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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

U.S. EQUAL EMPLOYMENT)
OPPORTUNITY COMMISSION,)
)
Plaintiffs,)
vs.)
GNLV CORP., etc., et al.,)
Defendants.)

Case No. 2:06-cv-01225-BES-PAL

**PROTECTIVE ORDER
GOVERNING CONFIDENTIALITY
OF DOCUMENTS**

The court conducted a hearing on February 12, 2008 on a series of motions concerning the parties' discovery disputes. The court has entered a separate Order (#31) resolving those discovery disputes, the time has run for filing objections, and no objections have been filed. This protective order is entered to protect the confidentiality of documents produced in pretrial discovery in this case.

The defendant requests that the court enter a protective order in the form approved in the United States District Court for the Eastern District of California attached as Exhibit "14" to the Defendant's Motion for Protective Order (#17). The EEOC suggested alternative language in its Opposition to Defendant's Motion for Protective Order (#23). During oral argument at the hearing conducted February 12, 2008, counsel for the EEOC indicated she would not oppose entry of a protective order in the form attached as Exhibit "7" to Defendant's Reply (#28) which the EEOC stipulated to in an order entered in another case in this district. That protective order governed confidentiality of documents from personnel files the parties anticipated would be disclosed in discovery. Counsel for the defendant indicated that he had no objection to the proposed protective order attached as Exhibit "7," provided it was expanded in scope to include documents in addition to personnel files and records produced in this case during discovery.

BACKGROUND

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2 This is an action by the U.S. Equal Employment Opportunity Commission (“EEOC”) against
3 defendant GNLV Corp., d/b/a Golden Nugget Hotel and Casino, which alleges the defendant subjected
4 a class of employees to a hostile work environment based on their race and sex. The EEOC brought
5 this action on behalf of a charging party, and other similarly situated employees. The EEOC alleges the
6 unlawful conduct occurred “since at least September 1, 2002.” In the current motion, the defendant
7 seeks a protective order protecting the confidential nature of records and documents the parties
8 anticipate will be produced in discovery in this case. The defendant asks for a protective order
9 maintaining the confidentiality of employment records of its employees or former employees who are
10 not parties or class members, financial and proprietary information and the identification of its
11 customers’ names, addresses, telephone numbers, and other “customer-related information.” The court
12 has compelled the defendant to supplement its discovery responses to provide information from
13 employee files and customer complaints related to the types of claims the EEOC has asserted in this
14 complaint. The court has also ordered that the defendant produce non-public financial information in
15 the event the EEOC prevails on a punitive damage claim after dispositive motions are decided.
16 Additionally, the court compelled the EEOC to produce employment records, tax records, and medical
17 records and information for employees on whose behalf the EEOC seeks to recover damages. While
18 the EEOC initially resisted entry of the protective order, during oral argument counsel for the EEOC
19 agreed privacy concerns in certain categories of documents justified entry of a protective order to
20 preserve confidentiality.

DISCUSSION

A. Protective Orders

22 Fed. R. Civ. P. 26(c) permits the court in which an action is pending to “make any order which
23 justice requires to protect the party or person from annoyance, embarrassment, oppression or undue
24 burden or expense” upon motion by a party or a person from whom discovery is sought. The burden of
25 persuasion under Fed. R. Civ. P. 26(c) is on the party seeking the protective order. Cipollone v. Liggett
26 Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986). To meet that burden of persuasion, the party seeking
27 the protective order must show good cause by demonstrating a particular need for the protection sought.
28

1 Beckman Indus., Inc., v. Int'l. Ins. Co., 966 F.2d 470, 476 (9th Cir. 1992). Rule 26(c) requires more
2 than “broad allegations of harm, unsubstantiated by specific examples or articulated reasoning.” Id.,
3 citing Cipollone v. Liggett. “A party asserting good cause bears the burden, for each particular
4 document it seeks to protect, of showing that prejudice or harm will result if no protective order is
5 granted.” Foltz v. State Farm, 331 F.3d 1122, 1130 (9th Cir. 2003), citing San Jose Mercury News,
6 Inc., v. District Court, 187 F.3d 1096, 1102 (9th Cir. 1999).

7 In Seattle Times Co. v. Rhinehart, the Supreme Court interpreted the language of Fed. R. Civ. P.
8 26(c) as conferring “broad discretion on the trial court to decide when a protective order is appropriate
9 and what degree of protection is required.” 467 U.S. 20, 36 (1984). The Supreme Court acknowledged
10 that the “trial court is in the best position to weigh fairly the competing needs and interests of the parties
11 affected by discovery. The unique character of the discovery process requires that the trial court have
12 substantial latitude to fashion protective orders.” Id. Although the trial court has broad discretion in
13 fashioning protective orders, the Supreme Court has also recognized “a general right to inspect and
14 copy public records and documents, including judicial records and documents.” Nixon v. Warner
15 Communications, 435 U.S. 589, 597 (1978). However, the common law right to inspect and copy
16 judicial records is not absolute. Id. Thus, the Supreme Court concluded, “[e]very court has supervisory
17 power of its own records and files, and access has been denied where the court files might have become
18 a vehicle for improper purposes.” Id.

