's letter of 02/06/12 (proposing sharing protective order), first page mistakenly dated 07/13/11, attached as Ex. B.) The sharing provision Plaintiff originally proposed limited sharing to "cases involving personal injury," which was designed to keep Home Depot's documents away from its adversaries in commercial litigation. Before the instant motion, Home Depot had not complained about the *scope* of the sharing provision, instead announcing in stark terms that it "will not agree to" a sharing provision. (Home Depot letter of 03/22/12, attached as Ex. C.) In response to Home Depot's newly-announced concern about the *scope* of the provision, Plaintiff has added the phrase "arising out of the failure to secure cargo" to paragraph two, which governs sharing. In addition, Plaintiff has added a sentence to Exhibit "A" of Plaintiff's Proposed Sharing Protective Order forbidding release of confidential documents to Home Depot's competitors.

Protective Order. Plaintiff's proposed order protects Home Depot's confidential information; promotes efficiency, full and fair disclosure, judicial economy; and ensures that Home Depot produces all documents responsive to Plaintiff's discovery requests.

II. FACTS.

This is a personal injury case involving Home Depot's failure to secure cargo as required by O.C.G.A. § 40-6-248.1. On September 21, 2010, Defendant Jeffrey Hansen purchased a freezer from Defendant Home Depot. When Hansen left Home Depot, in violation of Georgia law and Home Depot's policies, Defendants made no effort to tie the freezer down. Shortly after Hansen departed, the freezer tumbled out of his pickup. It crossed into the other lane and struck the vehicle driven by Plaintiff Carla Ahrendt. As a result of the impact, Ms. Ahrendt suffered severe injuries. On the next day or shortly thereafter, Hansen returned to Home Depot and acquired a replacement freezer. Upon information and belief, Home Depot adequately secured the replacement freezer. Plaintiff is seeking discovery from Home Depot relating to Defendant Hansen's acquisition of the original freezer, Defendant Hansen's acquisition of the replacement freezer, Home Depot's policies for securing cargo, and Home Depot's knowledge of other similar incidents.

Home Depot's insistence on an unreasonable protective order has caused significant delay in this case. As Judge Wayne M. Purdom has written, "[t]he timing of the motion for a protective order is important. *The motion must be filed before the due date for the discovery or the date that the deposition is to be taken, and not afterwards.*" Judge Wayne M. Purdom, Ga. Civil Discovery § 4:8 (emphasis added). If the rule were otherwise, a party could delay discovery by not *mentioning* a protective order until it served its discovery responses, and not

moving for a protective order until months later when it became apparent that the other party would move to compel. That is exactly what Home Depot has done here.

Home Depot's discovery responses were due—per Plaintiff's extension—by January 16, 2012. Those discovery responses were woefully deficient, and were followed by extended correspondence between the parties. Plaintiff sought to arrange a meet-and-confer with a court reporter present, and although Home Depot initially agreed (*see* Home Depot email of 03/22/12, attached as Ex. D), Home Depot subsequently reversed course and refused to meet and confer in the presence of a court reporter. (Home Depot letter of 04/02/12, attached as Ex. E.) Following Home Depot's refusal, the parties met and conferred by letter in an attempt to resolve the discovery issues. (*See* Plaintiff's letter of 04/24/12, attached as Ex. F.) It was only after that—on May 3, 2012, *three and a half months after discovery responses were due*—that Home Depot moved for a protective order. Home Depot did not even mention the need for a protective order until it served its discovery responses, many of which refused to give adequate responses until "entry of a confidentiality order." Home Depot was required to do more than simply send Plaintiff a copy of a proposed protective order on the day it responded to discovery, then move for a protective order three and a half months later: *Home Depot was required to move for a protective order "before the due date for the discovery."* Judge Wayne M. Purdom, Ga. Civil Discovery § 4:8. (emphasis added). Because Home Depot failed to do that, its motion is untimely.

