

UNITED STATES OLYMPIC & PARALYMPIC COMMITTEE

HOPE SOLO,)	
)	
Complainant,)	ORDER
)	ADOPTING
v.)	MEMORANDUM AND ORDER
)	OF SPECIAL MASTER
US SOCCER FEDERATION,)	
)	
Respondent.)	December 28, 2020

I. BACKGROUND AND RULING

1. On November 18, 2020, the Hearing Panel appointed the Honorable William G. Bassler, as a special master, to assist the Hearing Panel in ruling on the various discovery issues raised by Hope Solo (“Solo”) and US Soccer Federation (“USSF”).
2. Judge Bassler is a former U.S. District Court Judge for the District of New Jersey with extensive experience in legal and arbitral proceedings, including the resolution of complex and disputed legal matters.
3. The Hearing Panel requested that Judge Bassler meet with the parties, hear their respective positions and resolve the discovery issues raised in this proceeding. The Hearing Panel asked that Judge Bassler report back to the Hearing Panel by December 28, 2020.
4. On December 26, 2020, Judge Bassler issued his Memorandum and Order of Special Master (“Memorandum and Order”), which he provided to the Hearing Panel and to the Parties. Judge Bassler’s Memorandum and Order is attached to and made part of this Order.

5. The Hearing Panel reviewed and approves of Judge Bassler's Memorandum and Order. Accordingly, the Memorandum and Order is adopted by the Hearing Panel. Solo and USSF shall abide by and follow the Memorandum and Order as if made by the Hearing Panel.

6. The Hearing Panel in its November 18, 2020, Order also directed (i) that Solo and USSF complete exchange of documents no later than 5pm MST, December 31, 2020, and (ii) that the parties provide a Joint Report to the Hearing Panel by 5pm MST, January 4, 2021. As indicated in the November 18 Order, the Joint Report shall include the Parties recommendations as to a revised scheduling order and hearing date.

7. The directives of the November 18 Order still stand.

II. ORDER

8. It is so ordered.

Dated this December 28, 2020.



^{for}

Robert Wood, Chair

Alex Natt, Panel member
Mark Ladwig, Panel member

UNITED STATES OLYMPIC & PARALYMPIC COMMITTEE

HOPE SOLO,

Claimant,

v.

**UNITED STATES SOCCER FEDERATION,
INC.,**

Respondent.

MEMORANDUM AND ORDER OF
SPECIAL MASTER

December 26, 2020

I. PROCEDURAL HISTORY

On November 18, 2020, the Hearing Panel appointed the Hon. William G. Bassler, U.S.D.J. (ret.) as a Special Master to assist the Hearing Panel “in ruling on the various discovery issues pertaining to this proceeding.” (Order ¶ 9 at 3). The discovery disputes pertain to whether certain documents should be designated “as attorneys’ eyes only” and whether the Complainant’s answers to certain document requests are deficient. Paragraph 10 instructs: “Judge Bassler will meet with the parties, hear their respective positions and resolve the discovery issues raised in this proceeding.” Throughout this proceeding, the attorneys have assumed that the Special Master would hear and rule on the discovery disputes.

On November 19, 2020, the Special Master conferred by video conference with Michael Calhoon of Baker Botts, counsel for Hope Solo, and Lawrence E. Buterman and Sarah F. Mitchell of Latham and Watkins, counsel for US Soccer Federation (USSF). Present also was Hope Solo (Solo).

On November 23, 2020, the Special Master conferred with counsel telephonically to discuss the Protocol for resolution of the discovery disputes and to set a briefing schedule. Pursuant to that Protocol, the Hearing Master received from counsel an agreed upon binder of core documents consisting of thirty-six exhibits of over 200 some pages comprising the Amended Complaint, motions, email letters and exchanges, a Confidentiality Agreement, Objections and Responses to Document Requests, and iterations of the proposed stipulated Protective Order. This voluminous history, of which counsel is fully familiar, is incorporated here by reference. The Special Master forwarded his Conflicts of Interest search to Counsel and, by email exchange, Counsel confirmed that there were no objections to his appointment. Counsel also signed the Special Master's engagement letter and arranged for deposits to be wired to his trust account.

Pursuant to the Protocol, USSF filed its brief dated November 30, 2020 "in Support of 'Attorneys' Eyes Only' Designation of 43 Documents" together with exhibits and published federal cases. Solo filed a Response dated December 9 together with exhibits and her own citation of federal cases in support of her position. USSF filed a Reply dated December 11, 2020. Over 25 cases were submitted for the Special Master's review, several of which were cited by both sides.

On December 18, 2020, a three-hour oral argument was conducted via Zoom video conference. Solo was represented by Michael Calhoun, Andrew Behrman, Brian Kerr and David Howard. USSF was represented by Larry Buterman, Michael Hale and Sarah Mitchell. Solo was also present during the hearing.

On December 22, 2020, the Special Master conducted a hearing via Zoom with respect to open discovery issues reflected in their respective position statements of December 21 and December 22.

