

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Employment

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

Court File No. C4-04-12239

Plaintiffs,

v.

3M Company,

Defendant.

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

INTRODUCTION

For reasons unrelated to the merits of the Motion to Compel that was heard on June 10, 2005, the Named Plaintiffs filed an Affidavit of their statistical expert, Janet R. Thornton, Ph.D., ("Thornton Affidavit") in connection with their Memorandum of Law in Support of the Motion to Compel ("Memorandum"). Pursuant to the previously entered Stipulated Protective Order ("SPO"), the Named Plaintiffs filed both the Thornton Affidavit and the Memorandum under seal. Subsequently, the Named Plaintiffs informed Defendant 3M Company ("3M") they desired to have the Thornton Affidavit and Memorandum unsealed. Although they never provided 3M with a reason why unsealing was necessary, and although the SPO plainly permits the Named Plaintiffs to use the Thornton Affidavit and Memorandum to advance their cause with potential class members, the Named Plaintiffs now have filed the instant Motion. Like the Named Plaintiffs' prior communications with 3M on this subject, the instant motion is devoid of any reason why the Court should unseal the Thornton Affidavit or Memorandum. Indeed, it suggests that the Thornton Affidavit was filed, from the outset, in order to become available to the public

and to annoy and inconvenience 3M. Because the Thornton Affidavit does contain confidential information as defined by Minnesota Rule of Civil Procedure 26.03 and the SPO, and because the Named Plaintiffs have failed to provide any reason not to maintain under seal the admittedly preliminary propositions reported in Thornton Affidavit and Memorandum, 3M respectfully asks the Court to deny the Named Plaintiffs' Motion.

BACKGROUND

The Court, of course, has access to the full text of the SPO and is well-equipped to draw its own conclusions regarding the meaning of its terms, particularly those portions of the SPO either paraphrased or only partially excerpted by the Named Plaintiffs in their Motion. Notably, and contrary to the Named Plaintiffs' suggestion that the SPO sets forth a discrete and exhaustive list of "Confidential" material,¹ Section 2 of the SPO, more fully, offers the following guidance to the parties and the Court:

Confidential information shall include information, documents, *data*, portions of deposition transcripts, interrogatory answers, responses to requests for admission, *and any other discovery materials designated as Confidential, that meets the standards of Minn. R. Civ. P. 26.03, including, but not limited to:* (1) information that has not been made publicly available about 3M's market analyses, strategic planning, research and development, and finances; and (2) *proprietary information that has not been made publicly available regarding 3M's employment policies, practices, and related training or learning programs.* In addition, individually identifiable personnel information about 3M's employees and former employees, such as performance ratings, compensation information, health or medical information, information relating to a spouse, partner, or dependent, discipline documentation, information regarding a failure to be selected for a job, training or development opportunity, or other employment benefit, and the reasons for or nature of termination of employment, may be designated as Confidential. All "Confidential" designations are to be made by counsel for the Designating Party after personal review of such information in

¹ See Pls.' Mem. Supp. Mot. to Unseal at 2.

good faith and upon a reasonable basis for believing that the information is Confidential under the terms of this Stipulation and Protective Order.

See Stipulation and Protective Order § 2 (attached as Ex. 1 to Affidavit of Susan M. Coler in Support of Motion to Unseal (“Coler Aff.”)) (emphasis added).

In Section 6 of the SPO, the parties agreed that underlying source material designated as Confidential may be disclosed to “[t]he Named Plaintiffs on the condition that each Named Plaintiff acknowledges that he is bound by this Stipulation and Protective Order by signing a copy of Exhibit A.” See id. § 6(a). Particularly relevant to the present Motion, in Section 10 of the SPO, the parties further agreed that:

Even if a brief or expert report [quoting, excerpting, or summarizing Confidential or Attorneys’ Eyes Only information] is sealed, counsel for Named Plaintiffs may disclose such document to Named Plaintiffs and putative class members if: (a) it does not disclose individually identifiable (whether by name or by context) personnel information about 3M’s employees or former employees relating to: (i) performance ratings; (ii) compensation information; (iii) health or medical information; (iv) information relating to a spouse, partner, or dependent; (v) discipline documentation; (vi) information regarding a failure to be selected for a job, training or development opportunity, or other employment benefit; and (vi) the reasons for or nature of termination of employment; and (b) each person to whom the disclosure is made acknowledges that he or she is bound by this Stipulation and Protective Order by signing a copy of Exhibit A.