At this point, Plaintiff still has no meaningful discovery from Home Depot. First, when Plaintiff first requested that Home Depot preserve surveillance video, Home Depot responded that preserving the video "would be at your expense" and "[t]he cost would be approximately $10,000"—although the real cost, as Home Depot's subsequent document production revealed,

was much, much less. (Home Depot Letter of 01/28/11, mistakenly dated 01/28/10, attached as Ex. G.); (Ahrendt v. Home Depot 000061-62, attached as Ex. H.) Second, a month after Home Depot finally wrote that it *had retained* and *was reviewing* video of the defendant driver picking up his replacement freezer, Home Depot abruptly announced that "the video from the time period requested no longer exists." (Home Depot Letters of 02/16/12, attached as Ex. I, and 03/22/12, Ex. C.) Third, although Home Depot's responses were due on January 16, 2012, Home Depot *still has not produced a single guideline or procedure* for loading customers' vehicles. Fourth, although Plaintiff offered to speak with Home Depot's counsel by phone with a court reporter present, and offered to pay for the court reporter, Home Depot refused to meet and confer where its statements or agreements could be recorded. (Home Depot letter of 04/02/12, Ex. E.) Fifth, by the January 16, 2012 production deadline—which Plaintiff had extended, at Home Depot's request—Home Depot had produced *only* correspondence between the parties, limited insurance information, photographs, and a receipt for the original freezer. Home Depot withheld everything else. Plaintiff enumerates the above problems not merely to spill ink, but to make this point: *Home Depot's goal is to avoid producing evidence.* To accomplish that goal, Home Depot hopes to make each litigant spend the maximum in time, resources, and effort to obtain the evidence to which the Civil Practice Act entitles him.

Because Home Depot has refused to engage in meaningful discovery unless Plaintiff agreed to enter into an overly restrictive non-sharing protective order, meaningful discovery has unfortunately been stifled in this action.

III. LEGAL STANDARD.

Georgia law requires the party seeking a protective order to establish "good cause" why a protective order should be entered. O.C.G.A. § 9-11-26(c). The Court then exercises its

discretion in determining whether a protective order is actually necessary and, if so, the terms of the order. *Fulton County Bd. of Assessors v. Saks Fifth Ave., Inc.*, 248 Ga. App. 836, 842 (2001). Home Depot contends that it is entitled to an overly restrictive non-sharing protective order in this case pursuant to § 9-11-26(c)(7), which provides:

> Upon motion by a party or by the person from whom discovery is sought and for **good cause shown**, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (7) That a trade secret or other confidential research, development, or commercial information not be disclosed **or be disclosed only in a designated way**[.]

(emphasis added). "Good cause for the issuance of a protective order . . . must be clearly demonstrated. [cit.] Such cause necessarily is not established by stereotyped or conclusional statements, bereft of facts." *Young v. Jones*, 149 Ga. App. 819, 824 (1979). "Protective orders should not be entered when the effect is to frustrate and prevent legitimate discovery." *Karp v. Friedman, Alpren & Green*, 148 Ga. App. 204, 206 (1978). This is because protective orders are intended to be "protective-not prohibitive." *Deloitte Haskins & Sells v. Green*, 187 Ga. App. 376, 378 (1988).

A plaintiff's intention to share discovery does not constitute good cause for a protective order. *Deford v. Schmid Prod. Co.*, 120 F.R.D. 648, 654 (D. Md. 1987). Rather, pursuant to the express terms of § 9-11-26(c)(7), even if this Court determines that Home Depot's confidential information should be protected, this Court retains the discretion to specify a "designated way" the information should be disclosed. Plaintiff has proposed such a designated way in her Proposed Sharing Protective Order and has limited sharing of confidential information to only counsel who have similar claims. This is an appropriate "designated way" in which Home

Depot's confidential information may be disseminated. *See, e.g, Baker v. Liggett Group, Inc.*, 132 F.R.D. 123, 125-26 (D. Mass. 1990) and Section (IV)(C), *supra.*

IV. THE COURT SHOULD REJECT HOME DEPOT'S PROPOSALS THAT HAVE NOTHING TO DO WITH PROTECTING CONFIDENTIAL INFORMATION AND EVERYTHING TO DO WITH FRUSTRATING DISCOVERY AND THE JUDICIAL PROCESS.

Home Depot's motion should be denied because: (1) Home Depot has failed to show "good cause" or show that the documents it has yet to produce are confidential; (2) courts across the country, and in Georgia, have recognized that sharing orders similar to the one proposed by Plaintiff simultaneously protect Home Depot's confidential information from dissemination to competitors and allow the many benefits of sharing discovery amongst counsel with similar claims; and (3) numerous other national defendants have agreed to sharing protective orders governing the dissemination of confidential information.

A. Home Depot Has Failed to Meet its Heavy Burden of Establishing with Particularity Why Any of the Documents It Seeks to Unilaterally Deem Confidential Are Actually Confidential.

