

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]

**REPLY 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

In opposing Plaintiffs' Motion to Unseal, defendant 3M ignores the critical language of the "Stipulation and Protective Order" ("SPO") addressing summaries of data. Instead, it engages in supposition and exaggeration concerning the supposed harm caused by unsealing, it manufactures some type of balancing test that appears nowhere in the SPO involving the extent to which plaintiffs would be harmed by continued sealing, and then it mischaracterizes the harm that plaintiffs would suffer if the two documents in question remain sealed. 3M thus has not carried its affirmative burden to justify continued sealing. The Court should enforce the SPO and unseal the expert affidavit and memorandum of law (together the "submissions") that are the subject of this motion.

ARGUMENT

I. 3M PRESENTS NO BASIS TO MAINTAIN THE SEAL BECAUSE NEITHER SUBMISSION INDEPENDENTLY MEETS THE CRITERIA FOR DESIGNATION AS CONFIDENTIAL

Under paragraph 10 of the SPO, the submissions may remain under seal only if they *independently* meet the definition of Confidential information contained in paragraph 2. 3M admits, albeit buried amidst its lengthy case analysis, that it “bears the burden of offering good cause to support” the continued sealing of the submissions. Memorandum of Law in Opposition to Plaintiffs’ Motion to Unseal (1) Affidavit of Janet R. Thornton, Ph.D. and (2) Memorandum of Law in Support of Plaintiffs’ Motion to Compel (“Def’s Mem.”) at 7. 3M argues that the submissions qualify for sealing because they reveal ““proprietary information that has not been made publicly available regarding 3M’s employment policies, practices, and related training or learning programs.”” *Id.* at 2 (quoting SPO, ¶ 2), 12.

The language of paragraph 10 of the SPO refutes 3M’s argument. It 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,” and then makes a critical comparison:

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.

This comparison makes clear that generalized statistical information does not rise to the level of “proprietary information ... regarding 3M’s employment policies, practices, and related training or learning programs.” SPO, ¶2. Before it may qualify as Confidential, the information must be at a level of specificity that allows persons to draw conclusions about how the policies or practices would apply directly to individuals with a particular set of relevant attributes.¹ And even after that hurdle is overcome, the party seeking to maintain a Confidential designation still bears the burden of showing that the information constitutes proprietary information.

If the language of a stipulated order is ambiguous, the Court may consider the negotiating history in construing it. *See Koecher v. Koecher*, 374 N.W.2d 542, 546 (Minn. Ct. App. 1985) (holding that trial court erred in refusing to consider parol evidence “in order to interpret the clause [in a stipulation that resolved divorce proceedings] as the parties intended” when language of the clause “is ambiguous”). Parol evidence is useful here to the extent that paragraph 10 is ambiguous.

The comparison in paragraph 10 cited in the block quote above was the last language negotiated in the stipulation. Instead of the second sentence that appears in that portion of the SPO, 3M originally proposed, “By comparison, a statistical analysis or summary of 3M’s average total compensation paid by job title, based on but not disclosing the actual compensation received by any individual employee ... may still be Confidential on the grounds that such a summary reveals proprietary data of 3M that would have unique value to 3M’s competitors seeking to recruit and hire for similar positions.” Reply Affidavit of Susan M. Coler in Support

¹ This language of the SPO also undermines 3M’s argument that “proprietary” information, as that term is used in paragraph 2, means only information that “is not made publicly available” and that “3M has spent time and money to develop.” Def’s Mem. at 12. In addition, revelation of the information at minimum must “have significant value” to 3M’s competitors. SPO, ¶ 10.

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 ("Coler Aff."), Ex. 1. Plaintiffs countered with the language appearing in the SPO. Plaintiffs explained to 3M:

We suggest this language because we do not believe that "average total compensation paid by job title" would tell a competitor anything of value. If our statistical expert performed an analysis of compensation that controlled only for job title, 3M would seek to have the expert disqualified. Presumably, for a competitor to acquire a significant advantage, it would have to know not only how much was paid on average to persons with a particular job title, but also on average the impact of level of degree (bachelors, masters, doctorate), years of experience, and possibly other factors on compensation for persons in that job title.

Id.