II. OVERVIEW OF THE CRITERIA FOR APPLYING THE ATTORNEYS' EYES ONLY DESIGNATION

In litigation in the federal courts, it is common for counsel to agree on a confidentiality agreement that is memorialized in a protective order of the court so that in the discovery process certain information like intellectual property or sensitive commercial information is shielded from public disclosure. Often, the parties agree to designate some documents as confidential and other documents as “for attorneys’ eyes only.” It is also common, as in the case before the Panel, for the attorneys to disagree on the terms of the confidentiality order. When the parties cannot agree on the terms of the protective order, the Federal Rules of Civil Procedure give the federal courts the authority to fashion an appropriate order.

Courts have broad discretion as to whether to impose restrictions on discovery. United States ex rel. Liotine v. CDW Government, 2011 WL 2293280, at *2 (S.D. Ill. June 9, 2011) (“As a general rule, a district court enjoys wide latitude in the discovery matters before it.”). In the dispute before the Panel, both counsel assume that the criteria for resolution of this discovery dispute is found in the cases cited to the Special Master. Because the cases cited by both counsel rely on Fed. R. Civ. P. Rule 26(c)¹, that rule merits examination. Rule 26(c) provides that upon a

¹ Fed. R. Civ. P. 26(c) states:

(c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending -- or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

showing of good cause, a court may “issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” That order may include forbidding disclosure or discovery. Fed. R. Civ. P. 26 (c)(1)(A). In addition to foreclosing all discovery, Rule 26 also authorizes a court to enter an order “requiring that a trade secret or other confidential research, development or commercial information not be revealed OR BE REVEALED ONLY IN A SPECIFIED WAY.” (emphasis added). An “attorneys’ eyes only” (AEO) designation is a method of disclosure allowing commercial information to be revealed “in a specified way.” Fed. R. Civ. P. 26(c)(1)(G). An illustrative case is S2 Automation LLC v. Micron Technology, 283 F.R.D. 671, 212 (D.N.M. 2012). In that case, the plaintiff Automation sued the defendant Micron Technology for breach of contract. Automation was a supplier of goods and services associated with computer chip manufacturing. Micron Technology was a computer chip manufacturer. The parties could not agree on a confidentiality order so the court held a hearing and determined that a two-tier system was appropriate: one provided a designation for confidential information and another for attorneys’ eyes only.

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- (A) forbidding the disclosure or discovery;
 - (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;
 - (C) prescribing a discovery method other than the one selected by the party seeking discovery;
 - (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
 - (E) designating the persons who may be present while the discovery is conducted;
 - (F) requiring that a deposition be sealed and opened only on court order;
 - (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
 - (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery*. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses*. Rule 37(a)(5) applies to the award of expenses.

The case is illustrative not only as to how these kinds of disputes arise, but also for the application of Fed. R. Civ. P. Rule 26(c), which requires a showing of good cause for a protective order. The S2 Automation court, like many of the cases relied on by both parties, provides that the burden of demonstrating good cause is on the one seeking the order. S2 Automation, 283 F.R.D. at 680 (“It is on the party seeking the protective order who has the burden to show good cause for a protective order.” (quoting Velasquez v. Frontier Med. Inc., 229 F.R.D. 197, 200 (D.N.M. 2005))). The court also cites to the well-known and authoritative treatise, 6 J. Moore, Moore’s Federal Practice § 261.04[1] at 26-514 (3d ed. 2012), which states that “the burden of justifying the confidentiality of each document sought to be covered by the protective order is on the party seeking the order.” Id. at 682.

The Manual for Complex Litigation (Fourth), published by the Federal Judicial Center, a Congressionally created entity to promote improvements in judicial administration of federal courts, is also instructive on the issue of burden:

If a party believes that a document designated or sought to be designated confidential by the producing party does not warrant such designation, the party shall first make a good-faith effort to resolve such a dispute with opposing counsel. In the event that such a dispute cannot be resolved by the parties, either party may apply to the court or special master for a determination as to whether the designation is appropriate. The burden rests on the party seeking confidentiality to demonstrate that such designation is proper.

S2 Automation, 283 F.R.D. at 687, n.4 (citing Manual for Complex Litigation (Fourth), § 40.27 at 753 (2004)).

In addition to emphasizing that under Rule 26(c), the burden of showing good cause for a confidentiality designation or AEO designation is on the party seeking it, the S2 Automation court describes the kind of information warranting a protective order.

Intellectual property, trade secrets, and other sensitive commercial information, such as those Micron Technology seeks to protect, fall within the scope of

permissible protective orders under rule 26 (c). *See* Fed. R. Civ. P 26 (c) (1)(G); *Am. Standard, Inc. v. Pfizer Inc.* 828 F.2d 734, 740 (Fed. Cir. 1987 (stating that confidential information includes trade secrets and marketing plans)

Id. at 681. The S2 Automation court recognizes what many of the cases cited by the parties in this case illustrate: “**confidential information includes that which would cause substantial economic harm to a producer’s competitive position.**” Id. (emphasis added) (citing Diamond State Ins. Co. v. Rebel Oil Co. Inc., 157 FRD 691, 697 (D. Nev. 1994)).

Much more can be learned from reading this decision as it reflects statements made in the other cases cited by the parties. There is a reason that the cases cited by the parties are from magistrate judges, district courts, and not courts of appeals. As the court notes, “[f]ederal district courts have broad discretion over discovery” and “are in the “best position to weigh these variables and determine the appropriate limits because, unlike an appellate court, the district court has the ability to view firsthand the progression of the case, the litigants, and the impact of discovery on parties and nonparties.” Id. at 680 (citations omitted).

