



**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**IN RE: YEAGER AIRPORT LITIGATION**

**Civil Action No. 16-C-7000**

**THIS DOCUMENT APPLIES TO ALL CASES**

**AGREED PROTECTIVE ORDER**

The parties have determined that discovery in this litigation may require production of confidential and proprietary information, and that a protective order is needed to expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, and protect material entitled to be kept confidential. Based upon the agreement of the Parties:

**IT IS HEREBY ORDERED THAT:**

**DEFINITIONS**

1. The terms defined in Paragraph 1 shall have the meaning provided. Defined terms may be used in the singular or plural.

- 1.1 "Producing Party" means the Party or person who produces or who is asked to produce documents or information that the Party or person considers to be Confidential.
- 1.2 "Designating Party" means the Party or person, other than the Producing Party, who considers documents or information produced to be Confidential.
- 1.3 "Receiving Party" means the Party receiving or requesting the production of documents or information designated as Confidential.
- 1.4 The "Litigation" means the lawsuit captioned above, including all discovery proceedings, hearings, preparation and pre-trial, trial and post-trial activities related thereto.
- 1.5 The "Parties" shall mean the parties to this Litigation.
- 1.6 "Non-party" shall mean any entity or individual that is not a party to this Litigation.
- 1.7 "Confidential Information" shall include any materials that contain, describe, evidence, identify, or refer to information of a confidential or proprietary nature, or that is otherwise entitled to protection under W.V.R.Civ.P. 26(c)(7) (allowing for a protective order requiring "[t]hat a trade secret or other confidential research, development, or commercial information not be disclosed or be

disclosed only in a designated way"). These materials include, but shall in no way be limited to, the following:

- a) Individuals' family, financial, medical, or personnel records;
- b) Confidential proprietary or trade secret information;
- c) Material or information as to which the Producing Party has an independent obligation of confidentiality to any entity other than the Parties in this action; and/or material or information that otherwise would create a substantial risk of serious harm or injury if disclosed outside this litigation.
- d) Pricing strategy or formulas;
- e) Current and prospective customer lists, business plans and competitive market analysis;
- f) State or location level volume, cost, profit, and/or margin information not available through known public sources;
- g) State or location level sales data; and/or
- h) Non-public financial statements and tax returns.

### **INSPECTION OF CONFIDENTIAL INFORMATION**

2. Each person to whom Confidential Information is disclosed or made available, including experts and consultants retained by one or more of the Parties, shall first be advised in writing of the existence and the contents of this Order and shall agree in writing to be bound by its terms.

3. Confidential Information may only be inspected by or revealed to the following persons:

- a) the Court and Court personnel,
- b) members of any jury empaneled in this case,
- c) outside counsel (including administrative, paralegal, clerical, and secretarial staff employed by such counsel), and

- d) the "Qualified Persons" designated below:
- 1) the Parties and employees of the Parties and their respective insurers who are directly involved in the handling and/or administration of the Litigation or who, in the good-faith judgment of a Party's counsel, need to have access to Confidential Information for a legitimate litigation need;
  - 2) experts or consultants (together with their administrative staff) retained by counsel to assist in the prosecution, defense, or settlement of this action. If any such expert or consultant, or any member of such expert or consultant's employees or staff, are a current employee of a competitor of any Party where such competitor is involved in the development of any product at issue in this litigation, or any affiliate of such a competitor, then the Party retaining such expert or consultant shall notify the other Party (hereinafter "Product Defendant") prior to providing any Confidential Information designed by the Product Defendant to such expert or consultant so that the Parties can prepare a separate agreement relating to said Confidential Information;
  - 3) court reporter(s) employed in this action;
  - 4) litigation support services, including outside copying services, court reporters, stenographers or companies engaged in the business of supporting computerized or electronic litigation discovery or trial preparation, hired by a Party or its counsel for the purpose of assisting that Party in this action;
  - 5) a witness at any deposition or other proceeding in this action who is an employee or owner of the producing Party or who authored or was copied on the document prior to commencement of this litigation; and
  - 6) any other person as to whom the Parties in writing agree.