19 **B. The Presumption of Public Access**

20 Unless court records are of the type “traditionally kept secret” the Ninth Circuit recognizes a
21 “strong presumption in favor of access.” Foltz v. State Farm Mutual Auto Insurance Company, 331
22 F.3d 1122, 1135 (citing Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995)). Grand jury
23 transcripts and warrant materials involved in pre-indictment investigations are two categories of
24 documents and records which have “traditionally been kept secret for important policy reasons.” Times
25 Mirror Co. v. United States, 873 F.2d 1210, 1219 (9th Cir. 1989). Although the federal common law
26 right of access exists, it “does not mandate disclosure in all cases.” San Jose Mercury News, Inc., 187
27 F.3d at 1102. The strong presumption in favor of public access recognized by the Ninth Circuit “can be
28 overcome by sufficiently important countervailing interests.” Id.

1 **1. Pretrial Discovery**

2 In the Ninth Circuit, “[i]t is well-established that the fruits of pretrial discovery are, in the
3 absence of a court order to the contrary, presumptively public.” San Jose Mercury News v. United
4 States District Court, 187 F.3d 1096, 1103 (9th Cir. 1999). Thus, the Ninth Circuit concluded,
5 “[g]enerally, the public can gain access to litigation documents and information produced during
6 discovery unless the party opposing disclosure shows ‘good cause’ why a protective order is necessary.”
7 Phillips v. General Motors, 307 F.3d 1206, 1210 (9th Cir. 2002). “For good cause to exist, the party
8 seeking protection bears the burden of showing specific prejudice or harm will result if no protective
9 order is granted.” Id. at 1210-11. Or, as the Ninth Circuit articulated the standard in Foltz, “[t]he
10 burden is on the party requesting a protective order to demonstrate that (1) the material in question is a
11 trade secret or other confidential information within the scope of Rule 26(c), and (2) disclosure would
12 cause an identifiable, significant harm.” Foltz at 1131, quoting Deford v. Schmid Prods. Co., 120
13 F.R.D. 648, 653 (D. Md. 1987). “If a court finds particularized harm will result from disclosure of
14 information to the public, then it balances the public and private interests to decide whether a protective
15 order is necessary.” Id. at 1211 (citing Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir.
16 1995)).

17 **2. Sealed Discovery Documents**

18 In Phillips, the Ninth Circuit carved out an exception to the presumption of public access,
19 holding that the presumption does not apply to materials filed with the court under seal subject to a
20 valid protective order. 307 F.3d at 1213. The Phillips decision relied on the Seattle Times decision in
21 concluding that protective orders restricting disclosure of discovery materials which are not admitted in
22 evidence do not violate the public right of access to traditionally public sources of information. Id. at
23 1213 (quoting, Seattle Times, 467 U.S. at 33. The Ninth Circuit reasoned that the presumption of
24 public access was rebutted because a district court had already determined that good cause existed to
25 protect the information from public disclosure by balancing the need for discovery against the need for
26 confidentiality in issuing the protective order. Id. Therefore, “when a party attaches a sealed discovery
27 document to a non-dispositive motion, the usual presumption of the public’s right of access is
28 rebutted.”

1 **3. Materials Attached to Dispositive Motions**

2 The Ninth Circuit recently and comprehensively examined the presumption of public access to
3 judicial files and records in Kamakana v. City and County of Honolulu, 447 F.3d 1172 (9th Cir. 2006).
4 There, the court recognized that different interests are at stake in preserving the secrecy of materials
5 produced during discovery, and materials attached to dispositive motions. Citing Phillips and Foltz, the
6 Kamakana decision reiterated that a protective order issued under the Rule 26(c) may be issued once a
7 particularized showing of good cause exists for preserving the secrecy of discovery materials. “Rule
8 26(c) gives the district court much flexibility in balancing and protecting the interests of private
9 parties.” 447 F.3d at 1180. The Kamakana court, therefore, held that a “good cause” showing is
10 sufficient to seal documents produced in discovery. Id.

11 However, the Kamakana decision also held that a showing of “compelling reasons” is needed to
12 support the secrecy of documents attached to dispositive motions. A showing of “good cause” does not,
13 without more, satisfy the “compelling reasons” test required to maintain the secrecy of documents
14 attached to dispositive motions. Id. The court found that:

15 Different interests are at stake with the right of access than with
16 Rule 26(c); with the former, the private interests of the litigants are not
17 the only weights on the scale. Unlike private materials unearthed during
18 discovery, judicial records are public documents almost by definition, and
19 the public is entitled to access by default. (Citation omitted). This fact
20 sharply tips the balance in favor of production when a document formally
sealed for good cause under Rule 26(c) becomes part of the judicial
record. Thus, a “good cause” showing alone will not suffice to fulfill the
“compelling reasons” standard that a party must meet to rebut the
presumption of access to dispositive pleadings and attachments.