S2 Automation also teaches another important point: a third party may not move for a Rule 26(c) protective order if it is not a party to the underlying action, has not intervened, or has not been served with a subpoena seeking discovery. Id. (citing SEC v. Dowdell, 144 Fed. Appx. 716, 722-23 (10th Cir. 2005) (unpublished)). The court in Arvco Container Corp. v. Weyhaeuser Co., 2009 WL 311125 (W.D. Mich. Feb. 9, 2009) made this same point:

Defendant attempts to assert the rights of Star Pizza Box, arguing that the cost incurred by Star Pizza Box for its purchase of products is entitled to protection. It is certainly true that cost information is more likely to be proprietary than price information, especially in a competitive market. Defendant, however, has not cited any authority that would grant it standing to assert the rights of Star Pizza Box in this litigation.

Arvco Container Corp., 2009 WL 311125, at 8, n.5.

Nevertheless, AEO protection has been granted for sensitive confidential information like personnel files of non-party employees. Liotine, 2011 WL 2293280 (citing Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999)). The reason that the courts take the extra step of imposing an “attorneys’ eyes only” designation on documents over and above the confidentiality designation is to protect the party from producing the information to a competitor who, once it knows the confidential information, cannot be expected to forget it in future business negotiations. It is an example of the familiar saying that “you can’t unring the bell once it’s rung.” Protecting confidential information from a competitor who could take advantage of it is a constant theme running through the cases and may establish good cause for the more restrictive AEO classification.

Errant Gene v. Sloan-Kettering Institute, 2016 WL 4618972 (S.D.N.Y. Sept. 2, 2016) provides another example of when an AEO designation is appropriate. In that case, Errant Gene Therapeutics sued Sloan Kettering Research for fraudulently inducing it to enter into an agreement to purchase a treatment for sickle-cell anemia and thalassemia. Sloan-Kettering sought an AEO designation for documents that Sloan Kettering argued Errant Gene would use to advance its own clinical trials. In imposing the AEO designation on some documents, the court observed: “The competing interests to be evaluated in determining the outcome of such a dispute are one party’s right to protect its confidential materials from misuse by competitors.” Id. at *3 (citation omitted). The court was specific: Girondi’s (President of Errant Gene) ambitions in developing the vector directly contradicted providing him with unfettered access to information regarding (Sloan Kettering’s) business dealings, clinical trials, or personnel information. Id. at *4. The court further noted that: “Girondi would be intimately involved in competitive decision making. . . . Because of Girondi and Salaman’s roles in competitive decision making, the

inadvertent risk of disclosure warrant[ed] a more restrictive designation for document production as proposed by [Sloan-Kettering Institute]. Id. at *4 (emphasis added).

A final example from Deman Data Systems, LLC v. Schessel, 2014 WL 204248 (M.D. Pa. Jan. 16, 2014) will suffice. There, a non-party to the litigation sought a protective order for an AEO designation to protect against the disclosure of pricing and terms of license agreements that the non-party GSS had negotiated with various software vendors. GSS argued that “if specifics were known to the Plaintiffs or others, it could undercut GSS’s future license negotiations and adversely affect its business.” Id. at *1. The court found that the AEO designation was appropriate because GSS, a non-party, competed with both the plaintiff and defendant. Id. at *5 (“Plaintiffs and Defendants compete for GSS’s business, and GSS contends that neither should be permitted to have access to negotiated terms GSS has secured from the other.”).

A party will not be entitled to an AEO designation simply because the information constitutes “trade secrets” or commercially sensitive information. The party seeking the AEO designation must carry the burden that it will be commercially disadvantaged by the disclosure to its competitor. As noted by the court in K&M International v. NDY Toy, 2015 WL 520969 (N.D. Ohio Feb. 9, 2015), “the mere presence of ‘trade secrets’ or ‘commercially sensitive information’ does not automatically entitle Defendants to AEO protection. . . . Rather the burden remains on Defendants to show that disclosure “will work a clearly defined and serious injury.” Id. at *5 (citations omitted).

In addition to the concern of economic harm to a competing party, there is another theme running through the cases cited by both parties. Good cause under Fed. R. Civ. P. Rule (26)(c) cannot be established by generalizations. Deman, 2014 WL 204248 at *8 (A litigant’s vague

feeling of discomfort or its desire to hobble its opponent in litigation do not establish good cause); Penn, LLC, v. Prosper Business Development Corp., 2012 WL 5948363, at *4 (S.D. Ohio Nov. 28, 2012) (“In the business context, such a showing required ‘specific demonstrations of fact, supported where possible and by affidavits and concrete examples.’” (citations omitted)); Arvco Container Corp., 2009 WL 311125, at *5 (showing of significant harm to competitive and financial position “requires specific demonstrations of fact, supported where possible by affidavits and concrete examples, rather than broad, conclusory allegations of potential harm.” (citations omitted)).

