



ISSUE DATE: 17 JANUARY 2014

OALJ CASE No.: 2014-TSC-00001

MATT MCGUIRE,
Complainant,

vs.

BP PRODUCTS NORTH AMERICA, INC.,
Respondent.

Order Disapproving Settlement Agreement

The parties, who are represented by counsel, requested that I approve¹ the Confidential Settlement Agreement and Mutual Release of All Claims (“Agreement”) they filed. BP will divide the payment with separate checks to the Complainant and his lawyer.² An approved settlement “constitute[s] the final order of the Secretary and may be enforced [in U.S. district court] pursuant to [29 C.F.R.] § 24.113.”³

A cover letter asks that “the Department of Labor maintain the terms of the settlement agreement as confidential,”⁴ *i.e.*, that the Secretary extend the confidentiality provisions beyond the parties, to preclude public access to their adjudicatory filing, with no designation of specific portions they regard as confidential, or why the entire Agreement or any portion of it qualifies to be treated as confidential. They ask to be given notice and an opportunity to object in the event

¹ Settlement approval is required by 29 C.F.R. § 24.111(d)(2) & (e)(2013) (all regulations are cited as they appear in the 2013 version of the Code of Federal Regulations, unless another year is given).

² Agreement, ¶ 4.

³ 29 C.F.R. § 24.111(e); *see also* 29 C.F.R. §§ 24.111(d)(2), 24.113; *Kanj v. The Viejas Band of Kumeyaay Indians*, ARB No. 14-009, ALJ No. 2006-WPC-1, slip op. at 2 (ARB Dec. 19, 2013) (Final Decision and Order Approving Settlement and Dismissing Complaint With Prejudice in a whistleblower proceeding under the Federal Water Pollution Control Act and the Clean Water Act).

⁴ Letter from Jeffrey Needle, Esq. of Dec. 17, 2013.

that a request is made under the Freedom of Information Act⁵ (FOIA) to disclose the Agreement.⁶

The Agreement is disapproved for four reasons:

- its choice of law provision;
- the attempt to displace the fee shifting regime Congress enacted in the applicable employment protection statutes for whistleblowers, which run in favor of a successful Complainant, and replace it with a prevailing party fee provision in arbitration;
- its liquidated damages provision; and
- the overbroad request to withdraw the entire Agreement from the public domain, based on no more than the parties' request for confidentiality.

The Agreement resolves all issues the Complainant raised under the Toxic Substances Control Act⁷ and the Clean Air Act.⁸ I review the Agreement to determine whether, as the Secretary has said in the Federal Register, its terms are “just and reasonable and in the public interest,”⁹ or as the Administrative Review Board sometimes asks, whether the terms are “fair, adequate, and reasonable.”¹⁰ I perceive no meaningful difference in either articulation of the test.

To the extent their Agreement also resolves claims brought or that could have been brought under other statutes, I consider and approve only the terms that pertain to the Toxic Substances Control Act and Clean Air Act claims.¹¹

The Agreement contains a confidentiality provision, enforceable in arbitration, augmented by a liquidated damages provision. The broad confidentiality obligation acknowledges that the Complainant remains free to make disclosures “as required by law,” so it is an acceptable term.

⁵ 5 U.S.C. § 552.

⁶ Letter from Jeffrey Needle, Esq. of Dec. 17, 2013.

⁷ 15 U.S.C. § 2622.

⁸ 42 U.S.C. § 7622.

⁹ 76 Fed. Reg. 2808, 2817 (Jan. 18, 2011).

¹⁰ *See, e.g., Anderson v. Schering Corp.*, ARB No. 10-070, ALJ No. 2010-SOX-7, slip op. at 3 & n.8, 4 (ARB Jan. 31, 2011) (Final Decision and Order Approving Settlement and Dismissing Complaint With Prejudice that had been brought under the Sarbanes-Oxley Act of 2002 (18 U.S.C. § 1514A)).

¹¹ *Kanj v. The Viejas Band of Kumeyaay Indians*, ARB No. 14-009, ALJ No. 2006-WPC-1, slip op. at 2 (ARB Dec. 19, 2013); *Anderson v. Schering, supra*, slip op. at 3 & n. 10; *Coffman v. Alyeska Pipeline Servs., Co.*, ARB No. 96-141, ALJ No. 1996-TSC-5, slip op. at 2 (June 24, 1996).