Home Depot fails to meet its burden to "clearly demonstrate[ ]" the need for a protective order. *Young* 149 Ga. App. at 824; *accord Apple Inv. Properties, Inc. v. Watts*, 220 Ga. App. 226, 228 (1996); Purdom, Ga. Civil Discovery § 4:8; Ga. Unif. Super. Ct. R. 6.1. Georgia law controls this motion. In Georgia, protective orders may issue so "[t]hat a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." O.C.G.A. § 9-11-26(c)(7). Georgia law defines "trade secret." A "trade secret" is information that "is not commonly known," "[d]erives economic value, actual or potential, from not being generally known," and "[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." O.C.G.A. § 10-1-761(4); *see* Purdom, Ga. Civil Discovery § 5:4 (applying Trade Secrets Act to scope of civil discovery).

The documents that Plaintiff seeks in this case are not trade secrets. Trade secrets are highly sensitive pieces of commercial information like the recipe that an asphalt manufacturer uses to produce its product. *Douglas Asphalt Co. v. E.R. Snell Contractor, Inc.*, 282 Ga. App. 546, 549-50 (2006). Here, as Home Depot has acknowledged, Plaintiff seeks "guidelines, training tools, policies, procedures, manuals, rules a[nd] regulations." Def.'s Br. at 2. These guidelines, which should instruct employees to properly tie boxes down to trucks, are not "trade secrets." That one should make cargo secure before transporting it on a public roadway is common sense, and anyone observing Home Depot's usual business would (one hopes) observe that Home Depot instructs its employees to follow that practice. *Taylor Freezer Sales Co., Inc. v. Sweden Freezer E. Corp.*, 224 Ga. 160, 164-65 (1968) (where there does not "appear to be any element of secrecy or confidential information that is pecul[i]ar to the [defendant's] business and known only to it and its employees," there is no trade secret); *accord Thomas v. Best Mfg. Corp.*, 234 Ga. 787, 790 (1975). Where a purportedly confidential process can be learned from observing it—like a automotive parts vendor's process of taking unordered parts on regular sales runs in the hopes of selling those parts—that process is not a trade secret. *Allen v. Hub Cap Heaven*, 225 Ga. App. 533, 535 (1997); *see also Leo Publications, Inc. v. Reid*, 265 Ga. 561, 563 (1995). Here, because anyone observing Home Depot's loading area could readily learn its process for securing cargo, that process is not a "trade secret." Even where a process is so closely guarded that employees are forced to sign confidentiality agreements, the process is not always a trade secret. *Equifax Servs., Inc. v. Examination Mgmt. Servs.*, 216 Ga. App. 35, 39-40 (1994).

An Eleventh Circuit case is particularly illustrative. That case involved a process of financial valuation that:

> involves the consideration of the following information: the assessed value of the property; the valuation reports on the property produced by third-party real-estate information database services; the attributes of the property and the neighborhood based on "drive-bys" of the site by CARC employees; and a prediction of the property owner's likelihood of redeeming the tax liens and making interest payments based on the specific owner's payment record and CARC's national averages of tax redemption behavior. After compiling this information to arrive at a valuation of the property, CARC factors in its own financial constraints imposed by its institutional lenders to determine the maximum bid price at which it believes it can make a reasonable profit on the purchase of the tax deed at auction. CARC claims as trade secrets its compilation of property-specific information, its national database on tax redemption behavior, and its final bid guidelines for tax deeds sold at auction.

Capital Asset Research Corp. v. Finnegan, 160 F.3d 683, 686-87 (11th Cir. 1998). Applying Georgia law, the court determined that the above-described process was *not* a trade secret. *Id.* Home Depot's much simpler process of tying boxes down on trucks is not a trade secret either. It is unlikely that Home Depot would need to protect, or that Home Depot's competitors would even want, information concerning its tie-down procedures.

Despite the fact that Home Depot failed to meet its burden of establishing good cause with particularity, Plaintiff agreed to enter into a protective order that would govern the production and dissemination of these documents out of professional courtesy and to expedite this litigation. Although Plaintiff remains agreeable to the entry of a protective order without the need for Home Depot to meet its burden of proving confidentiality at this time, this Court should take into consideration that, as of now, Home Depot has not met its burden of establishing the confidentiality of any of the documents it is withholding. Entering an overly restrictive non-sharing protective order under such circumstances would be inappropriate.