The Hearing Panel should be aware that there is no single over-arching decision that provides a straight path to the right answer in resolving the Parties’ dispute over whether the AEO designation should be applied to the documents in question. That is because the competing interests of discovery and the protection of confidential materials depend on the particular facts of each case. Errant Gene, 2016 WL 4618972 at *3 (“The competing interests to be evaluated in determining the outcome of such a dispute are one party’s right to broad discovery and the other party’s ability to protect its confidential materials from misuse by competitors.” (citation omitted)); Bodine v. Salesforce, 2019 WL 9465819 at *5 (D. Montana Nov. 26, 2019) (“the Court is required to balance the respective interests of both parties.” (citation omitted)). DeFazio v. Hollister, 2007 WL 2580633 at *1 (E.D. Cal. Sept. 5, 2007) (“... a balancing of interests is necessary before inclusion of an ‘attorneys’ eyes only’ provision.” (citation omitted)); Kanbar v. American Friends of Magen David Adom, 2018 WL 5920496 (N.D. Cal. Nov. 13, 2018) (noting the good cause determination under Fed. R. Civ. P. Rule 26 (c)(1) “requires a balance of the difficulties imposed upon plaintiff against the need to protect information from abuse by competitors.” (citation omitted)). The need to balance the competing interests and the fact

sensitive nature of that evaluation explains the different outcomes in the cases cited by the Parties in support of their respective positions. In other words, “the devil is in the details.”

III. ANALYSIS

A. DID USSF APPROPRIATELY DESIGNATE THE SOCCER UNITED MARKETING AGREEMENT AND RELATED DOCUMENTS AS AEO?

1. THE PARTIES’ POSITIONS

USSF has identified some 21 documents as Category 1, which consist of the current agreement and other confidential agreements involving USSF and Soccer United Marketing (SUM) and communications surrounding negotiations of agreements between US Soccer and SUM. See Appendix A identifying the documents in question.

In support of its application for AEO classification, USSF has submitted the Declaration of Anastasia Danias Schmidt (Schmidt) on behalf of SUM, a non-party. (Ex. J to Solo Brief). Schmidt is the General Counsel of SUM. Schmidt declared under penalty of perjury that the terms of the SUM agreement contain “highly confidential and competitively sensitive agreements” between SUM and USSF. (Id. at ¶ 4). In ¶ 6, Schmidt declared:

Among other things, these confidential terms include specific compensation terms (including revenue guarantees, payment schedules, and agreements on how to allocate profits); SUM’s specific performance obligations (including the specific benefits SUM agreed to secure for U.S. Soccer and specific benefits SUM agreed to provide U.S. Soccer itself); procedures for the renewal and termination of the agreements (including the timing for negotiations and the means by which SUM’S performance is measured under the agreements); strategic business plans for the promotion and commercial exploitation of the U.S. Soccer property (including specific goals for broad cast deals and carriers, ideas for programming content, and more, and specific terms governing how SUM will carry out its obligations under the agreements (including procedures governing when and what prior approvals are necessary).

Schmidt further declared in ¶ 7:

If any of the terms of the SUM Documents become public (either deliberately or inadvertently) SUM would be at a competitive disadvantage in negotiating future contracts on behalf of its current clients, because those counterparties could use the confidential contract terms contained in the SUM Documents against SUM. For, example, the confidential business plans contained in the SUM Documents could give the broadcast networks, sponsors, licensors and other companies with whom SUM negotiates valuable information about SUM'S priorities and plans and could unfairly use that information in negotiations to the detriment of SUM and its clients.

This declaration was not contradicted.

USSF argues correctly that AEO provisions are “routinely warranted to protect commercial interests of both the producing party and third parties whose rights may be affected by disclosure of confidential information.” (USSF Brief at 7 (citing S2 Automation, 283 F.R.D. 671, Deman, 2014 WL 204248, Liotine, 2011 WL 2293280)). USSF distinguishes the cases cited by Solo and argues that “AEO designations are a reality of modern litigation, which contemplates that a party’s counsel will review AEO-designated documents and then be able to adequately advise their client based on counsel’s review,” citing to J.D. Fields & Co., Inc. v. Nucor-Yamato Steel Co., 2015 WL 12696208, at *9 (E.D. Ark. June 15, 2015) (“requiring plaintiff to rely on its competent counsel and experts properly balances [plaintiff’s] interest and need to view the sensitive information against [defendant] and [a third party’s interest in confidentiality.]”). These cases, USSF argues, belie Solo’s claim that she will be prejudiced if she is unable to view the 43 documents in question.

Unlike the situation in Prometheus Sols, Inc. v. Coker, 2015 WL 13662596, at *2-3, 6 (D.N.M. April 1, 2015), where the court denied AEO designation, *inter alia*, because the plaintiff’s counsel had no experience in weapons design but the plaintiff had such experience, making it “impossible for [counsel] to litigate the case without hiring prohibitively expensive experts to help him understand the case,” USSF repeatedly argues that “Ms. Solo has no

independent knowledge of the issues involved in this arbitration. . . . and has represented just in this past week that she does not have a single email or document aside from her communications with her counsel) that relate in any way to this matter.” (Solo Brief at 1-2).