1. Choice of Law

The initial shortcoming of the Agreement appears in ¶ 14, which says it shall be governed and construed under the laws of the State of Washington, something impermissible under the Secretary's decisions since at least 1990.¹² No choice of law provision may limit the authority of the Secretary of Labor or of any federal court to construe the Agreement under the statutes and regulations of the United States.¹³ In resolving a dispute about the annuity payments due under a settlement agreement the Secretary of Labor had approved in a whistleblower claim that arose under the Energy Reorganization Act,¹⁴ the Third Circuit recognized that the settlement agreement "involves a right to sue derived from a federal statute and, consequently, federal common law principles govern construction of the [settlement] contract."¹⁵

The Secretary of Labor has frequently approved agreements since 1990 with impermissible choice of law provisions, by inserting cautionary language in the approval order that he interprets the offending provision "as not limiting the authority of the Secretary of Labor and any federal court, which shall be governed in all respects by the laws and regulations of the United States."¹⁶

It is time for this to stop. The Fifth Circuit made clear long ago that the Secretary may approve or disapprove what the parties submit as their settlement, not re-write it by "interpreting" the text of the

¹² *Anderson v. Waste Mgmt. of N.M.*, 88-TSC-2, slip op. at 2 (Sec'y Dec. 18, 1990).

¹³ *Stites v. Hous. Lighting & Power*, 1989-ERA-1, slip op. at 3 (Sec'y May 31, 1990) (interpreting a provision of a settlement agreement providing in part "that any civil action or other litigation arising out of or resulting from a breach or violation or alleged breach or violation of this [Settlement] Agreement, shall be controlled by the laws of the State of Texas" as "not restricting in any way the authority of the Secretary to bring an enforcement action under 42 U.S.C. § 5851(d) [the Energy Reorganization Act that protects whistleblowers in the nuclear industry], nor as limiting in such action the jurisdiction of the district court to grant all appropriate relief as identified in the statute"); to similar effect, *see Hildebrand v. H. H. Williams Trucking, LLC*, ARB No. 11-030, ALJ No. 2010-STA-056, slip op. at 3 (ARB Sept. 26, 2011).

¹⁴ 42 U.S.C. § 5851.

¹⁵ *Williams v. Metzler*, 132 F.3d 937, 946 (3d Cir. 1997), *remanding* ARB No. 96-160, ALJ No.1994-ERA-2.

¹⁶ *Anderson v. Schering, supra*, slip op. at 4 & n. 17; to similar effect, *see also Son v. Interstate Found. of Ardmore*, ARB No. 10-124, OALJ No. 2010-STA-038, slip op. at 2 & n. 9 (Apr. 27, 2011); *Trucker v. St. Cloud Meat & Provisions Inc.*, ARB No. 08-080, ALJ No 2008-STA-023, slip op. at 3 (May 30, 2008); *Brown v. Holmes & Narver, Inc.*, 1990-ERA-26, slip op. at 3 (Sec'y May 11, 1994); *Rivera v. Bristol-Myers Barceloneta, Inc.*, 93-CAA-3, slip op. at 2 (Sec'y June 28, 1993).

agreement to mean what it does not say.¹⁷ The reward for “reinterpreting” unacceptable state choice of law provisions in whistleblower settlements for nearly a quarter of a century has been to ossify their use, not change behavior.

This shortcoming is especially troublesome because it is somewhat less likely that the Secretary or an Article III federal court will decide any dispute under the Agreement, which includes an arbitration provision in ¶ 3. The unacceptable choice of law provision may mislead an arbitrator. An arbitrator’s authority, which arises from the arbitration clause in the Agreement, does not include the power to alter the Agreement. The arbitrator would be obliged to follow the laws of Washington when the underlying claim arises under no Washington statutes, and Washington’s courts, while wholly competent in their sphere, have no expertise to apply in federal whistleblower protection statutes that are litigated before the Secretary of Labor and in federal courts. Federal law governs. The Agreement must be changed to say so to be approved.