B. This Court Should Deny Home Depot's Motion and Should Enter Plaintiff's Proposed Sharing Protective Order Because the Vast Majority of Courts that Have Addressed this Issue have Authorized and Recognized the Utility of Sharing Protective Orders.

This Court should enter Plaintiff's proposed sharing protective order because Plaintiff's Proposed Sharing Protective Order protects Home Depot's confidential business information while promoting efficiency, minimizing discovery costs, ensuring full and fair disclosure by Home Depot, and conserving judicial resources. Home Depot has failed to establish good cause why a non-sharing protective order is warranted. *See Young*, 149 Ga. App. at 824 (establishing that party seeking protective order bears burden).

1. Home Depot's arguments in support of a non-sharing protective order are meritless.

Home Depot contends that an overly restrictive non-sharing protective order is necessary to protect Home Depot's confidential information from being viewed by its competitors. Home Depot's arguments are misplaced and are nothing more than a smokescreen for Home Depot's true purpose in filing this motion—to make discovery expensive and burdensome for future litigants and to ensure that it can produce what it wants, when it wants, without fear that it will be caught hiding documents.

Home Depot clearly does not want attorneys who are representing people injured by improperly secured cargo to be able to prosecute their clients' claims in an efficient manner by having access to the documents that provide crucial evidence. By seeking restrictive confidentiality orders that prevent any sharing of documents between lawyers handling similar cases, Home Depot seeks to force each plaintiff and his or her lawyer to reinvent the wheel by forcing them to sift through mountains of documents in an effort to find the relevant documents actually necessary to prosecuting a claim against Home Depot. As one trial court noted, "[t]here

can be no justification for defendants' position other than to discourage other claimants and deprive them of evidence already known and produced to others similarly situated." *Cipollone v. Liggett Group, Inc.*, 106 F.R.D. 573, 577 (D.N.J. 1985).

In contrast to Home Depot's arguments, Plaintiff's Proposed Sharing Protective Order would provide an express method for the limited dissemination of Home Depot's confidential information only to Plaintiff's counsel with similar claims against Home Depot, and would lessen this Court's burden by removing the possibility that this Court will have to adjudicate a motion to intervene and modify Home Depot's overly restrictive non-sharing protective order. This Court should deny Home Depot's motion because the same arguments proffered by Home Depot in this case have been thoughtfully considered and rejected by a number of courts throughout the country.

Home Depot's extensive reliance on *Folz v. State Farm Mutual Automobile Insurance Co.* and its progeny is somewhat puzzling. 331 F.3d 1122 (9th Cir. 2003). Not only is that case not controlling, but the Ninth Circuit expressly *permitted* sharing and found that State Farm's blanket assertion of confidentiality *failed* to carry its burden of showing "good cause" for a protective order. *Id.* at 1131.

2. Courts across the country and in Georgia have authorized the sharing of information amongst Plaintiff's counsel.

Sharing protective orders promote efficiency, minimize discovery costs, ensure full and fair disclosure by defendants, and promote judicial economy. The majority of courts across the country have allowed the sharing of information between plaintiffs' counsel. *See, e.g., Kamp Implement Co., Inc. v. J.I. Case Co.*, 630 F. Supp. 218, 219 (D. Mont. 1986) (Collecting cases and recognizing, "[o]f the courts that have considered protective orders of the nature proposed by defendant, an overwhelming majority have refused to grant any type of protection from

dissemination."); *Wolhar v. General Motors Corp.*, 712 A.2d 464, 467 (Del. 1997) ("The great weight of authority in other jurisdictions holds that such sharing is not only theoretically sound but also justified as an efficient use of the resources of the courts and the parties."). These courts have recognized that information exchange between plaintiffs' counsel is not only authorized, it is also encouraged and can be done without risking the unbridled dissemination of a defendant's confidential information. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 814 (Ky. 2004) ("That discovery might be useful in other litigation or other proceedings is actually a good thing because it furthers one of the driving forces behind the Civil Rules by allowing the cost of repeating the discovery process to be avoided and thereby encouraging the efficient administration of justice.").