Solo responds that the cases cited by USSF “are inapposite because Ms. Solo is not a direct competitor to SUM,” (Solo Brief at 13), and instead points to cases that say that “outside counsel only designations are only appropriate in rare circumstances, none of which are present here.” Solo notes that the cases cited by USSF actually support her position. For example, in S2 Automation, 283 F.R.D. 671, a case involving breach of contract and business tort claims between businesses operating in the “highly competitive semiconductor sector,” the court allowed in-house legal counsel to discuss all AEO documents with their in-house legal personnel. (Solo Brief at 14). And unlike Liotine, 2011 WL 2293280, the AEO designation does not allow counsel to discuss any of these documents with their client or with other witnesses. In Liotine, the protective order contained provisions that allowed counsel to do so. Liotine, 2011 WL 2293280, at *2 (“if [the requesting party’s counsel] finds information it wishes to discuss with [him], the protective order contains provisions that will allow it do so.”).

2. CONCLUSION

Every dispute has its unique set of facts. The facts of this case set it apart from the cases cited by USSF in support of its position that the Hearing Panel should impose an AEO designation on the documents in question.

In the first place, I can find no cases that, absent agreement of the parties, would give this Panel the authority to impose an AEO designation on the SUM agreement and related documents categorized by USSF as Category 1 documents. When this question was raised at oral argument, the response from USSF was that counsel had agreed that in evaluating the claim for AEO

protection, federal case decisions would provide the criteria. That may be so, but counsel cannot give this Panel authority when it does not have it. Federal Rules of Civil Procedure Rule 26(c) gives the courts the authority to impose an AEO designation, which while frequently employed, has been characterized by some courts as a drastic remedy. As noted by the court in Prometheus Solutions, Inc., 2015 WL 13662596 at *3:

First, while the Court recognizes that such provisions are not unusual in litigation involving trade secrets it is a drastic remedy, given its impact on the party entitled to the information. It limits the ability of the receiving party to view the relevant evidence, fully discuss it with counsel, and make intelligent litigation decisions.

(citation omitted).

Assuming, however, that this Hearing Panel has the inherent authority to impose an AEO designation where the parties have not agreed to one, (see Bylaws of the United States Olympic and Paralympic Committee at §§10.5, 10.6, and 10.9), there is a fundamental difference in this case from those cases where the court imposed an AEO designation. When carefully scrutinized, the courts find good cause because the one seeking the information and the one seeking protection are in commercial competition with each other. A release of the information to a competitor would place the objecting party in a competitive disadvantage. That is not the case here. Solo is not in the business of competition with SUM. Her knowledge of the contents of the SUM agreement would not give her a competitive commercial advantage. The cases relied on by USSF simply do not apply to this unique situation. If Solo is to be denied a review of the SUM documents, the justification must be found somewhere else.

USSF argues that Solo does not need to see the SUM documents because she has no expertise or even personal knowledge about the SUM agreement, citing to J.D. Fields, 2015 WL 12696208, at *9 (“Fields has not explained sufficiently at this time how its ability to litigate this case will be severely impaired if it must rely on its competent counsel and experts.”). This

argument misses the critical difference between this line of cases and the dispute before the Panel. Solo has, by her complaint, put the SUM agreement into the center of the dispute. The parties here disagree that the SUM documents are critical core documents. A cursory review of Solo's Amended Complaint demonstrates that they are. Solo alleges that SUM, the for-profit arms of Major League Soccer, "makes only a nominal payment to USSF of less than \$30 million per year" (Amended Compl. at ¶ 2); that "USSF has allowed SUM and MLS to profit tremendously from undervaluing the value of the licensing agreement" and that "USSF's constituents outside of MLS do not obtain their fair economic benefit" (Id. at ¶ 3); that the Stevens Act requires USSF "to provide equitable support and encouragement to its female athletes by among other things refusing to contribute equitable investments to women's teams and refusing to ensure safe working conditions for the USWNT," (Id. at ¶ 9), which it has not done; "that through its numerous conflicts of interest, USSF has allowed MLS and SUM to hoard the money that should flow to all USSF's athletes." (Id. at ¶ 11).

In addition to charging a lack of transparency surrounding the negotiation of the SUM agreement (¶¶ 10, 61, 72) as required by the Stevens Act and the USOC Bylaws, Solo clearly puts the SUM agreement front and center in this dispute:

The USSF board has not earned the benefit of the doubt that its decision was made independently and in the best interests of USSF. This could be excused if terms of the agreement were entirely fair to USSF. However, that is not the case. Much like the negotiation and approval process, material terms of the agreement are shrouded in secrecy, further calling into question the propriety of the entire arrangement. However, based on publicly available information, it is clear that the contract heavily favors SUM and MLS, at the expense of USSF and its various stakeholders.

(Amended Compl. at ¶ 75).

None of the cases supporting AEO designation seek to prohibit the party challenging the legitimacy of the contract from seeing the contract itself. In fact, to do so would violate the

legitimacy of the process itself. That is why no case cited by USSF supports such a result. An attorney has a “general duty to share information with the client,” DeFazio v. Hollister, Inc., 2007 WL 2580633 at *1-2 (E.D. Cal. Sept 5, 2007), which of course is trumped by a federal court’s resort to Fed. R. Civ. P. Rule 26(c) to protect sensitive information. (Id. at n.1). But denying a plaintiff access to core documents like the contract itself is an entirely different matter.