Plaintiffs thus informed 3M what level of detail plaintiffs believed would be necessary in order for a statistical analysis to qualify as Confidential. 3M did not indicate any disagreement with this analysis. Instead, its counsel merely reported four days later, "I believe we can accept your proposal," and thereafter circulated a version of the SPO including plaintiffs' proposed language. *Id.*, Ex. 2.²

Notwithstanding the language and history of paragraph 10, 3M now seeks to maintain the seal on the submissions because of analyses no different in level of reported detail than the hypothesized "summary of the overall distribution of performance ratings at 3M." 3M contends that competitors could use Dr. Thornton's preliminary analyses of average merit salary increases and rates of promotions and of selections for ALDP and Black Belt/Master Black Belt

² Knowing that the comparison between the two examples in paragraph 10 undercuts its argument, 3M dismisses the language as "intended to be illustrative (not exhaustive or conclusive)." Def's Mem. at 4. While it is true that the examples were chosen for "illustrative purposes only," this history shows that they were drafted with care in order to illustrate what the parties meant in the preceding sentence of the paragraph.

assignments and Executive conference designations to recruit 3M employees or parry 3M's recruitment efforts. Def's Mem. at 9-10.

In her preliminary analyses, Dr. Thornton had time and/or information to control only for job title, grade, and time of promotion, *i.e.*, little more than the type of analysis that 3M proposed in its example that plaintiffs did not consider constituted Confidential information. Thornton Aff. of May 20, 2005, ¶ 6. In reporting the results, Dr. Thornton did not break out her analyses for each job title (as 3M hypothesized in its example rejected by plaintiffs) or job grade. Rather, she aggregated the results for each pool (defined by all people with the same job title and grade at the studied point in time) and reported only overall numbers. *Id.*, ¶¶ 11, 12, 14, 17. Those summary tables show overall averages for the exempt salaried workforce as a whole, similar in detail to a "summary of the overall distribution of performance ratings at 3M." The tables that 3M claims to fear say nothing about the chances of promotion or Black Belt selection for an employee in a particular job and grade with a given level of degree, years of experience, and other relevant factors, other than that, if that person was 55, s/he probably would have a much lower chance of promotion or selection than if s/he was 35.

Because of the level of generality in the results reported by Dr. Thornton, it is unfathomable that the submissions, if revealed publicly, will result in the recruiting harm conjured up by 3M. *See CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154-55 (D.C. Cir. 1987) (rejecting employer's arguments against release of information under FOIA that "revelation of applicant flow data ... would enable competitors [to] more easily ... direct their recruiting efforts to the best sources of potential employees," when agency counters that data "will not be of any

particular help to competitors since the ... categories are broad").³ 3M's affiant, Timothy J. Richmond, does not mention one instance in which 3M lost a recruitment battle because of disclosure of information on this level of generality, or won a recruitment battle against a competitor based on such information.

Certainly he had opportunity to observe such impact because 3M has not hesitated to reveal information about its personnel practices publicly at a similar level of numerical generality to the information in Dr. Thornton's report. For example, the cover story in the March 16, 2004 edition of *Human Resource Executive* reported that 3M had trained 1,000 Black Belts and Master Black Belts during the four years beginning in 2001. *Coler Aff.*, Ex. 3. A corporate fellow at the Department of Defense reported that, when the program was fully developed, 3M planned to sustain 400 Black Belt and 75 Master Black Belt positions. *Id.*, Ex. 4 at 21. More important, 3M publicly has revealed great detail about the operations and benefits of its Black Belt, ALDP, and performance appraisal systems, information undoubtedly of far greater use to competitors than are data concerning the number of participants or rates of selection for participation in the programs. *Id.*, Exs. 3, 4, 5.

Finally, Richmond repeats numeric detail from the Thornton Affidavit in paragraphs 4 and 11 of his affidavit, and provides additional numeric information about the Executive Conference in paragraph 8. *See Richmond Aff.*, ¶¶ 4, 8, 11. *3M did not even file the Richmond*

³ None of the cases relied on by 3M deal with the sealing of employment data. *See, e.g., Star Tribune v. Minnesota Twins P'ship*, 659 N.W.2d 287 (Minn. Ct. App. 2003) (personal financial information); *SEC v. TheStreet.com*, 273 F.3d 222 (2d Cir. 2001) (illegal profit-sharing at the NYSE); *Miscellaneous Docket Matter 1 v. Miscellaneous Docket Matter 2*, 197 F.3d 922 (8th Cir. 1999) (voluntary personal relationships); *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986) (contamination of a town's water supply); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986) (products liability suits against tobacco companies); *United States v. Garrett*, 571 F.2d 1323 (5th Cir. 1978) (tax dispute); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204 (8th Cir. 1973) (criminal proceedings).

affidavit under seal. The company's failure to protect its own recitation of such information casts doubt on its value to 3M's competitors.