Approving the Agreement while striking the offending choice of law provision is theoretically possible, due to the Agreement’s severability clause in ¶ 15, but that wouldn’t make sense here. The Secretary has issued a decision that relied on a severability clause to strike a settlement provision that would have “prohibit[ed] the parties from discussing the facts surrounding the complaint with government agencies,”¹⁸ which the Secretary rejected as “contrary to public policy and unenforceable.”¹⁹ Once that provision was excised, the agreement could be approved, and if need be, enforced. But excising this choice of law provision does not dispense with the choice of law issue. I recognize that in that same 1994 decision, the Secretary went on to “interpret” the Nevada choice of law provision “as not limiting the authority of the Secretary of Labor or a Federal court under the ERA and implementing regulations.”²⁰

¹⁷ *Macktal v. Sec’y of Labor*, 923 F.2d 1150, 1154–56 (5th Cir. 1991).

¹⁸ “In Paragraph 12, the parties agreed to sever any part of the Agreement ‘held, determined or adjudicated to be invalid, unenforceable or void for any reason whatsoever’ and that severance shall not affect the validity or enforceability of the remaining portions. The severance provision permits me to approve the remainder of the Agreement without the offending language prohibiting the parties from discussing the facts surrounding the complaint with government agencies. Compare *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1155-1156 (5th Cir. 1991) (‘Severing paragraph 3 eliminated a material term of the agreement. This the Secretary cannot do without the consent of the other two parties.’)” *Brown v. Holmes & Narver, Inc.*, 1990-ERA-26, slip op. at 3 (Sec’y May 11, 1994).

¹⁹ *Id.*

²⁰ *Id.*

Controlling legal authority in effect for more than 23 years forbids ¶ 14's choice of law provision. Lawyers can draft an acceptable choice of law provision; a settlement agreement that falls short ought to be rejected, as this one is.

2. Litigation Fees and Expenses in Arbitration

The Agreement substitutes arbitration for judicial enforcement of the Agreement's terms, saying that "any disputes concerning performance of the settlement terms, including breach of the confidentiality obligations" (of which more will be said later) "shall be submitted to binding arbitration" ²¹ Nothing is inherently troublesome with choosing arbitration to enforce the settlement Agreement. But in that arbitration, "the prevailing party [is] to receive a reasonable attorney's fee incurred in the pursuit of any successful claims." ²²

If approved as written and if, as an example, BP failed to pay the settlement amounts, the Complainant must claim the settlement proceeds in arbitration, not in court. If, on the other hand, the Complainant somehow violated the Agreement, attorneys' fees and expenses would be awarded to BP. The fee regime Congress enacted in the Toxic Substances Control Act and Clean Air Act—both of which confine a fee award to a successful complainant ²³—disappears. The Agreement requires the arbitrator to award a fee to the "prevailing party." ²⁴ Recasting the relative fee obligations of the parties is so inconsistent with the Congressional scheme that it cannot be approved; it fails the test of being "just and reasonable and in the public interest."

No Agreement, however, can interfere with the Secretary's independent authority to bring an action to enforce an approved

²¹ Agreement, ¶ 3.

²² *Id.*

²³ "If such an order [granting relief] issued, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued." 15 U.S.C. § 2622(b)(2)(B) (Toxic Substances Control Act); *see* the almost identical language in sentence following 42 U.S.C. § 7622(b)(2)(B)(ii) (Clean Air Act); *see also* 29 C.F.R. § 24.109(d)(1) (implementing both Acts).

²⁴ Agreement, ¶ 3. In one narrow situation the Complainant may avoid a fee award. This exception does not save the Agreement.

settlement in district court that seeks injunctive relief, compensatory and exemplary damages.²⁵

3. Liquidated Damages

Paragraph 2 of the Agreement sets the liquidated damages available to BP in arbitration if the Complainant breaches the confidentiality obligation imposed in ¶ 1. Those damages are assessable “for each breach of the confidentiality provisions.”²⁶ I cannot tell whether a “breach” is only the Complainant’s personal lapse, or encompasses each repetition of confidential information by anyone who hears or reads the Complainant’s disclosure of confidential information, and in turn repeats it. Those could quickly consume or exceed the settlement payment the Complainant is to receive from BP. Stacking liquidated damage awards looks more like an attempt to terrorize the Complainant than to make a good faith attempt *ex ante* to estimate the damage a breach of confidentiality would cause BP. Once confidentiality is breached, the damage is done; the Complainant would have no control over how a person who receives the forbidden disclosure broadcasts it to others. The first breach is the significant one.

Comparing the settlement payment BP promises to make with the per-occurrence liquidated damages provision—especially in conjunction with the “prevailing party” attorney’s fee award available in arbitration under this Agreement—I find the liquidated damages easily could equal or exceed BP’s payment to the Complainant. That liability is unreasonably large. I disapprove it, under the principle set out in the Restatement (Second) of Contracts,²⁷ as an impermissible penalty.²⁸ It too fails the test of being “just and reasonable and in the public interest.”

