

STATE OF MINNESOTA
COUNTY OF RAMSEY

EMPLOYMENT
DISTRICT COURT
SECOND JUDICIAL DISTRICT

Clifford L. Whitaker, and Michael V.
Mucci, on behalf of themselves and all
others similarly situated,

Plaintiffs,

vs.

3M Company,

Defendant.

Court File No. 62-C4-04-012239

[T. Warner]

**MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFFS'
MOTION TO UNSEAL (1) AFFIDAVIT
OF JANET R. THORNTON, PH.D. AND
(2) MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFFS'
MOTION TO COMPEL**

[Class Action]

INTRODUCTION

The parties to this age discrimination class action agreed to a protective order, since approved by the Court, that limits disclosure of discovery materials one party deems "Confidential." See Affidavit of Susan M. Coler in Support of Motion to Unseal (1) Affidavit of Janet R. Thornton, Ph.D. and (2) Memorandum of Law in Support of Plaintiffs' Motion to Compel ("Coler Aff."), Ex. 1, Stipulation and Protective Order ("SPO").¹ The SPO directs the parties to file under seal any court submission that refers to, contains or attaches any material a party has designated "Confidential." However, the SPO also provides a mechanism for unsealing court submissions upon agreement of the parties or motion to the Court.

This motion seeks the unsealing of two court filings: (1) the Affidavit of Janet R. Thornton, Ph.D. executed May 20, 2005 and submitted for filing on May 23, 2005 in support of Plaintiffs' Motion to Compel; and (2) the Memorandum of Law in Support of Plaintiffs' Motion to Compel submitted for filing on May 23, 2005, which explains plaintiffs' need for answers to

¹ All exhibits are attached to the Coler Affidavit and shall be referenced simply as "Ex. ___."

certain outstanding discovery requests related to key contentions in their Complaint. *See* Exs. 2, 3 (referred to respectively as “Thornton Affidavit” and “Memorandum” and together as “submissions”). Pursuant to the SPO, plaintiffs filed these submissions under seal. Unsealing of the submissions is appropriate because they contain no “Confidential” information the disclosure of which is prohibited by the SPO.

BACKGROUND

The SPO establishes a process for regulating, throughout “the course of discovery” in this case, the disclosure of materials that either party designates as “Confidential.” Ex. 1 at 1. In defining “Confidential,” the SPO incorporates by reference “the standards of Minn. R. Civ. P. 26.03,” which in turn authorizes courts to specify the manner or extent to which “a trade secret or other confidential research, development, or commercial information [shall] be disclosed.” Minn R. Civ. P. 26.03(g). The SPO also declares that “Confidential information shall include” three particular kinds of “discovery materials”: first, “information that has not been made publicly available about 3M’s market analyses, strategic planning, research and development, and finances”; second, “proprietary information that has not been made publicly available regarding 3M’s employment policies, practices, and related training or learning programs”; and third, “individually identifiable personnel information about 3M’s employees and former employees.” Ex. 1, ¶ 2.

The SPO requires that “expert reports, briefs, and other court filings quoting, excerpting, or summarizing Confidential ... information (including, but not limited to, statistical or other data analysis that has been conducted utilizing 3M’s ... data) shall be filed under seal.” *Id.*, ¶ 10. However, ¶ 10 further provides that either party may seek the unsealing of the filing, either informally through negotiation with the other party or, if an impasse is reached, through a motion

to this Court. *Id.* In that event, the parties have agreed that “the Court shall order the disputed seal removed if the document (or portion of the document) does not *independently* meet the requirements for designation as Confidential set forth in paragraph 2.” *Id.* (emphasis added).

The SPO further explains the applicable analysis:

[T]he Court shall consider each document (or portion of a document) on a case-by-case basis, recognizing, for example, that a statistical analysis or summary based on underlying Confidential information is not necessarily Confidential *unless the summary itself meets the requirements for designation as Confidential* but also recognizing that the statistical analysis or summary may properly be designated as Confidential for reasons other than or in addition to the reasons for the designation of the underlying Confidential information.

Id. (emphasis added). The party seeking to keep a court filing under seal has the burden of proving that the court filing independently satisfies the requirements of ¶ 2 for designation as Confidential. *Id.*

Pursuant to the SPO at ¶ 10, plaintiffs filed the Thornton Affidavit and Memorandum under seal because the affidavit contained analyses of 3M statistical data designated as “Attorneys’ and Experts’ Eyes Only” and the Memorandum reports the results of those analyses. *See* Exs. 2, 3. Plaintiffs then notified 3M pursuant to ¶ 10 that they believed that the submissions should not be maintained under seal and invited dialogue. Ex. 4. The parties conferred but were unable to resolve the issue. *Coler Aff.*, ¶ 2, Exs. 5-7. This motion followed.

ARGUMENT

I. PLAINTIFFS’ SUBMISSIONS DO NOT INDEPENDENTLY MEET ANY OF THE CRITERIA FOR DESIGNATION AS CONFIDENTIAL AND HENCE SHOULD BE UNSEALED

Neither the Thornton Affidavit nor the Memorandum should remain under seal unless 3M shows that the submissions *independently* meet the definition of “Confidential” in the SPO at ¶ 2. The independence requirement means that 3M must show that the submissions themselves

constitute “Confidential” information, not just that “Confidential” information was used in preparing the submissions. If, for example, a filing summarizes an underlying document marked “Confidential” because it contains trademark information, but the summary included in the filing does not disclose that trademark information, then the filing does not independently meet the requirements of ¶ 2 of the SPO based on the trademark information in the underlying document.