USSF cites to cases that once it demonstrates that documents are confidential, the burden shifts to Solo to explain why she needs to see them. Those burden shifting cases do not apply here because as we have seen, Solo is not commercially competing with SUM. Even if the burden did shift, those cases do not address the facts here: the documents sought are the documents at issue. Solo does not have to explain why she needs to see them. The following excerpt from Penn, 2012 WL 5948363, at *5 succinctly makes the point:

Prosper’s remaining arguments are likewise unavailing. The argument that Penn “lacks the ability to interpret any meaning” from the documents has nothing to do with whether the documents should be designated AEO. Nor is the fact that Plaintiffs’ consultant (Rebekah Smith) may have “already performed such tasks” as comparing side-by-side the documents . . . **Plaintiffs are entitled to view these documents in consultation with their counsel and Ms. Smith in order to among other things, assist with the preparation of their case.**

(emphasis added).

Courts have recognized that in circumstances like the one before this Hearing Panel, depriving Solo of the right to look at the SUM documents would work a severe prejudice. Defazio, 2007 WL 2580633 at *2 (“The indiscriminate use of ‘attorney eyes only’ protective orders does pose significant handicap on the restricted litigant” and “discovery, trial preparation and trial are made more difficult and expensive if an attorney cannot make complete disclosure of the facts to the litigant.”). As the court explained in Arvco Container Corp., 2009 WL 311125 at * 6:

It is difficult, and perhaps impossible for an attorney to counsel a client to compromise or even abandon a case on the basis of information kept secret from the client. A litigant who is not in possession of all relevant facts, furthermore, is in a poor position to assess its obligation to evaluate its ongoing obligation to maintain only arguably meritorious action at every stage of the case.

Solo's counsel has sufficiently and succinctly outlined how Solo's right to a fair hearing would be severely prejudiced if she could not discuss the SUM documents with counsel: unable to work with experts; could only look at redacted documents; required to leave hearing despite Preliminary Hearing Order, May 8, 2020, providing for party representative "during the entire hearing" thus limiting her ability and others to present evidence. (Solo Brief at 19). And equally important, "Ms. Solo would be unable to accurately analyze the case based on these documents- and her counsel would be unable to have informed discussions with her-which would impair her ability to fairly consider her case with the assistance of counsel regarding a settlement." (Id. at 19).

Finally, it is the Special Master's opinion that precluding Solo the right to review the very documents she has challenged as violating the Ted Stevens Olympic & Amateur Sports Act and the USOPC Bylaws would constitute a deprivation of due process that could jeopardize the integrity of any decision the Hearing Panel might make in this case. The question of whether Solo's inability to look at the documents in question violates her due process rights was not briefed but was raised at the oral argument. In Nunn v. Dillon Auto Sales, 2016 WL 1369337, the court noted that limiting the ability of a party to provide needed assistance to counsel, may result in "the denial of fundamental due process rights." Nunn, 2016 WL 1369337, at *2 (citing Martinez v. City of Ogden, 2009 WL 424785, at * 3 (D. Utah Feb. 18, 2009)).

Solo's counsel has argued persuasively that he cannot evaluate the documents and try the case without Solo's input which requires that Solo not be precluded from reviewing the SUM

documents. In balancing Solo's right to review discovery subject to the existing Confidentiality Agreement and USSF's concern to further protect the confidentiality of the SUM's documents by the imposition of an AEO designation, USSF has not carried its burden that the AEO designation is appropriate in the circumstances of this case.

Before leaving this discussion of Category 1 documents, one further point needs to be discussed: the adequacy of the Confidentiality Agreement to protect the SUM documents. Solo and USSF entered into a Confidentiality Agreement dated October 28, 2020. Paragraph 25 reads:

The Parties agree that money damages would be an inadequate remedy for any breach (or threatened breach of this Agreement, and agree that the provisions of this Agreement may be enforced by any preliminary or permanent, mandatory or prohibitory, injunction or other order or decree of a court of competent jurisdiction. The agreed remedies set forth above shall not be construed to limit or derogate from any legal or equitable remedy authorized by any applicable law.

The SUM Agreement also contains a confidentiality provision which states that neither SUM nor USSF shall disclose the Agreement "without the prior written consent of the other party except . . . as may be required by law or legal process." (Solo Brief at 10). USSF's concerns about its obligation to SUM is misplaced since SUM recognized that the SUM Agreement could be disclosed in a legal proceeding, which the Section 10 hearing is.

Since Solo is not a business competitor or likely to be, the cases USSF relies on for AEO protection simply do not support an AEO designation in this case. Instead, the SUM documents fit into the category of confidential materials that courts will protect. Liotine, 2011 WL 2293280 at *1 (entering Protective Order pursuant to Fed. R. Civ. P. Rule 26 for "non-public medical records, tax records, contract negotiation documents, freight shipping contracts, organizational charts and business-sensitive contracts, organizational charts and business sensitive proprietary, or settlement-related information produced to the General Service Administration").

USSF argues that the Confidentiality Agreement is not sufficient protection for the SUM documents because breaching it would not expose Solo to judicial sanctions that she would face for violating a court order. But the absence of the possibility of being held in contempt does not mean the Confidentiality Agreement has no teeth. A breach would trigger an injunction but also expose Solo to damages for that breach. There is nothing in the record to suggest that Solo would be so foolhardy as to cavalierly ignore the Confidentiality Agreement and expose her family and herself to financial jeopardy.