²⁵ 15 U.S.C. § 2622(d) (Toxic Substances Control Act); 42 U.S.C. § 7622(e) (Clean Air Act); 29 C.F.R. § 24.113 (applicable to both Acts).

²⁶ Agreement, ¶ 2.

²⁷ “Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.” Restatement (Second) of Contracts, § 356(1) (1981).

²⁸ Courts regard § 356 of the Restatement (Second) of Contracts as the authoritative statement on liquidated damages, unless a state legislature has displaced it with a statutory test. The approaches courts take to liquidated damages as they apply § 356 of the Restatement are far from uniform, however. *See*, Michael Pressman, *The Two-Contract Approach to Liquidated Damages: A New Framework for Exploring the Penalty Clause Debate*, 7 VA. L. & BUS. REV. 651, 656–70 (2013) (reviewing the variety of approaches courts have taken to liquidated damages clauses).

4. Withdrawal of the Agreement from the Public.

Under ¶ 1 of the Agreement, both parties must keep “the existence and the terms” of the settlement agreement confidential, with certain exceptions. But parties don’t control what information belongs to the public. In this adjudicatory proceeding before a government agency, an order entered on the Secretary’s behalf that approves a settlement will be public, so the fact that a settlement was reached can’t be secret. A settlement approval order, as an order in an adjudication,²⁹ is a public record.

The parties’ chief failing is their assumption that the entire Agreement should be sealed now, based on nothing more than a request. My analysis is not the final word on whether some member of the public may inspect and copy an unredacted copy of a sealed original settlement agreement. That separate process is described at 29 C.F.R. Part 70.³⁰ My concern is what the parties must show to have one or more parts of the Agreement provisionally withheld now, pending a decision by a FOIA disclosure officer on a request to inspect or copy the Agreement. A simple request won’t do.

All filings in the case (including the Agreement) become public records. The First Amendment,³¹ common law,³² and FOIA³³ generally require federal adjudicators to make case records available to the public on request. A party may show that a filing falls within a specific common law exception to the public nature of adjudicatory records, or in administrative adjudications, one of the nine FOIA exemptions or three exceptions. The adjudicator is responsible to determine whether a litigant has made the showing required to justify sealing any part of the adjudicatory record or evidence.³⁴ This ordinarily requires specific

²⁹ 29 C.F.R. § 70.4(a)(1).

³⁰ *Edgemon v. Tenn. Valley Auth.*, ARB No. 97-099, OALJ No. 96-ERA-011, slip op. at 2 (Sept. 23, 1997).

³¹ *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (granting a news organization’s motion to unseal a settlement agreement the parties had filed and the trial judge had approved).

³² *Baxter Int’l, Inc. v. Abbott Labs.*, 297 F.3d 544, 547–48 (7th Cir. 2002) (denying the parties’ renewed motion to place documents under seal); Robert Timothy Reagan, *Sealing Court Records and Proceedings: A Pocket Guide*, at 2–4, 16 (Federal Judicial Center 2010); Robert Timothy Reagan, Shannon R. Wheatman, Marie Leary, Natacha Blain, Steven S. Gensler, George Cort, and Dean Miletich, *Sealed Settlement Agreements in Federal District Court*, at 1–3 (Federal Judicial Center 2004).

³³ *Blanch v. Ne. Nuclear Energy Co.*, 90-ERA-11 (Sec’y May 11, 1994) (denying request to seal a settlement agreement “to ensure that the agreement and its terms will not be disclosed to the public”).

³⁴ *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1162 (9th Cir. 2011) (reversing an order to seal that encompassed “non-confidential material,” and failed to explain the

factual findings, not the trial court’s “unsupported hypothesis or conjecture.”³⁵ For settlements, the general rule, reflected in The Sedona Guidelines on Confidentiality and Public Access, is that “settlements filed with the court should not be sealed unless the court makes a particularized finding that sufficient cause exists to overcome the presumption of public access to judicial records.”³⁶ As one court of appeals has said, “The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to.”³⁷ The same is true of administrative adjudications where the Secretary of Labor must approve a settlement agreement.

