
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting Network, Inc.,
an Illinois non-profit corporation, and
Danny Lee Shelton, individually,

Case No. 07-40098-FDS

Plaintiffs,

v.

Gailon Arthur Joy and Robert Pickle,

Defendants.

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION TO ENFORCE PROTECTIVE ORDER**

INTRODUCTION

Plaintiffs Three Angels Broadcasting, Inc. ("3ABN") and Danny Lee Shelton ("Shelton") have moved, pursuant to the terms of the Confidentiality and Protective Order entered in this case [Doc. No. 60] (the "Protective Order"), for an order directing the Defendants to maintain the confidentiality of a two-page document that they stamped as confidential and produced to Defendants in response to discovery requests. Defendants have indicated that it is their intention to use the document in connection with an unidentified motion to be filed in the near future.

FACTS

1. On April 17, 2008, this Court issued the Protective Order [Doc. 60], which provides in part as follows:

If any non-designating party or their counsel intends to use ... for the purpose of any motion filed with the Court, any documents ... which have been designated as Confidential Information, he/she shall so advise

designating party's counsel seven (7) days prior to such use, and counsel for all parties shall confer in an effort to agree upon a procedure to maintain the confidentiality of such Confidential Information. If no agreement is reached, the matter shall be submitted to the Court by the party opposing the use of Confidential Information by motion with the material at issue filed under seal per the provisions of Local Rule 7.2. (Doc. 60 ¶ 3).

2. The Protective Order defines "Confidential Information" as follows:

"Confidential Information" as used herein means any type or classification of information in any of the Subject Discovery Materials which is designated as "CONFIDENTIAL" by one of the parties, or a third party (the "designating party"), in accordance with this Order.

Confidential Designation

1. Whenever the designating party determines that a disclosure of the Subject Discovery Materials will reveal matters that such party believes in good faith are not generally known or readily available to the public, and that such party deems to constitute proprietary information, confidential business or commercial information, and/or trade secrets relating to its business, such party has the right to designate such information as confidential. In the case of written information, this designation must be made by marking the page or pages where such Confidential Information is contained, "CONFIDENTIAL", either prior to its disclosure to the other party (the "receiving party") or at the time a copy(ies) of such written information is provided to the receiving party. (ECF Doc. 60 p. 2).
3. On June 27, 2008, Plaintiffs produced a set of documents to the Defendants which included a two-page document authored by Dr. Walter Thompson, Chairman of the Board of Plaintiff Three Angels Broadcasting Network, Inc. ("3ABN"), which was labeled for purposes of the document production with the page numbers "TABN002620" and "TABN002621." Both pages of the "Thompson Memo" were labeled "CONFIDENTIAL." (Affidavit of M. Gregory Simpson ¶ 1 and Exhibit 1).

4. The designated document is self-evidently an internal business record of Plaintiff Three Angels Broadcasting Network (“3ABN”) in which an 3ABN’s Chairman of the Board, Walt Thompson, memorializes actions taken with respect to a workplace personnel dispute among staff at 3ABN’s wills and trust department. (Simpson Aff. ¶ 2). The only recipient of the email memo is Mollie Steenson, an employee of 3ABN. (*Id.*).
5. Because this document was an internal record pertaining to 3ABN’s investigation and handling of an employment dispute within 3ABN, 3ABN produced it subject to the Protective Order and stamped it as “Confidential.”
6. On September 10, 2008, Defendant Robert Pickle sent an email indicating that “We are considering filing TABN002620 and TABN002621 as exhibits in connection with a pleading, and are giving you notice as required by the Confidentiality Order.”
7. There followed an exchange of email correspondence between counsel for Plaintiffs and the Defendants in which Plaintiffs advised that Defendants were free to use the document so long as it was filed under seal, and so long as any written material revealing the contents of the document was also filed under seal. Defendants were unwilling to accept this limitation. Redaction of sensitive information was explored but rejected because the portion of the document that Defendants wanted to use included the sensitive information. Simpson Aff. ¶ 3 and Ex. B.

ARGUMENT

The terms of the Protective Order are simple: Any discovery material that a party reasonably believes to be a business record that is not generally available to the public may be designated as “Confidential Information.” (Protective Order p. 2). Once designated as such, the discovery material may not be disclosed to the public. The standard for “Confidential Information” set forth in the Protective Order is matter that the producing party “believes in good faith are not generally known or readily available to the public, and that such party deems to constitute proprietary information, confidential business or commercial information, and/or trade secrets relating to its business.”

This standard is consistent with Federal Rule of Civil Procedure 26(c)(7), which allows for protection of “other confidential...or commercial information...” “The subject matter of confidential business information is broad, including a wide variety of business information.” *Miles v. Boeing Co.*, 154 F.R.D. 112, 114 (E.D. Pa. 1994) (citation omitted). Federal courts have routinely entered orders that restrict the use of various financial and other confidential commercial information so that it may be disclosed only to the requesting party’s attorneys and experts. *See Covey Oil Company v. Continental Oil Company*, 340 F. 2d 993, 999 (10th Cir. 1965) (restricting disclosure of pricing information to attorneys and experts); *GTE Products Corp. v. GEE*, 112 F.R.D. 169, 172 (D. Mass. 1986) (finding “no basis in law for the Defendant’s contention that they have the right to have confidential commercial information of competitors disclosed to them in addition to having the information disclosed to their attorneys.”); *Chesa Intern., Ltd. v. Fashion Associates, Inc.*, 425 F. Supp. 234, 237 (S.D.N.Y. 1977) (upholding the Master’s ruling that names of Defendant’s customers could be disclosed only to Plaintiff’s attorneys); *Maritime Cinema Service Corp. v. Movies En Route, Inc.*, 60

F.R.D. 587, 590 (S.D.N.Y. 1973) (disclosure of Defendant's fees and oral agreements with customers limited to Plaintiff's counsel). Plaintiffs' financial, audit and business accounting information certainly falls within this category of commercial documents warranting protection.

The Thompson Memo meets the definition of Confidential Information in the Protective Order because it is an internal record pertaining to an internal 3ABN personnel issue. Therefore, Plaintiffs are entitled to preserve its confidentiality. Defendants should be directed that they may use the Thompson Memo provided that they file it under seal, and that they may quote or paraphrase the substance of the Thompson Memo in a legal memorandum, but must also file it under seal.

CONCLUSION

This Court has previously determined that the Protective Order appropriately balances the rights of the Defendants to receive information that they believe to be relevant to the case against the right of the Plaintiffs to protect their internal business records, in this case a personnel dispute, from public eyes. Defendants now wish to revisit that ruling on case-by-case basis. They should be directed that they may use information designated by 3ABN as Confidential only if they file it under seal.

Respectfully Submitted:

Dated: September 30, 2008

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