

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE**

KATHERINE O'HAVER,)	
)	
Plaintiff,)	
)	Case No. 1816-CV30710
vs.)	Division 12
)	
ANESTHESIA ASSOCIATES OF KANSAS)	
CITY, P.C., et al.,)	
)	
Defendants.)	

SPECIAL MASTER ORDER NO. 2

On May 16, 2022, Defendants 3M Company and Arizant Healthcare Inc. filed a Motion for Protective Order to Keep Confidential Certain Documents. Plaintiff filed a Motion to Remove Confidential Designation of Documents on May 19, 2022. Those two motions generally deal with the same issue; it involves the same eight exhibits/documents. The parties have filed responses and replies to the two motions and on June 14, 2022, held an hour and 45-minute oral argument with this Special Master in regard thereto. This Special Master now takes those motions up for decisions. The Special Master being fully advised in the premises and having reviewed the motions, responses, replies, exhibits, court decisions, and Missouri Rules of Civil Procedure makes the following findings and orders in the matter. Both Motions are sustained in part and overruled in part.

The Defendants' motion is considered first because rulings on that motion will effect the Order on the Plaintiff's motion.

The Defendants argue that the designation of the eight documents referred to in Defendants' motion would create a risk of competitive harm to 3M. While there is a presumption of open records in Missouri there are exceptions that limit that presumption. Competitive sensitive

information is one such recognized exception. See Missouri Rules of Civil Procedure Rule 56.01(c)(7). Defendants argue that Missouri Courts use the following criteria to determine whether information is confidential:

1. The extent to which the information is known outside the business;
2. The extent to which the information is known to those involved in the business;
3. The extent of the measures taken to guard the secrecy of the information; and
4. The value of the information to the business and its competitors. See *State ex rel. v Wright v Campbell* 938 S.W.2d 640 (Mo.APP1997).

Defendants further argue that the MDL and Eighth Circuit U.S. Court of Appeals determined that the information in these eight documents involve the confidential nature of 3M's sales data and strategy, scientific and technical data analysis and planning.

Plaintiff argues there is a presumption in favor of court records being open to the public. See *Brewer v Cosgrove* 498 S.W.3d 837 (Mo.APP.2016). Plaintiff further argues that the party seeking secrecy has the burden of proving confidentiality is necessary under limited circumstances and must show good cause which is established only if specific examples of harm are shown. Plaintiff argues throughout its response 3M has failed to show a specific actual or potential harm to warrant protection as confidential.

On October 19, 2020, this Court entered a Protective Order. Confidential information was defined therein to include "...trade secrets or other confidential information such as research, development, or commercial information as contemplated by Rule 56.01(c)(7) as well as other competitively sensitive information that would more likely than not cause competitive harm or injury to the designating party if disclosed..."

I find that Exhibits numbered Exhibit 1, Bates No. 3MBH00297650-63; Exhibit 3, Bates No. 3MBH0047439-42; Exhibit 4, Bates No. 3MBH01617179-81; Exhibit 5, Bates No. 3MBH00529150-51; and Exhibit 8, Bates No. 3MBH01332558 are appropriately held back as confidential and fall within the terms necessary under Missouri law to remain confidential. I find

that Exhibit 2, Bates No 3MBH00982932-33 which is a string of emails sent in 2007; Exhibit 6, Bates No. 3MBH01260231-32 a string of emails written in 2002 between an employee of 3M and non-employees of 3M; and Exhibit 7, Bates No. 3MBH02087963-69 a 2014 string of emails, to be outside of the bounds of the definition of Confidential Information to be protected under the Protective Order entered by this Court on October 19, 2020 or Missouri law.

Taking up the Plaintiff’s Motion I make the following findings. The exhibits I have held herein in response to Defendants’ to be confidential or not confidential shall remain so for Plaintiff’s Motion.

Plaintiff’s Motion discusses the following depositions and transcription receipt dates:

DEPONENT	DATE OF DEPOSITION	DATE DEPOSITION TRANSCRIPT RECEIVED BY ATTORNEY
Al Van Duren	January 25, 2022	February 1, 2022
May Issa	February 3, 2022	February 14, 2022
Dr. Jason Bible	March 8, 2022	April 4, 2022
Dr. Gregory Ballard	March 9, 2022	March 21, 2022
Al Van Duren (Corp. Rep.)	April 14, 2022	April 26, 2022
Al Van Duren	April 15, 2022	April 26, 2022

Throughout those depositions there were substantial questions and testimony concerning portions of the eight exhibits referenced in these motions The Protective Order in summary provided that a party must designate as confidential deposition testimony before the close of the deposition or within 21 days after receipt of the deposition transcript. The Protective Order on October 19, 2020, in Section 3.2b states in part “... deposition testimony shall be treated as confidential until the lapse of the 21-day deadline. After such time only those portions of the

testimony that are appropriately designated for protection shall be covered by the provisions of this Order”. For some unknown reason the Defendants did not designate any portion of the deposition testimony as confidential during the depositions or during the 21-day period following receipt of the deposition transcript period. They finally did so on May 27, 2022. Evidently, the Defendants did not designate portions of the depositions as confidential until the Defendants realized that the Plaintiff was the taking the appropriate position that the depositions were not confidential. The Defendants have not provided any credible reason for such delay.

While on several of the depositions the court reporter affixed the legend “confidential” the court reporter evidently did so without instruction from a party and that designation is therefore held for naught.

Defendants argue that Plaintiff’s counsel by reading portions of the confidential exhibits into the record have in some way worked around the confidentiality designation. That may be true, but the questions propounded by Plaintiff’s counsel in such depositions were legitimate questions of appropriate issues to be raised to the deponent. Further the Defendants had ample opportunity to designate the deposition questions and answers as confidential under the October 19, 2022, Protective Order but simply failed to timely do so.

Therefore, the deposition transcripts themselves, exclusive of the exhibits I have in this Order held to be confidential, are found to be not confidential.

IT IS SO ORDERED.

Dated: 06/21/2022



Leland Shurin
Special Master