Courts seal things like “trade secrets, the identities of undercover agents, and other facts that should be held in confidence”³⁸ because the reasons to secrete them overcome the right of public access. It is not enough that one or more parties strongly prefer secrecy,³⁹ unless they can go another step, and prove the compelling

rationale for sealing); *Citizens First Nat’l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (“The determination of good cause cannot be elided by allowing the parties to seal whatever they want, for then the interest in publicity will go unprotected unless the media are interested in the case and move to unseal.”); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (criticizing a broad confidentiality order that gave litigants unfettered right to file documents under seal, pointing out that “[t]he District Court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public.”); *see also In re Krynicki*, 983 F.2d 74 (7th Cir. 1992) (Easterbrook, J., in chambers) (highlighting why motions to seal entire appellate briefs or records are virtually certain to fail); *see also* U.S. Dist. Ct. for W. Dist. of Wash., Local Civil Rule 5(g)(3); U.S. Dist. Ct. for N. Dist. of Ill., Local Civil Rules 5.8 and 26.2.

³⁵ *Hagestad v. Tragresser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (internal quotes omitted).

³⁶ The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality and Public Access in Civil Cases, Chapter 4: Settlements, Principle 2 (March 2007).

³⁷ *Jessup*, 277 F.3d at 929.

³⁸ *Hicklin Eng’g, L. C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006).

³⁹ *Goesel v. Boley Int’l (H.K.) Ltd.*, ___ F.3d ___, 2013 WL 6800977 at *4 (7th Cir. Dec. 26, 2013) (Posner, J., in chambers) (rejecting in one order two unrelated motions to seal settlements that appeared in the records before the court of appeals; each motion was based on no more than the parties’ confidentiality agreements: “the fact that they don’t want to disclose is not a reason”); *In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010) (refusing to seal an indemnity agreement and other documents that AT&T Mobility and Google had attached to their filings opposing the plaintiff’s effort to add AT&T Mobility as a party to the case, and rejecting the contention that disclosure of the documents might allow others to “obtain a negotiating advantage by knowing their terms”).

reason required to seal filings or proof, or in administrative adjudications, that a specific statutory exception to openness or an exemption to FOIA applies. The adjudicatory records of the Commissioner of Social Security in disability proceedings, for example, are not available to the public under FOIA Exemption Six (unwarranted invasion of personal privacy),⁴⁰ so no particularized showing in an individual adjudication is required to withhold them from public inspection.

Sealed settlement agreements are rare in the federal courts. At the request of the Advisory Committee on Civil Rules of the Judicial Conference of the United States, the Federal Judicial Center did an empirical study of how often settlement agreements in civil cases are filed under seal. The 1994 study “Sealed Settlement Agreements in Federal District Court” found that they happened “in less than one-half of one percent of civil cases.”⁴¹

Redacted versions of documents that merit protection remain public, however. The lawyers for the parties are undoubtedly familiar with this.⁴² The Northern District of Illinois, for instance, requires a party to “move the court for a sealing order specifying the particular document or portion of a document to be filed under seal.”⁴³ The Western District of Washington specifically recognizes in its local rules the “strong presumption of public access to the court’s files.”⁴⁴ Its local rules obligate lawyers to “minimize the amount of material filed under seal, and to explore redaction and other alternatives to filing under seal,”⁴⁵ and to file a public, redacted copy of papers, along with any sealed motion papers.⁴⁶ The Northern District of California imposes a generally similar mandate that:

“a sealing order may issue only upon a request that establishes that the document, or portions thereof, are privileged, protectable as a trade secret or otherwise entitled

⁴⁰ 5 U.S.C. § 552(b)(6) of FOIA, protecting “personnel and medical files and similar files” when their disclosure “would constitute a clearly unwarranted invasion of personal privacy”; implemented by regulations of the Commissioner of Social Security at 20 C.F.R. § 402.100(c) & 20 C.F.R. §§ 401.105(b), 401.115.

⁴¹ Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439 (2006); Reagan et al., *supra*, *Sealed Settlement Agreements in Federal District Court*, at 1, 8 (Federal Judicial Center 2004).

⁴² The Complainant’s lawyer maintains his office in Seattle; BP’s lawyer is based just outside Chicago, in Naperville.

⁴³ U.S. Dist. Ct. for N. Dist. of Ill., Local Civil Rule 26.2(d).

⁴⁴ U.S. Dist. Ct. for W. Dist. of Wash., Local Civil Rule 5(g).