See id. § 10.

Further, with respect to briefs and expert reports “summarizing Confidential or Attorneys’ Eyes Only information,” the SPO recognizes that a:

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.* For illustrative purposes only, a document containing a statistical analysis or other type of summary of the overall distribution of performance ratings at 3M, but not disclosing the actual performance rating received by any individual employee, may not

be Confidential, even though the individualized data on which such a summary is based likely would be Confidential for reasons of individual privacy. By comparison, a statistical analysis or summary of 3M's compensation, based on but not disclosing the actual compensation received by any individual employee (which individualized data might be Confidential for reasons of individual privacy), may still be Confidential if it permitted a competitor to determine how much 3M would pay a person in a given position with a given set of attributes relevant to pay, because such information might have significant value to 3M's competitors seeking to recruit and hire for similar positions.

See id. (emphasis added). Notably, these examples set forth in the SPO were intended to be illustrative (not exhaustive or conclusive), to help the Court in making its own determination as to whether specific materials ought to remain within the boundaries of this case or be subject to broadcast to the public at-large.

Each party has a good faith obligation to determine whether material they are about to produce or file warrants confidential protection under the SPO. See id. § 2 (“All ‘Confidential’ designations are to be made by counsel for the Designating Party after personal review of such information in good faith and upon a reasonable basis for believing that the information is Confidential under the terms of this Stipulation and Protective Order.”). The Named Plaintiffs acknowledge that “[p]ursuant to the SPO at ¶ 10, [they] 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 Pls.’ Mem. Supp. Mot. to Unseal at 3. Nonetheless, on June 3, 2005, subsequent to the filing of the items under seal, the Named Plaintiffs notified 3M in writing that they intended to seek to have the seal removed from the Thornton Affidavit and Memorandum. See Ex. 4 to Coler Aff. On June 16, 2005, the parties engaged in a substantive meet and confer discussion over this (and other issues). See Coler Aff. ¶ 2. In that discussion, and contrary to the Named Plaintiffs’ suggestion in their Motion, 3M specified several grounds (recounted in full

below) upon which the preliminary analytical estimates set forth in the Thornton Affidavit (and reported in the Memorandum) were appropriately sealed and should remain sealed. The Named Plaintiffs suggested the possibility of preparing redacted versions of the Thornton Affidavit and Memorandum in response to 3M's stated concerns, but they never provided such items and, instead, filed this Motion. See Ex. 6 to Coler Aff.

ARGUMENT

The Named Plaintiffs' Motion to Unseal both the Thornton Affidavit and the Memorandum is without merit for at least four reasons. First, there is no presumption that documents and confidential information produced in discovery, including material related to non-dispositive discovery motions, should become part of the public record. To the contrary, the Named Plaintiffs' own authorities establish that a court has broad discretion to order the protection of such material precisely because there is no common-law or constitutional right of public access to it. Second, the information reported in the Thornton Affidavit and repeated in the Memorandum is confidential and appropriately under seal. Third, there is no need for the Court to exercise its discretion to unseal the documents in order to permit the Named Plaintiffs to advance their claims, because the SPO expressly permits Named Plaintiffs to use such material in this case, including sharing it with any other putative class members simply upon assurances that such individuals will respect its confidentiality. Finally, contrary to the Named Plaintiffs' suggestion, non-public information revealing the structure and results of 3M's employment policies, practices, and related training or learning programs is precisely the kind of information that parties agreed would remain confidential by virtue of the SPO, and the need to maintain this confidentiality is particularly acute given the admittedly preliminary and tentative nature of the findings reported in the Thornton Affidavit and Memorandum.

I. THERE IS NO PRESUMED RIGHT TO PUBLICIZE MATERIAL OBTAINED OR DEVELOPED IN THE COURSE OF DISCOVERY.

Protective orders are not only permitted under the procedural rules but also are viewed as “essential to the functioning of civil discovery.” See Bayer AG and Miles Inc. v. Barr Laboratories, 162 F.R.D. 456, 465 (S.D.N.Y. 1995); see also Minn. R. Civ. P. 26.03; Star Tribune v. Minnesota Twins Partnership, 659 N.W.2d 287, 293-94 (Minn. Ct. App. 2003) (recognizing, in a decision cited by the Named Plaintiffs, that district courts have “broad discretion to fashion protective orders” and that such orders are not uncommon in complex litigation). “Without an ability to restrict public dissemination of certain discovery materials that are *never introduced at trial*, litigants would be subject to needless annoyance, embarrassment, oppression or undue burden or expense.” SEC v. TheStreet.Com, 273 F.3d 222, 229 (2d Cir. 2001) (internal quotations omitted, emphasis added).