The sharing of information amongst lawyers subject to a protective order also promotes speedy, efficient, and inexpensive litigation by facilitating the orderly dissemination of discovery material. *Burlington City Bd. of Educ. v. United States Mineral Prod. Co., Inc.*, 115 F.R.D. 188, 190 (M.D.N.C. 1987) (collecting cases and noting, "[t]he sharing of information between even diverse plaintiffs promotes speedy, efficient and inexpensive litigation by facilitating the dissemination of discovery material necessary to analyze one's case and prepare for trial."); *Baker*, 132 F.R.D. at 126 ("the sharing of information obtained in discovery with litigants in comparable cases is consistent with Fed. R. Civ. P. 1 which provides that the Rules are to 'be construed to secure the just, speedy, and inexpensive determination of every action.'") (quoting *Cipollone*, 113 F.R.D. at 91). As aptly stated by the United States Court of Appeals for the Seventh Circuit in *Wilk v. American Medical Association*, 635 F.2d 1295, 1299 (7th Cir. 1981):

> "(a)s a general proposition, pre-trial discovery must take place in the (sic) public unless compelling reasons exist for denying the public access to the proceedings." . . . This presumption should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues, for

> in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process.

(quoting *Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978)).

This is because sharing protective orders level the playing field between plaintiffs and defendants by lessening the financial burden on injured plaintiffs who are forced to sue large corporations with deep pockets. *Burlington City Bd. of Educ.*, 115 F.R.D. at 190 ("Permitting plaintiffs to share information helps counterbalance the effect uneven financial resources between parties might otherwise have on the discovery process, thereby protecting economically modest plaintiffs faced with financially well off defendants and improving accessibility to justice."); *Baker*, 132 F.R.D. at 126 ("[T]o routinely require every plaintiff . . . to go through a comparable, prolonged and expensive discovery process would be inappropriate."); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982) (allowing sharing of documents to reduce "effort and expense inflicted on all parties…by repetitive and unnecessary discovery. In this era of ever expanding litigation expense, any means of minimizing discovery costs improves the accessability and economy of justice...Each plaintiff should not have to undertake to discovery anew the basic evidence that other plaintiffs have uncovered. To so require would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel. Efficient administration of justice requires that courts encourage, not hamstring, information exchanges"); *Garcia v. Peeples*, 734 S.W.2d 343, 347-48 (Tex. 1987) ("In addition to making discovery more truthful, shared discovery makes the system itself more efficient."). By reducing the costs of discovery, sharing protective orders increase plaintiffs' access to justice and lessen defendants' incentive to purposefully increase the costs of litigation.

Sharing protective orders also promote full disclosure of discoverable material by defendants who must consistently produce all of the responsive information requested by plaintiffs in discovery or face the consequences of withholding responsive documents. As noted by the court in *Raymond Handling Concepts Corp. v. Superior Court*, 39 Cal. App. 4th 584, 591 (1995)(citation omitted),

> Shared discovery is an effective means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses. In addition to making discovery more truthful, shared discovery makes the system itself more efficient. The current discovery process forces similarly situated parties to go through the same discovery process time and time again, even though the issues involved are virtually identical. Benefiting from restrictions on discovery, one party facing a number of adversaries can require his opponents to duplicate another's discovery efforts, even though the opponents share similar discovery needs and will litigate similar issues.

The exchange of information amongst plaintiffs' counsel litigating similar cases even benefits Home Depot. *Burlington City Bd. of Educ.*, 115 F.R.D. at 190 (recognizing that information exchange amongst plaintiffs' counsel "reduces repetitious requests and depositions, thereby conserving even defendant's time and expense[.]"); *Cipollone*, 106 F.R.D. at 577.

Finally, sharing protective orders promote judicial economy by alleviating the Court's obligation to referee discovery disputes. *Burlington City Bd. of Educ.*, 115 F.R.D. at 190 (a sharing order "conserves judicial resources by reducing the number of discovery motions and disputes."). Allowing sharing pursuant to the express terms of Plaintiff's Proposed Sharing Protective Order will also save this Court time by removing the probability that this Court will have to adjudicate a motion for a modification of Home Depot's restrictive non-sharing protective order filed by litigants with similar cases against Home Depot. *Kamp Implement Co.*, 630 F. Supp. at 220 ("If defendants' proposed [non-sharing protective] order were entered, the court would be faced with motions by litigants in other cases for modification of the order to

allow the information to be released to them. This would result in duplication of time and effort in each instance where discovery is sought.").