⁴⁵ *Id.*, Local Civil Rule 5(g)(3)(A).

⁴⁶ *Id.*, Local Civil Rule 5(g)(5)(A).

to protection under the law (hereinafter referred to as “sealable”). The request must be narrowly tailored to seek sealing only of sealable material.”⁴⁷

If a motion to seal is granted in the Northern District of California, “the document filed under seal will remain under seal and the public will have access only to the redacted version, if any, accompanying the motion.”⁴⁸ A recent decision from the Eastern District of California illustrates its similar practice, designating by order the portions of filings to be redacted from the public docket as trade secrets, while maintaining unredacted filings under seal.⁴⁹

Even briefs in the courts of appeals that refer to protected materials have parallel versions: the public one redacted to the least extent required to protect the safeguarded evidence, and a sealed version that discusses it.⁵⁰

Should appropriate redaction yield a motion or an exhibit almost entirely blacked out, however, there is no point to providing the public a redacted version. A judge could dispense with it—but those situations should be rare.

No party has offered any evidence, by declaration or otherwise, to show why some specific portion of the Agreement comprises or includes confidential information exempt from public disclosure under FOIA Exemption 4, or any other statutory or common law exception to the general rule of public access to adjudicatory records.⁵¹ The Department of Labor’s regulations require a person who seeks to protect confidential commercial information submitted to the Department be specific about what qualifies to be withheld from the public.⁵² No party is entitled to withdraw entire documents filed in

⁴⁷ U.S. Dist. Ct. for N. Dist. of Cal., Local Civil Rule 79-5(b).

⁴⁸ *Id.*, Local Civil Rule 79-5(f)(1).

⁴⁹ *Zurich Am. Ins. Co. v. ACE Am. Ins. Co.*, 2012 WL 3638467 at 3–4 (E.D. Cal. 2012) (designating portions of declarations and briefs by page and line number to be redacted from the public filings).

⁵⁰ *Hicklin*, 439 F.3d at 348 (mentioning that a litigant filed a sealed brief containing a trade secret diagram that was omitted from the brief’s public version).

⁵¹ *Cf.*, *Rigby v. Wash. Public Power Supply Sys.*, ALJ No. 97-ERA-12 (Aug. 22, 1997), where the presiding judge determined that the affidavit of the employer’s general counsel explaining that the terms of the settlement agreement included nonpublic commercially sensitive information that would cause substantial competitive harm to the employer if disclosed, was adequate to “substantially comply” with 29 C.F.R. § 70.26(b) (1997). I express no view on whether an affidavit that repeated the trial judge’s summary of the affidavit the general counsel filed in *Rigby* would be adequate to determine that portions of this Agreement qualify to be redacted under the current iteration of 29 C.F.R. § 70.26(b).

⁵² See 29 C.F.R. § 70.26(b); *Fish v. H & R Transfer*, ARB No. 01-071, ALJ No. 00-STA-56, slip op. at 3 n.1 (Apr. 30, 2003) (referring to the Department’s FOIA

adjudicatory proceedings from the public because he prefers secrecy.⁵³ Without a colorable basis in proof to believe that any FOIA or common law exemption to disclosure applies, I have no reason to treat the Agreement as confidential pending the determination of a FOIA disclosure officer of whether it should be available for inspection and copying. I would treat as confidential the portions of the Agreement that qualify as confidential. A public version, redacted to the minimum degree necessary to protect any confidentiality interest proven to apply, must be available to the public from the outset, however. Parties must designate, in good faith, only the portions of their filings that qualify for protection from inspection and disclosure.⁵⁴

Accordingly, the Agreement is disapproved. The parties should be prepared to attend the telephonic Scheduling Conference set for February 19, 2014,⁵⁵ by submitting their completed proposed scheduling order. They also have the option to submit an acceptable settlement agreement.

So Ordered.

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

regulations at 29 C.F.R. § 70.26(b) (2002), which also expected a party who submitted a settlement agreement “to designate specific information as confidential commercial information”).

⁵³ “A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under [FOIA] Exemption 4. These designations will expire ten years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.” 29 C.F.R. § 70.26(b), *published at* 71 Fed. Reg. 30763, 30767 (May 30, 2006).

⁵⁴ *Paine v. Saybolt, Inc.*, ARB No. 97-102, ALJ No. 97-CAA-004 (ARB July 22, 1997).

⁵⁵ See the Order of Nov. 4, 2013.