21 Id. Kamakana recognized that “compelling reasons” sufficient to outweigh the public’s interests in
22 disclosure and justify sealing records exist when court records may be used to gratify private spite,
23 permit public scandal, circulate libelous statements, or release trade secrets. Id. at 1179 (internal
24 quotations omitted). However, “[t]he mere fact that the production of records may lead to a litigant’s
25 embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court
26 to seal its records.” Id., citing, Foltz, 331 F.3d at 1136. To justify sealing documents attached to
27 dispositive motions, a party is required to present articulable facts identifying the interests favoring
28 continuing secrecy, *and* show that these specific interests overcome the presumption of public access by

1 outweighing the public’s interests in understanding the judicial process. Id. at 1181 (internal citations
2 and quotations omitted).

3 **ANALYSIS**

4 The parties seek a protective order governing confidentiality of materials produced in pretrial
5 discovery. The court finds the parties have established good cause for maintaining the confidentiality
6 of private materials produced during discovery. Specifically, the court finds that discovery materials
7 consisting of documents and records contained in personnel files, medical files and records, and tax
8 files and records implicate the privacy rights of both parties and non-parties and should be protected
9 from public disclosure during discovery. Similarly, the court finds that defendant’s financial and
10 accounting information which is treated as confidential proprietary information by the defendant
11 deserves protection from public disclosure during discovery. Finally, defendant’s customer information
12 which defendant treats as confidential and proprietary deserves protection during the discovery phase of
13 the litigation.

14 The form of protective order the defendant requests has provisions which would require
15 documents designated as confidential information by a party attached to any applications or motions to
16 be submitted under seal. However, neither party has attempted to make a showing of “compelling
17 reasons” to maintain the secrecy of documents attached to dispositive motions. This protective order
18 governing confidentiality will protect private and confidential documents and records produced in
19 discovery from public disclosure. However, any party wishing to seal any documents attached to a
20 dispositive motion will be required to make a showing of compelling reasons to maintain the secrecy of
21 documents attached to any dispositive motions filed in this case. The parties may, however, redact
22 personal data identifiers covered by the policy of the Judicial Conference of the United States and the
23 E-Government Act of 2002 from any document attached to dispositive motions filed in this case
24 without seeking further leave of the court. See the court’s Special Order 108 (requiring parties filing
25 papers with personal identifiers to redact documents containing social security numbers, names of
26 minor children, dates of birth, financial account numbers, and home addresses).

27 To protect the privacy, confidentiality, and proprietary interests of the parties and non-parties to
28 discovery materials produced in this case,

1 **IT IS ORDERED:**

- 2 1. Documents produced in discovery which consist of employment records of the defendant
3 related to employees or former employees who are not parties or class members in this
4 litigation, medical files and records, and tax files and records produced in discovery shall
5 not be used for any purpose unrelated to the preparation for and trial of this matter
6 except upon consent of the person(s) whose records are produced, or upon further order
7 of the court.
- 8 2. Financial information which the defendant considers in good faith to constitute
9 confidential commercial information such as its financial statements, non-public annual
10 reports, balance sheets, assets and liabilities statements, and profit and loss statements
11 shall not be used for any purpose unrelated to the preparation for and trial of this action
12 except upon consent of the defendant or upon further order of the court.
- 13 3. Customer lists and personal identifiers of customers which defendant considers in good
14 faith to constitute confidential proprietary and commercial information shall not be used
15 for any purpose unrelated to the preparation for and trial of this action except upon
16 consent of the person(s) whose records are produced, or upon further order of the court.
- 17 4. Any documents designated as confidential and subject to this protective order which are
18 attached to, referred to, or are exhibits to any non-dispositive motion, brief,
19 memorandum, document, or transcript filed in this case shall be filed in a sealed
20 envelope bearing the following legend:

21 **Confidential Materials Subject to Protective Order (Filed under Seal)**

- 22 5. No documents which are filed with the court as attachments to a summary judgment or
23 other dispositive motion may be filed under seal unless the proponent seeking protected
24 status for the document(s) establishes “compelling reasons” to rebut the presumption of
25 public access to dispositive pleadings and attachments.
- 26 6. Any party seeking to seal attachments to a motion for summary judgment or other
27 dispositive motion filed with the court shall submit the documents they propose to file
28 under seal for *in camera* review with a memorandum presenting articulable facts

1 identifying the interests favoring continuing the secrecy of the attachments, and showing
2 that these specific interests outweigh the public's interests in disclosure sufficient to
3 overcome the presumption of public access to dispositive pleadings and attachments.

4 7. Any application to seal documents attached to a motion for summary judgment or other
5 dispositive motion shall be served on opposing counsel together with the documents
6 filed under seal and submitted to the court for *in camera* review. Opposing counsel shall
7 have fifteen days from service of any application to seal documents attached to a motion
8 for summary judgment or other dispositive motion in which to file a response.

9 8. At the conclusion of this action (including any appeals) and unless the court orders
10 otherwise, any files and records produced in discovery which are covered by this
11 protective order shall be destroyed according to the EEOC's Records Disposition
12 Program, EEOC Directives, Transmittal 201.001, and shall not be released to the public.

13 Dated this 21st day of March, 2008.

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16 PEGGY A. LEEN
17 UNITED STATES MAGISTRATE JUDGE
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