For all these reasons, ***Georgia courts*** commonly enter sharing orders, even over the objection of a nationally-active defendant. S*ee Williams v. Honda Motor Co.*, Civil Action No.2010CV04232B, State Court of Clayton County, Georgia; *Milton v. Honda Motor Co.*, Civil Action No. 4:03-CV-140-2, Middle District Court of Georgia, Columbus Division; *Gibson v. Ford Motor Co.*, Civil Action No. ST-00-CV-0111, State Court of Clarke County, Georgia (collectively attached as Ex. J.) For the same reasons, trial courts on a national basis also continue to enter sharing protective orders. (For federal decisions, *see Idar v. Cooper Tire & Rubber Co.*, No. C-10-217, 2011 WL 688871 (S.D. Tex. Feb. 17, 2011); *Pia v. Supernova Media, Inc.*, 275 F.R.D. 559, 561-62 (D. Utah 2011); *JAB Distributors, LLC v. London Luxury, LLC*, No. 09-CV-5831, 2010 WL 4008193 (N.D. Ill. Oct. 13, 2010); *Brownlow v. Gen. Motors Corp.*, No. 3:05CV-414-R, 2007 WL 2712925 (W.D. Ky. Sept. 13, 2007). For state court decisions (including some orders entered by consent), *see Hampton v. DaimerChrysler Corp.*, Case No. 05-CVS-1127, Superior Court of Iredell County, North Carolina; *Cooper v. General Motors Corp.*, Civil Action No.: 251-96-1253CIV, Circuit Court of Hinds County, Mississippi; *Neal v. DaimlerChrysler Corp.*, Case No.: 03-CA-8085, Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida; *Stansell v. Ford Motor Co.*, C/A No.: 01-CP-25-122, Court of Common Please of Hampton County, South Carolina; and *Flax v. DaimlerChrysler Corp.*, Civil Action No. 02C-1288, Circuit Court for Davidson County, Tennessee (state court orders collectively attached as Ex. K)). As the foregoing court decisions recognize, the benefits of sharing are not really disputable—which is why Home Depot must resort to baseless

accusations, such as accusing Plaintiff's counsel of "trying to market themselves as anti-Home Depot lawyers," to oppose sharing.

Apparently recognizing the benefits of sharing, Home Depot exhorts the Court that whether a document should be shared must be decided later, when a future litigant in need of evidence will be required to petition this Court for access to the documents. It is unclear to Plaintiff why Home Depot would want such a system, unless to place one more obstacle and one more opportunity for delay in the path of a litigant needing evidence. Such a practice would only delay the dissemination of evidence and place an additional administrative burden upon the Court, and Plaintiff opposes it for those reasons.

C. Other National Defendants Have Effectively Conceded that They Lack Good Cause to Contest a Sharing Protective Order with Guidelines Limiting the Dissemination of Confidential Information.

Unlike Home Depot, other nationally-active corporate defendants apparently realize there is no good cause for non-sharing protective orders and simply agree to provisions allowing the sharing of documents with counsel with similar claims against them. (*See, e.g., Reese v. Ford Motor Co.*, No.: 03 A 10881-1, State Court of Cobb County, Georgia; *Randolph v. General Motors Corp.*, Civil Action File No. 96-VS-011089-3-J, State Court of Fulton County, Georgia; *Moseley v. General Motors Corp.*, Case No. CV 90V6276, State Court of Fulton County, Georgia; *Katz v. DaimlerChrysler Corp.*, Civil Action File No. 07CV-130355, Superior Court of Fulton County, Georgia; *Wheeler v. Ford Motor Co.*, Civil Action File No. 2007CV05570E, State Court of Clayton County, Georgia; *Brazelton v. General Motors Corp.*, Civil Action File No. 07A1956-3, State Court of Cobb County, Georgia; *Bates v. Michelin North America, Inc.*, Civil Action File No. 1:09-cv-3280, Northern District Court of Georgia, Atlanta Division (collectively attached as Ex. L.) These defendants apparently recognize that any confidential

information that may be shared with counsel who have similar claims against Home Depot will not reach their competitors because the sharing protective orders set forth specific, quantifiable procedures for the limited dissemination of confidential information. Accordingly, this Court should enter Plaintiffs' Proposed Sharing Protective Order.

V. THERE ARE OTHER PROBLEMS WITH HOME DEPOT'S PROPOSED PROTECTIVE ORDER.

The first problem with Home Depot's proposed protective order is that it would prohibit sharing. A second problem is that, pursuant to paragraph two, it would allow Home Depot to produce materials, and then subsequently—retroactively—declare them "confidential." A third problem comes in paragraph fourteen, which contains a sentence that Plaintiff frankly cannot comprehend: "Nothing in this Order shall constitute an admission by the party that the information designated as Confidential is actually Confidential Information."