#### **USE OF CONFIDENTIAL INFORMATION**

4. All Confidential Information shall be used solely for the purposes of this Litigation and as permitted by and subject to this Order. Under no circumstances may Confidential Information be used for non-Litigation purposes, or in any matter, controversy,

mediation, arbitration, or litigation now pending or later filed other than this Litigation, and shall not be disclosed to any person except in accordance with the terms hereof.

### **DESIGNATION OF CONFIDENTIAL INFORMATION**

5. The Producing Party or Designating Party shall clearly mark or designate in writing any material, including discovery responses, to be treated as "Confidential" under the terms of this Order. The inadvertent or unintentional production of confidential or secret information without being designated as Confidential at the time of the production or disclosure shall not be deemed a waiver in whole or in part of a Party's claim of confidentiality or secrecy. Documents containing Confidential Information inadvertently or unintentionally produced without being designated as Confidential may be retroactively designated by notice in writing and shall be treated appropriately from the date written notice of the designation is provided. To the extent that, prior to such notice, a Receiving Party may have disclosed it to persons other than the persons permitted to receive the information pursuant to paragraph 3 above, the Receiving Party shall not be deemed to have violated the Protective Order, but the Receiving Party shall make reasonable efforts to retrieve any document or information promptly from such person and to limit any further disclosure pursuant to this Protective Order

6. Testimony taken at a deposition, conference, hearing or trial may be designated as Confidential by making a statement to that effect on the record at the deposition or other proceeding, or by designating such testimony as Confidential upon receipt of the transcript. In order to permit time for such designation, in the absence of other agreement or notification to the court reporter, all deposition testimony shall be treated as Confidential for forty five (45) days from the date of mailing of the transcript by the court reporter. A Party shall have forty five (45) days from the date of mailing of the deposition transcript by the court reporter to make designations of the testimony. The time period may be shortened upon written

advance notice by any Party of its intent to use portions of a specific deposition transcript in a court filing, after which any other Party shall have seven (7) days to designate specific portions of the deposition as Confidential before the transcript is filed. Arrangements shall be made with the court reporter taking and transcribing such proceeding to separately bind such portions of the transcript containing information designated as Confidential, and to label such portions appropriately.

7. Any document or testimony that is designated as Confidential Information and is revealed by or included in any discovery proceeding (whether formal or informal and whether in the form of depositions, transcripts, discovery answers, or document production) or in any hearing, motion, pleading, affidavit, brief, or other document submitted to this Court during pretrial matters, shall be subject to this Order. If a Party wishes to use any Confidential Information in any affidavits, briefs, memorandum of law, or other papers filed in this Court in this litigation, the Party shall apply to have such papers or transcript filed under seal upon separate, specific motion and later order of the Court.

8. Subject to this Order and further Order of the Court, nothing herein shall prevent the use of Confidential Information at hearing or trial. The Court may close applicable portions of hearings or the trial of this matter should any Party deem such closure desirable or necessary. Before discussing the substance of any Confidential Information at a hearing or trial, the Party intending to introduce or use such information into evidence must first notify the Court and counsel for the other Parties. No Party shall disclose the substance of Confidential Information of a Party at a hearing or trial until that Party has been given the opportunity to object or take the necessary measures to safeguard the confidentiality of such information and obtain a ruling from the Court.

### **OBJECTION TO DESIGNATION**

9. Any dispute arising under this Order shall be submitted to the Court for resolution. If any Party disagrees with the designation of any information as Confidential, the material so designated shall nonetheless be treated as such unless and until the Producing Party agrees or the Court orders that the Confidential Information designation shall be removed.

10. If any Confidential Information or data obtained, derived, or generated therefrom is sought from a Receiving Party in any other judicial or administrative proceeding or otherwise, the Receiving Party agrees to notify the Party or Parties who made the Confidential designation in writing within five (5) days so as to permit the Party or Parties to seek a protective order from the appropriate court or take other appropriate action. The Receiving Party shall not provide any Confidential Information until such time as the Party or Parties notified have advised whether they agree to or oppose such disclosure, and if they oppose, until the notified Party or Parties have had a reasonable opportunity to seek a protective order from the appropriate court or take other appropriate action. Nothing herein, however, shall be construed as requiring anyone covered by this Protective Order to disobey any final court order, subject itself to any penalties for noncompliance with any court order or seek any relief from this Court.