At the oral arguments, USSF suggested that Solo agree to submit to the jurisdiction of a court to avoid difficulties of service. She has done that. USSF also suggested that there be included in the Confidentiality Agreement, provisions for indemnification, counsel fees and standing for SUM to sue. No authority has been provided that these kinds of provisions can be imposed unilaterally by a court. Nor am I going to impose conditions that the parties themselves did not agree to in the Confidentiality Agreement.

For the reasons stated above, USSF did not appropriately designate the SUM documents as attorneys' eyes only rather than confidential.

B. DID USSF APPROPRIATELY DESIGNATE ITS SENSITIVE BUSINESS AND FINANCIAL DOCUMENTS AS AEO?

1. THE PARTIES' POSITIONS

USSF designated as AEO 12 documents consisting of detailed presentations given at its confidential Board of Director and Business Review Meetings from 2018 to 2020 and nonpublic financial records from 2020. (USSF Brief at 13). See Appendix A.

The case discussion and analysis in the previous section are incorporated *mutatis mutandis* here.

USSF argues that Solo “has never articulated why it is necessary for her to personally view these sensitive documents.” This argument is totally without merit. Solo does not have to demonstrate why she needs to look at them. USSF has the burden of proving why she should not look at them. The cases cited in the previous section demonstrate that business sensitivity does not preclude review. Solo is not in the business of commercially competing with USSF; therefore, the rationale that looking at the documents could commercially disadvantage USSF simply does not apply. Courts apply the confidentiality designation to such documents, but not the more restrictive AEO designation. USSF’s argument also ignores the fact that, as a litigant, Solo is entitled to review discovery documents with her counsel. To deprive her of a right to review and discuss these documents, which are relevant to the claims in the Amended Complaint, would prejudice her rights and those of her counsel.

2. CONCLUSION

USSF has failed to meet its burden to show why designating these documents as “confidential” under the Confidentiality Agreement would be insufficient. Accordingly, USSF’s designation of these business and financial documents as AEO is inappropriate.

C. DID USSF APPROPRIATELY DESIGNATE HEIDRICK & STRUGGLES DOCUMENTS AS AEO?

1. PARTIES’ POSITIONS

USSF designated 10 documents AEO pursuant to an agreement between USSF and Heidrick & Struggles, an executive search company. See Appendix A.

As we have seen in the cases cited previously, personnel files are quintessential candidates for AEO protection. A review of the documents confirms USSF’s statement that “most of the candidate names were redacted from these documents . . .” (USSF Brief at 15).

Nevertheless, USSF claims that “these documents, the terms, format and methods of Heidrick’s search are its confidential materials.” USSF further argues that “emails between U.S. Soccer and Heidrick discussing the specific details should also reasonably be considered confidential under the Engagement Letter.” (*Id.*) Again, USSF contends that because Solo “has articulated no valid reason that she personally needs to see these materials, the heightened level of protection that an AEO designation provides is warranted given Heidrick’s expressed interest in confidentiality.”

The case law and analysis discussing Category 1 documents do not support USSF’s position. At issue here is discovery, not necessarily proof at trial. Arguably, the discovery could have some bearing on allegations in the Amended Complaint viewed globally and narrowly as to the issue of conflicts of interest. (*See* Amended Compl. at ¶¶ 37 and 39).

In any event, USSF need not be concerned as to its obligations under the Confidentiality Agreement with Heidrick and Struggles. Paragraph 5 of the Appendix to its engagement letter dated January 12, 2017 with USSF provides:

Confidentiality.

If the receiving party is required by applicable law, rule, regulation, or demand by a governmental authority to disclose any confidential information, it will (to the extent legally permissible) provide the disclosing party with prompt notice of such legal requirement.

(USSF Tab 11).

2. CONCLUSION

Here, sensitive personnel information has been redacted. As to the unredacted information, under the cases cited earlier, USSF has not met its burden that AEO protection rather than a confidential designation is warranted.

IV. MISCELLANEOUS DISCOVERY DISPUTES

The question of outstanding discovery disputes need not detain us as there are no longer any open issues. Solo complained that she did not get from USSF the documents she requested: (a) documents showing how much money SUM made from USSF's marketing rights, from whom and where that money was distributed; (b) documents showing analysis of fairness and reasonableness of SUM Agreement to USSF and constituents; and (c) documents from custodians from Dan Garber. (Solo Brief at 22).

After the exchange of positions and discussions at two Zoom video conferences, I am satisfied that USSF has satisfied its discovery obligations. In response to my inquiry, Latham & Watkins submitted USSF's Statement Regarding Discovery dated December 21, 2020. I note the following:

In response to Ms. Solo's document requests, U.S. Soccer conducted a thorough search for responsive, non-privileged documents. As part of that search, U.S. Soccer identified and produced documents from the files of 18 separate custodians, which include the highest level executives at U.S. Soccer, such as current President Cindy Parlow Cone and former Presidents Sunil Gulati and Carlos Cordiero; current Chief Executive Officer Will Wilson; current Chief Financial Officer Pinky Raina; former Chief Operations Officer Daniel Flynn; Chief Commercial Officer Jay Berhalter; former Chief Financial Officer Eric Gleason; former General Counsel John Collins; and multiple other Board of Directors members.

According to the Statement, 2500 documents were reviewed by USSF, the documents requested were not found and were not withheld. The Statement further provides that after the December 18, 2020 hearing, Latham reviewed "U.S. Soccer's production and did not locate any documents emanating from a Don Garber U.S. Soccer email address."