It is well established (by the Named Plaintiffs’ own cited authorities) that this Court has broad discretion under Minnesota Rule of Civil Procedure 26.03 to limit disclosure of discovery and discovery-related materials within the confines of the particular case at hand.² Yet, the Named Plaintiffs implicitly suggest that discovery and discovery-related materials are presumed to be matters of public record. That is simply not the case. The Named Plaintiffs’ cited authorities also establish that there is no general right of access beyond the parties to such

² See Seattle Times v. Rhinchart, 467 U.S. 20, 33 (1984) (“Restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.”); Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1310-14 (11th Cir. 2001) (noting that “[p]ublic disclosure of discovery materials is subject to the discretion of the trial court” and “[a]dditionally, where a party has sought the protection of Rule 26, the fact that sealed material is subsequently submitted in connection with a substantive motion does not mean that the confidentiality imposed by Rule 26 is automatically forgone”); Citizens of First Nat’l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999) (distinguishing the interests implicated in pretrial discovery and trial proceedings); In re the Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1338 (D.C. Cir. 1985) (Scalia, J.) (concluding that “material placed before the court in connection with summary judgment motions is not constitutionally required to be open to the public”).

material. See Star Tribune, 659 N.W.2d at 295-97 (affirming decision to limit public access to discovery materials and discovery motions because there is no presumptive right of access to such material); Anderson v. Cryovac, Inc., 805 F.2d 1, 8, 12 (1st Cir. 1986) (finding good cause for trial court's decision to restrict public access to discovery materials, where the litigation already had received newspaper attention and because "it is clear that there is no right of public access to documents considered in civil discovery motions").

Thus, while it is true 3M bears the burden of offering good cause to support the protection of discovery and discovery-related materials, it need not overcome any presumption against such protection. Moreover, 3M's burden is not uniquely demanding. The good cause standard does not require a showing that there are no less restrictive means of protecting the information at issue. See Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1119-20 (3d Cir. 1986) (holding that, under Fed. R. Civ. P. 26(c), "the good cause standard is significantly less demanding than the least restrictive means test" and requiring a heightened showing has the potential to work a "serious detriment"). Good cause for a protective order limiting public access to discovery materials and motions also is not limited to the existence of trade secrets; lesser interests warrant protection under the principles of Rule 26, including simply protecting parties from embarrassment. See id. at 1121. Accordingly, multiple decisions support trial courts' determinations that documents should remain under seal. See, e.g., Star Tribune, 659 N.W.2d at 295-97 (affirming trial court's order restricting public access to discovery material, even where trial court's order arguably may have been inconsistent with the Minnesota Government Data Practices Act); Anderson v. Cryovac, Inc., 805 F.2d at 14 (affirming trial court's decision to issue protective order restricting public access to discovery materials but reversing court's decision to apply restriction only to news media and not to individual members of the public); Cipollone v. Liggett Group, Inc., 785 F.2d at 1119-20 (remanding matter back to

trial court to apply a less demanding Rule 26 standard); United States v. Garrett, 571 F.2d 1323, 1329 (5th Cir. 1978) (refusing even to grant the requested discovery in the first place); General Dynamics Corp. v. Selb Mfg Co., 481 F.2d 1204, 1215 (8th Cir. 1973) (“We believe the entire matter of discovery and trial could have been handled in a manner which would have comported with justice for both sides. Answers to interrogatories could have been sealed except for the use of the parties and their counsel in the civil litigation.”).