Neither submission contains “Confidential” information within the meaning of that term set forth in the SPO. Accordingly, both documents should be unsealed.

A. The Parties’ Agreement Not to Disclose “Confidential” Information Does Not Apply to the Thornton Affidavit

The Thornton Affidavit is limited to analyses of aggregate personnel data. In particular, Dr. Thornton restricted herself to studying the composition of the salaried exempt workforce at 3M at the end of 2004, and the outcomes of some 3M employment decisions over four calendar years – that is, selection of employees for promotions, participation in certain job training programs, and job eliminations. Ex. 2, ¶¶ 2, 5.

The Thornton Affidavit does not independently contain any Confidential information. It reports no “individually identifiable personnel information about 3M’s employees.” Ex. 1, ¶ 2. Nor does it include any 3M “market analyses,” or any discussion of 3M “strategic planning, research and development, [or] finances.” *Id.* Although Dr. Thornton reports some information related to 3M expenditures, she does not do so in a way that fairly can be characterized as addressing the state of 3M “finances.” That is, the Thornton report contains merely a comparison of percentage increases in several forms of compensation, for persons promoted and those not promoted, within the overall group of persons in “PeopleSoft grades 70-210,” for each of the years 2001 to 2004. *See* Ex. 2, ¶13.

Finally, the Thornton Affidavit contains no “proprietary information ... regarding 3M’s employment policies, practices ... or ... programs.” Ex. 1, ¶ 2. To be sure, Dr. Thornton refers to several 3M training programs: Black Belt, Master Black Belt and ALDP; and nominations/designations to the Pre-MAP and Executive Conference. But these references are limited to the outcomes of selection decisions for these training or assessment programs, in terms of numbers of persons selected and ages of selectees compared to ages of persons in the same jobs and grades. Regardless whether 3M has any proprietary² interest in information relating to any of these programs, Dr. Thornton does not provide any information at all concerning the operation or outcomes of those programs. Hence there is no basis for designating her testimony “Confidential.”

B. Plaintiffs’ Memorandum Also Does Not Contain “Confidential” Information

Plaintiffs filed the Memorandum at issue here under seal solely because it quoted or summarized portions of the Thornton Affidavit. Coler Aff., ¶ 3; *see generally* Ex. 3. If as plaintiffs request, the Court unseals the Thornton Affidavit because it lacks any Confidential content, it follows that the Court should do the same for the Memorandum.

II. 3M’S RATIONALE FOR MAINTAINING THE SEAL ON THE SUBMISSIONS DOES NOT MEET THE REQUIREMENTS OF THE SPO

3M has stated extremely vague, and thus inadequate, grounds for asserting that the Thornton Affidavit and the Memorandum should remain sealed. In a letter to counsel for plaintiffs, 3M’s counsel said:

While the [Thornton] Affidavit may not include individual information about any individual employee, most certainly, several of the items described in the Affidavit are

² Black’s Law Dictionary, 5th Edition, defines “proprietary” as “pertaining to a proprietor; relating to a certain owner or proprietor.” A “proprietor” “[i]n many instances ... is synonymous with owner” and is “[o]ne who has the legal right or exclusive title to anything.”

confidential in their own right and would have significant value to 3M's competitors if they were freely distributed in a public forum.

Ex. 5. However, this letter does not explain which items in the Affidavit supposedly are "confidential in their own right" (and why), or how the Affidavit might provide "competitive advantage" or "value to 3M's competitors." *See id.* 3M admits that the submissions do not contain individually identifiable personnel information about 3M's employees, but identifies no portion of the Thornton Affidavit that contains non-public 3M information about "market analyses, strategic planning, research and development, [or] finances." Ex. 1, ¶ 2. Nor does 3M identify any "proprietary information ... regarding 3M's employment policies, practices ... or ... programs." *Id.*

3M cannot rely on vague generalizations to justify maintaining the submissions under seal. In making rulings related to protective orders, courts require "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973) (citation omitted); *see Star Tribune v. Minnesota Twins P'ship*, 659 N.W.2d 287, 294 n.6 (Minn. Ct. App. 2003) (explaining that "a particularized showing" must be made under an umbrella protective order when a challenge is raised); *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978); *accord Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986); *see Anderson v. Cryovac, Inc.*, 805 F.2d 1, 6 (1st Cir. 1986) (party seeking protection must make "a particular factual demonstration of potential harm" and cannot rely on conclusory statements). It is wholly insufficient for 3M to force plaintiffs and the Court to speculate about both the identity of the information that it believes would put it at a competitive disadvantage and the manner in which competitors would allegedly benefit from this information.


In short, 3M has not and cannot meet its burden of proving that the Thornton Affidavit and the Memorandum constitute "Confidential" information as defined in the SPO at ¶ 2. Accordingly, 3M has not and cannot justify keeping these submissions under seal.

CONCLUSION

For the reasons stated above, the Court should unseal the Affidavit of Janet R. Thornton, Ph.D. and the Memorandum of Law in Support of Plaintiffs' Motion to Compel, and remove the markings from these documents indicating that they were filed under seal.

DATED: June 28, 2005

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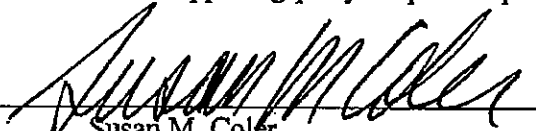
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ACKNOWLEDGMENT

Plaintiffs, by their attorneys, acknowledge that costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposing party or parties pursuant to Minn. Stat. §549.211.

DATED: June 28, 2005


Susan M. Coler