In combination, the generalized nature of the information in Dr. Thornton's report, the lack of any concrete details about the alleged harm that its revelation would cause, and 3M's own revelation of information about its personnel practices that could far more readily be termed "proprietary," make 3M's expressed fears both speculative and grossly exaggerated. 3M's showing falls far short of its burden to show with specificity alleged competitive harm justifying sealing under the SPO. *See Smith v. BIC Corp.*, 869 F.2d 194, 201 (3d Cir. 1989) (trade secret protection must be grounded on proof that "serious harm and embarrassment [is likely] as a result of the public disclosure") (emphasis added); *Cipollone*, 785 F.2d at 1121 ("broad allegation[s] that disclosure will result in injury to [a firm's] reputation" does not justify protective order based on claim of "disclosure of trade secrets").

II. PLAINTIFFS' INTEREST IN UNSEALING IS IRRELEVANT TO THE ANALYSIS UNDER THE SPO, BUT THAT INTEREST IS SUBSTANTIAL

Unwilling to limit itself to the proper analysis under paragraph 10 of the SPO, 3M seeks to insert into the SPO a balancing test requiring the Court to weigh possible harm to 3M from unsealing against possible harm to plaintiffs from continued sealing. The SPO does not contain any type of balancing process. If 3M wanted balancing, it either had to convince plaintiffs to agree to it or to ask the Court to impose it as part of a protective order. It attempted neither, and should not be allowed now, after the parties have agreed and the Court has signed the SPO, to introduce a "balanc[ing] of interests" into the process. Def's Mem. at 12.

Nonetheless, plaintiffs' interest in unsealing the submissions is substantial. 3M points out, correctly, that plaintiffs could show the submissions to interested members of the putative class who signed a statement acknowledging that they were bound by the SPO, even if the

submissions remain under seal. Def's Mem. at 11. Putative class members who already have contacted plaintiffs' counsel, however, are only a small percentage of the persons whom counsel hope to reach. Many more class members have not yet contacted plaintiffs' counsel than have done so, and they will not see the submissions if they first have to sign an acknowledgement to the SPO. Moreover, former 3M employees above the class level – the persons with the most relevant evidence with whom counsel can speak *ex parte* – cannot see a sealed document even if they sign acknowledgements. Finally, as the number of persons wanting to review a document such as the submissions increases – and there are thousands of potential class members – the logistics of individual transmissions of copies to each individual become more and more difficult.

Plaintiffs' counsel created a website dedicated to this case to communicate publicly available information to all interested persons, and if the submissions are unsealed, would post the submissions there. The website serves the significant purpose of allowing persons to obtain information about the case without threat of the disclosure of their names to 3M. Plaintiffs hope that the submissions, along with other information on the website, will help spur additional class members and non-class members to contact counsel – a process important and necessary to counsel's responsible investigation of the facts of this case.

Plaintiffs do not intend, however, to mislead persons into participating in this lawsuit. 3M asks in a footnote that the Court unseal the affidavit of Dr. Bernard Siskin and 3M's related memorandum of law if it unseals plaintiffs' submissions. Def's Mem. at 13 n.3. Actually, 3M did not file its memorandum under seal, so only Dr. Siskin's affidavit requires unsealing. Plaintiffs agree to this request. With their reply memorandum, plaintiffs have filed an amended proposed order that includes the unsealing of Dr. Siskin's affidavit. Plaintiffs additionally

pledge that, if the documents are unsealed, both affidavits and both sets of memoranda will be posted on the website.⁴

CONCLUSION

For the reasons stated above, and in plaintiffs' previously filed memorandum of law, the Court should unseal the Affidavit of Janet R. Thornton, Ph.D., the Memorandum in Law in Support of Plaintiffs' Motion to Compel, and the Affidavit of Bernard R. Siskin, according to the terms of the SPO entered in this case.

DATED: July 8, 2005

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⁴ Plaintiffs make this pledge because the purpose of their counsel is not, as 3M would have it, "to annoy and inconvenience 3M." Def's Mem. at 1-2. Rather, it is to prosecute the claims zealously and professionally within the bounds of the ethical rules. As both plaintiffs' briefs and oral arguments in connection with the motions argued June 10 made clear, the submissions both provided direct support for plaintiffs' arguments on those motions and responded to 3M's repeated attacks on the viability of the claims. Having filed the submissions for legitimate reasons, plaintiffs should be able to have them unsealed in accordance with the terms of the SPO, and plaintiffs should be permitted to make such a request without having the motives of their counsel maligned.

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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: July 8, 2005


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