II. THE MATTERS DISCLOSED IN THE THORNTON AFFIDAVIT AND MEMORANDUM ARE CONFIDENTIAL.

There seems to be no dispute between the parties that the underlying data from which Thornton constructed her preliminary, tentative estimates about employment decision-making at 3M is confidential. See Pls.’ Mem. Supp. Mot. Unseal at 4. The SPO recognizes, moreover, that underlying confidential data does not necessarily lose its protected status simply by virtue of being recompiled, analyzed, summarized, or otherwise reported in materials prepared by the parties and their expert witnesses. In fact, Section 10 recognizes that the very act of summarizing and/or analyzing individual pieces of confidential data may make expert reports and related filings confidential for other or additional reasons; namely, because it enables a degree of understanding of a complex organization (based on historical analysis, future projections, and other extrapolations) that an outsider or competitor could never hope to achieve, even if the competitor could glean some of the data on an anecdotal or *ad hoc* basis. The Named Plaintiffs would not be devoting time and money to the development of these statistical analyses unless they believed they had explanatory power. This same information attracts the interest of 3M’s competitors, hoping to understand, for example, how 3M allocates its leadership training resources, how it manages to retain employees (through compensation, promotion, and other practices) at greater than average rates, and how 3M envisions the size and shape of its current

management population, including those who have demonstrated the potential to assume more significant leadership.

As explained in detail in the accompanying Affidavit of Timothy J. Richmond Regarding Plaintiffs' Motion to Unseal Affidavit of Janet Thornton, PhD. ("Richmond Aff."), nearly all the data reported in the Thornton Affidavit is not publicized by 3M (either to outsiders or, in some cases, its own employees) and certainly not in the aggregated format that Thornton has prepared. See Richmond Aff. ¶¶ 4-9, 13. With respect to Executive Conference potential designation, for example, the individual employees assigned that designation typically are not aware of it, and the total number of such designations made each year are known to only a few executive and Human Resources personnel. See id. ¶ 8. All of this information would be extremely useful (and otherwise unavailable) to a competitor hoping to recruit talent away from 3M (or to stem the tide of potential departures to 3M) or arranging its succession planning and leadership development processes to mimic those of 3M (which is viewed as having a competitive advantage in these areas). See id. ¶¶ 10-12.

3M has devoted substantial resources to developing and implementing these personnel systems. The Named Plaintiffs' suggestion to hand over their details to the public would rob 3M of the competitive advantage it has earned through its own efforts. It is one thing to have a general sense of 3M's programs in this area; the confidential information in the Thornton Affidavit provides a much more complete picture of the size, scale, and overall scope of 3M's leadership development and succession planning programs. See id. ¶¶ 10-11.

A competitor, for example, that had access to the average merit salary increases 3M has given over the past four years, reported at Paragraph 12 of the Thornton Affidavit, could use that information to determine its own merit increases, based on the inference that 3M's success in retaining employees is based, at least in part, on providing a satisfactory level of compensation

increases each year. See Richmond Aff. ¶ 6. The competitor then could promise prospective employees annual merit increases that match 3M's historical increases, or promise current 3M employees increases at 1% or 2% above 3M's levels, if the employee were to leave 3M.

Promotion rates, like those reported in Paragraph 11 of the Thornton Affidavit, similarly could be used as a recruiting tool. A competitor, for example, could misconstrue the data Thornton reports to suggest to prospective employees (including current 3M employees) that they have limited chances for advancement at 3M. See Richmond Aff. ¶ 11. Confidential data regarding the percentage of 3M employees selected to participate in leadership development assignments and learning programs, such as ALDP and Six Sigma Black Belt/Master Black Belt assignments, or who receive Executive conference designations, data reported at Paragraphs 14-18 of the Thornton Affidavit, could be misused to even greater advantage by a competitor hoping to discourage a candidate about his or her long-term career potential at 3M. See Richmond Aff. ¶¶ 10-12.

This summary data, which depicts 3M's employment systems in operation, is deserving of protection both because it is the product of 3M's significant investment and because it would aid those in competition with 3M. See, e.g., C.A. Muer Corp. v. Big River Fish Co, 1998 WL 488007 at *4 (E.D. Pa. Aug. 10, 1998) (limiting access to discovery information that could be used by a competitor "for underbidding goods and services, for anticipatory expansion and for interfering with business operations"); Bergen Brunswick Corp. v. Ivax Corp., 1998 WL 113976 at *3 (S.D.N.Y. Mar. 12, 1998) (noting that "[p]otential damage from the release of sensitive business information has been deemed a ground for denying access to court documents" and collecting cases for similar propositions).