### **NO WAIVER**

11. Nothing in this Order shall be construed as a waiver by any Party of its right to object to the subject matter of any discovery request made in this action. The execution of this Order shall not be construed as an agreement by any Party to produce any document or supply any information, and shall not constitute an admission that any designated material is relevant

in any way to the issues raised in the Litigation or as a waiver of any privilege with respect thereto. Nothing contained in this Order and no designation as Confidential shall be construed as a finding (preliminarily or otherwise) that any information designated or protected by this Order does or does not constitute confidential, proprietary or trade secret information.

12. Neither the provisions of this Order nor any disclosure by a Party pursuant to this Order shall constitute a waiver at any time, or in any litigation relating to the matters referenced herein or otherwise, of any attorney/client privilege, work product doctrine, or any other privilege offered by the West Virginia Rules of Evidence or West Virginia Rules of Civil Procedure.

13. No use by any Party of any Confidential Information or documents or any information contained therein or derived therefrom shall abrogate any of the provisions of this Order with respect to such Confidential Information or documents or any information contained therein or derived therefrom.

14. This Order is agreed to and entered without prejudice as to any Party's right to seek other and/or additional relief pursuant to W.V.R.Civ.P. 26(c) or to seek other and/or additional relief in discovery generally. The Parties reserve and do not waive the right to seek additional protections beyond what is provided in this Order, to seek relief from the protections provided in this Order, and/or to otherwise modify this Order.

#### **ADDITIONAL PROVISIONS**

15. Nothing herein shall impose any restrictions on the use or disclosure by a Party of material obtained lawfully by such Party independent of discovery in this action, whether or not such material is also obtained through discovery in this action, or from disclosing its own Confidential Information as it deems appropriate. Further, nothing herein shall limit the

disclosure of Confidential Information to any person who authored and/or was a recipient (as evidenced by a document or by testimony in discovery) of the particular Confidential Information sought to be disclosed to that person unless said person is a current employee of a competitor of any Product Defendant, or any affiliate of such a competitor, and the Confidential Information was designated as such by a Product Defendant. In such circumstance, then Product Defendant shall be notified before the Confidential Information is disclosed to the author and/or recipient so that the Parties can prepare a separate agreement relating to said Confidential Information.

16. Absent further order of the Court with respect to treatment of Confidential Information at trial, this Order shall not apply to any document or information once it is introduced at trial and made a part of the trial record in this case. If any Party to the trial wishes special treatment of Confidential Information at trial, the same shall be sought through separate application to the Court, and nothing in this Order is intended either to support or to undermine such an application.

17. If a Party claims a hearing should be closed to prevent disclosure of Confidential Information, it is the responsibility of that Party to make such a request. The failure to request a closed hearing does not waive the protections of this Order. In the event of an appeal, it is the responsibility of any Party seeking to prevent disclosure of Confidential Information to seek relief from the appellate court. Until the appellate court has ruled on any Confidentiality Order, any filings with the appellate court that include Confidential Information must be filed under seal, unless the appellate court will not accept documents filed under seal.

18. This Order is entered solely for the purpose of facilitating the exchange of documents and information between the Parties to this action without involving the Court unnecessarily in the process. Nothing in this Order nor the production of any information or



document under the terms of this Order nor any proceedings pursuant to this Order shall be deemed to have the effect of an admission or waiver by either Party or of altering the confidentiality of any such document or information or altering any existing obligation of any Party or the absence thereof.

19. Upon termination of this case, the Parties and all experts or consultants shall assemble and return to each Producing Party all documents and other material in their possession designated under this Order, and all copies of same, or they shall certify the destruction thereof within one hundred and twenty (120) days after the conclusion of this case, except documents provided to a Party's respective insurance carrier may be retained in the insurance carrier's file pursuant to W. Va. C.S.R. § 114-15-4.2 and may be shared by the insurance carrier with its outside counsel involved in this litigation. Notwithstanding the foregoing, counsel for the Parties may maintain copies of Confidential Information if secured in a sealed file and kept confidential.

It is so ORDERED.

ENTER: February 21, 2017.

/s/ John A. Hutchison  
Lead Presiding Judge  
Yeager Airport Litigation

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