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**Docket: 2017-0213-BLS2**

**Date: August 27, 2019**

**Parties: CLEAN HARBORS ENVIRONMENTAL SERVICES, INC., Plaintiff vs. KEVIN SHEPPARD, Defendant**

**Judge: /s/Janet L. Sanders Justice of the Superior Court**

MEMORANDUM OF DECISION ON PLAINTIFF'S MOTION TO UPHOLD CONFIDENTIALITY DESIGNATIONS

The plaintiff produced more than 45,000 items of electronic discovery to the defendant amounting to 668,053 pages and classified all of them as "Confidential – Attorney's Eyes Only" pursuant to a Confidentiality Order in this case dated January 5, 2019. The justification for that blanket designation is that a review of a few hundred of them revealed that they contained competitively sensitive information. The parties attempted to negotiate a solution, but the plaintiff continues to insist on the designation for all the documents produced. As a consequence of that designation, plaintiff's counsel has not been willing to permit defense counsel to provide copies of any of the documents to the defendant or any witnesses even though the recipients of the documents would sign an agreement to keep them confidential. Plaintiff now seeks the Court's approval of plaintiff's designation and enforcement of the limitations that designation imposes. This Motion is DENIED for the following reasons.

As the BLS has recognized in its "Formal Guidance Regarding Confidentiality Agreements," the designation of documents as "attorney's eyes only" should be sparingly used,

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since it interferes with counsel's ability to confer with clients and prepare the case. Consequently, confidentiality orders which allow this designation should be approved "only when the need for such a provision is carefully explained, when there is no reasonable alternative to limiting the documents to 'attorney's eyes only' and when the number of documents so listed is minimized to the extent reasonable." Formal Guidance Regarding Confidentiality Agreements (available on the BLS website). The Confidentiality Order entered in this case complied with that Formal Guidance. It states that the parties shall not designate as Confidential any documents or information "other than as necessary to protect a legitimate financial trade or privacy interest." ¶ 1 of Confidentiality Order. As to "attorney's eyes only," the Confidentiality Order allows that designation only if the material contains "highly proprietary business information or trade secrets." See ¶ 2 of Confidentiality Order. It then goes on to describe with some specificity what kind of information would fall into that category. The Confidentiality Order also makes it clear that before making such designation, the producing party would first review the documents in question and, if only a portion of the document contained information properly designated "attorneys eyes only," then only that portion of the document should be so designated. In short, it was plainly the intent of the parties (and of this Court in adopting the proposed order) that the designation of "attorney's eyes only" would indeed be reserved for a narrow category of documents, with the burden on the producing party to review the documents first.

In support of the motion, plaintiff offers the affidavit of Michael McDonald, general counsel for plaintiff, who states that, before the production and designation, he reviewed "hundreds of ESI documents" and concluded that the "vast majority of the ESI contained competitively sensitive information." He does not explain how or why he reached that

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conclusion. Moreover, defense counsel's own review of the documents shows that many are not even confidential, much less merit the designation of attorney's eyes only. See Affidavit of Attorney Paul Samson in Opposition to the Motion. In short, plaintiff has not satisfied his burden under the Confidentiality Order. Plaintiff's counsel's proposal as set forth in his July 1, 2019 email is a reasonable approach to the documents in question. However, defendant's request for attorney's fees is DENIED.

/s/Janet L. Sanders Justice of the Superior Court

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