III. THE STIPULATION AND PROTECTIVE ORDER PROVIDES THE NAMED PLAINTIFFS' WITH A SUFFICIENT ABILITY TO DISSEMINATE CONFIDENTIAL EXPERT REPORTS AND RELATED MOTIONS WITHIN THE BOUNDARIES OF THIS ACTION.

Consistent with the foregoing principles, the SPO permits designation as "Confidential" of any document deemed to contain any confidential information about individual litigants, 3M employees, and of 3M as a company. See, e.g., Stipulation and Protective Order §§ 2, 10. The SPO, however, generally permits the Named Plaintiffs to review the Thornton Affidavit and Memorandum and to share these materials with other putative plaintiffs upon receiving assurances that such additional parties will respect the confidential nature of the materials. See id., § 10.

The Named Plaintiffs do not provide any reason why the Thornton Affidavit and Memorandum must be made public. Significantly, the Named Plaintiffs do not (because they cannot) contend that continuing to maintain these items under seal would prejudice them in any way in pursuing this action. They cannot, because the SPO provides them with the above-described broad liberty to utilize the Thornton Affidavit and Memorandum in this case – a set of liberties they do not mention to the Court.

A litigant's desire to publicize matters disclosed in pre-trial discovery is not a legitimate basis for denying protection under Rule 26. See, e.g., Miscellaneous Docket Matter # 1 v. Miscellaneous Docket Matter # 2, 197 F.3d 922, 926 (8th Cir. 1999) ("[D]iscovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titillate the public." (internal quotation omitted)); Damiano v. Sony Music Entertainment, Inc., 2000 WL 1689081 at *10 (D.N.J. Nov. 13, 2000) (ordering confidential treatment under protective order where it appeared that the plaintiff's purpose for seeking greater access to commercially sensitive information was to expose it to the public, including posting it on plaintiff's website).

IV. THE NAMED PLAINTIFFS HAVE AGREED THAT JUST THIS TYPE OF INFORMATION CAN BE DESIGNATED AS CONFIDENTIAL.

The Named Plaintiffs agreed that “proprietary information that has not been made publicly available regarding 3M’s employment policies, practices, and related training or learning programs” will remain confidential in this action. See Stipulation and Protective Order § 2. The information in the Thornton Affidavit and Memorandum comes squarely within this provision. As demonstrated above and in the Affidavit of Timothy Richmond, 3M has spent time and money to develop these systems and their attendant results. This information is not made publicly available. It is, therefore, proprietary. This information clearly involves 3M’s employment policies, practices, and related training or learning programs. Thus, it was agreed by both parties to be confidential. The Named Plaintiffs are bound by that agreement, and this Motion should be denied.

Presently, the Named Plaintiffs suffer no prejudice by maintaining the documents under seal. In contrast, unsealing Thornton’s preliminary “expert” propositions doubles the injury to 3M by giving confidential data about several core employment practices freely to those who compete with 3M for business and talent and by permitting the publicizing of an unflattering depiction of 3M that even Thornton admits is still preliminary and lacking her normal statistical rigor. See, e.g., Thornton Aff. ¶¶ 2, 5. The balance of interests informing the Court’s exercise of discretion on this issue strongly favors maintaining the confidentiality of the Thornton Affidavit and Memorandum; in fact, there is no countervailing reason to unseal such documents.

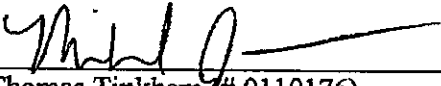
CONCLUSION

The Named Plaintiffs have not identified a single way in which maintaining the seal on the Thornton Affidavit and Memorandum impairs their ability to prosecute their claims, whereas 3M has identified numerous, specific ways in which it would be harmed by the public disclosure

of such materials. For all the foregoing reasons, 3M respectfully urges the Court to deny the Named Plaintiffs' unfounded and unnecessary Motion in its entirety.³

Dated: July 5, 2005

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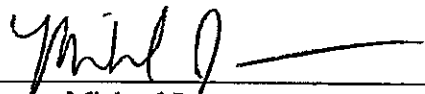
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ACKNOWLEDGMENT

The undersigned hereby acknowledges that sanctions may be imposed under Minn. Stat. § 549.211.

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³ If the Court grants Named Plaintiffs' Motion, 3M respectfully requests the Court also order unsealed the Siskin Affidavit and related Memorandum of Law in Opposition to Named Plaintiffs' Motion to Compel, filed June 3, 2005.