Paragraph thirteen presents a fourth, and more significant, problem. Paragraph thirteen contains a so-called "clawback" provision, which would require Plaintiff to send "all items constituting, containing, or reflecting" Home Depot's allegedly confidential information to Home Depot at the termination of this litigation. The Civil Practice Act says nothing about such a clawback provision. Moreover, even if Home Depot's proposed order did permit sharing, this extremely broad clawback provision would effectively vitiate the sharing provision: after this case ended, Plaintiff would have nothing *left* to share. Clawback provisions thus undo sharing provisions.

For every truly useful document obtained in litigation, the process of selecting and organizing the documents that are most important to prove the Plaintiff's case is a trial attorney's *core work product.* The ability to keep those documents, and not lose that core work product at the end of the case, is absolutely critical. It allows Plaintiff's counsel to fully evaluate future

cases and advise future clients. It also allows meaningful sharing with other attorneys and the consumers they represent. Home Depot knows that. Destruction of documents is a tactic to limit effective sharing.

Home Depot's corporate "document retention" policy is another important reason to allow non-destruction. While Home Depot has not yet produced its applicable document retention policies in this case, or revealed those to the Court in its motion for protective order, it is common for corporate defendants to have in place specific, limited time periods for keeping documents. After those time periods expire, the documents are discarded.

Home Depot will no doubt say that is simply good management practice in light of the many hundreds of thousands of documents Home Depot generates. A cynic might say that at least one reason for the policy is to get rid of "smoking guns" that could be used in litigation. The Court need not decide which is nearer the truth. *If* Home Depot is only worried about its record-storage capacities, then it should not matter to Home Depot whether Plaintiff's counsel keeps a copy of documents produced in this case. All that could do is help future litigants access relevant information that would otherwise be lost pursuant to Home Depot's document retention policy. There is no other possible motivation to insist on document destruction, except to make sure documents disappear and never see the light of day (or the courtroom) again.

Finally, there are occasions on which a lawyer's professional responsibility requires that he keep his client's file for a period after the litigation. If questions arise after this firm's representation of Ms. Ahrendt—if, for instance, Plaintiff or the firm is called upon to explain some decision made during the course of this litigation, or to explain what evidence Plaintiff relied on in making a given statement, or what conclusions the evidence authorized—those

questions may be unanswerable if the documents upon which they are based have been sent back to Home Depot.

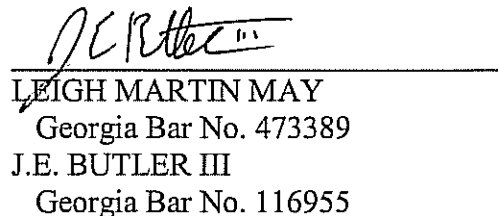
VI. CONCLUSION.

For all the reasons set forth above, Home Depot's motion for a non-sharing protective order should be denied and this Court should enter Plaintiff's Proposed Sharing Protective Order, which adequately balances Home Depot's need to protect its confidential information from being disseminated to its competitors with Plaintiff's right to share relevant documents with plaintiffs' counsel having similar claims against Home Depot.

This 4th day of June, 2012.

Respectfully submitted,

BUTLER, WOOTEN & FRYHOFER, LLP

By: 

LEIGH MARTIN MAY
Georgia Bar No. 473389
J.E. BUTLER III
Georgia Bar No. 116955

Butler, Wooten & Fryhofer, LLP
2719 Buford Highway
Atlanta, Georgia 30324
(404) 321-1700

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel of record with a copy of the foregoing pleading by depositing it in the United States Mail with adequate postage affixed thereon and addressed as follows:

Thomas E. Brennan
Fain, Major & Brennan, P.C.
100 Glenridge Point Parkway
Suite 500
Atlanta, GA 30342-1445

Warner S. Fox, Esq.
Sarah P. Wrege, Esq.
Will C. Ellis, Esq.
Hawkins Parnell Thackston & Young LLP
4000 SunTrust Plaza
303 Peachtree Street NE
Atlanta, GA 30308-3243

DATED: June 4, 2012.

BUTLER, WOOTEN & FRYHOFER, LLP

BY:
LEIGH MARTIN MAY
Georgia Bar No. 473389
J.E. BUTLER III
Georgia Bar No. 116955