Solo's application "to produce the remaining documents responsive to her requests" is therefore denied.

At the oral arguments, USSF raised an issue not briefed in its submissions: Solo has not conducted a search for relevant emails. We need not go into the arguments of counsel as

subsequently, Solo's counsel advised that Solo would in fact conduct such a search. Counsel are conferring to work out the parameters of that search. This issue is therefore moot.

ORDER

1. The 43 documents designated “Highly Confidential—Outside Counsel Only” by USSF shall be re-designated to “Confidential,” and shall be subject to any and all protections provided to “Confidential” documents in the parties’ October 28, 2020 Confidentiality Agreement (attached as **Exhibit K** to Ms. Solo’s Response Brief).

2. Hope Solo’s application for additional responses in discovery is **denied**.

Dated: December 26, 2020



HON. WILLIAM G. BASSLER

APPENDIX A

Category 1: SUM Agreement and Related Documents (21 documents designated as AEO)

Tab	Bates No.	Document Description
1	USSF00000793	SUM email regarding negotiation of agreement with U.S. Soccer.
2	USSF00000794	Master Rights Proposal emailed by SUM to U.S. Soccer.
4	USSF00005372	U.S. Soccer email quoting provisions of the SUM Agreement.
5	USSF00005489	U.S. Soccer email quoting provisions of the SUM Agreement.
6	USSF00008649	Master Rights Agreement between U.S. Soccer and SUM.
12	USSF00012666	May 29, 2020 Commercial Committee Meeting presentation which includes terms of the SUM Agreement and the parties' negotiation timing (<i>see</i> Slides 15-18).
15	USSF00015326	"Memorandum of Understanding" under which U.S. Soccer and SUM operated prior to execution of the current SUM Agreement.
20	USSF00017172	Transcript of Dec. 7, 2014 U.S. Soccer Board of Directors ("BOD") meeting at which negotiations with SUM were discussed.
21	USSF00017280	Transcript of June 1, 2014 BOD meeting at which negotiations with SUM were discussed.
22	USSF00017298	SUM letter regarding negotiation of agreement with U.S. Soccer.
26	USSF00017612	2004 Licensing Agent Agreement between U.S. Soccer and SUM.
33	USSF00017928	2007 Licensing Agent Agreement between U.S. Soccer and SUM.
34	USSF00017953	Amendment to 2004 Licensing Agent Agreement.
35	USSF00017954	Amendment to 2004 Licensing Agent Agreement.
36	USSF00017955	MLS letter regarding negotiation of agreement with U.S. Soccer.
37	USSF00017958	Transcript of Aug. 12, 2006 BOD meeting at which negotiations with SUM were discussed.
38	USSF00017977	Transcript of Feb, 28, 2014 BOD meeting at which negotiations with SUM were discussed.
39	USSF00017995	Minutes of Executive Session of Mar. 5, 2004 BOD meeting at which negotiations with SUM were discussed.
40	USSF00017997	Transcript of Mar. 5, 2004 BOD meeting at which negotiations with SUM were discussed.
41	USSF00018060	Overview of SUM and U.S. Soccer program related to use of player likenesses in advertising.

Tab	Bates No.	Document Description
42	USSF00018062	Professional Player Intellectual Property Agreement involving SUM.
43	USSF00018072	Professional Player Intellectual Property Agreement involving SUM.

Category 2: Sensitive Business and Financial Documents (12 documents designated as AEO)

Tab	Bates No.	Document Description
3	USSF00004389	April 24, 2018 Business Review Meeting presentation.
9	USSF00010933	April 7, 2020 Business Review Meeting presentation.
10	USSF00011692	June 30, 2020 Business Review Meeting presentation.
13	USSF00015244	Balance Sheet for the period ended Mar. 31, 2020.
23	USSF00017302	Feb. 27, 2018 Business Review Meeting presentation.
24	USSF00017395	May 8, 2018 Business Review Meeting presentation.
25	USSF00017517	Feb. 13, 2018 Business Review Meeting presentation.
27	USSF00017637	Dec. 11, 2018 BOD Meeting presentation.
28	USSF00017813	Nov. 26, 2019 Business Review Meeting presentation.
29	USSF00017887	Statement of Financial Activities – Expense for FY Mar. 31, 2020.
30	USSF00017906	Statement of Financial Activities – Revenue for FY Mar. 31, 2020.

Category 3: Heidrick & Struggles Documents (10 documents designated AEO pursuant to agreement between US Soccer and Heidrick & Struggles)

Tab	Bates No.	Document Description
7	USSF00010200	Emails between U.S. Soccer and Heidrick regarding independent director search.
8	USSF00010203	Status Report regarding independent director search.
11	USSF00012287	Agreement regarding Heidrick’s engagement by U.S. Soccer.
14	USSF00015256	Draft agreement regarding Heidrick’s engagement by U.S. Soccer.
16	USSF00015270	Status Report regarding independent director search.
17	USSF00015291	Status Report regarding independent director search.
18	USSF00015977	Status Report regarding independent director search.
19	USSF00015999	Overview of independent director candidate Patti Hart.

31	USSF00017911	Progress Report regarding independent director search.
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