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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Philip A Marsteller, et al.,
10 Plaintiffs,
11 v.
12 MD Helicopter Incorporated, et al.,
13 Defendants.

No. CV-14-01788-PHX-DLR

ORDER

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16 Before the Court is Defendant MD Helicopter Incorporated's ("MDHI") motion to
17 seal. (Doc. 512.) The issue has been fully briefed. (Docs. 525, 527.) For the following
18 reasons, the motion is granted in part and denied in part.

19 **I. Legal Standard**

20 Two standards generally govern requests to seal documents. "First, a 'compelling
21 reasons' standard applies to most judicial records." *Pintos v. Pac. Creditors Ass'n*, 605
22 F.3d 665, 678 (9th Cir. 2009) (citing *Kamakana v. City & Cty. of Honolulu*, 447 F.3d
23 1172, 1178 (9th Cir. 2006)).

24 This standard derives from the common law right "to inspect and copy
25 public records and documents, including judicial records and documents."
26 To limit this common law right of access, a party seeking to seal judicial
27 records must show that "compelling reasons supported by specific factual
28 findings . . . outweigh the general history of access and the public policies
favoring disclosure."

Id. (quoting *Kamakana*, 447 F.3d at 1178-79).

1 The second standard applies to discovery materials. “Private materials unearthed
2 during discovery’ . . . are not part of the judicial record.” *Id.* (quoting *Kamakana*, 447
3 F.3d at 1180). The “good cause” standard set forth in Federal Rule of Civil Procedure
4 26(c) applies to this category of documents. *Id.* For good cause to exist under Rule
5 26(c), “the party seeking protection bears the burden of showing specific prejudice or
6 harm will result if no protective order is granted.” *Phillips v. G.M. Corp.*, 307 F.3d 1206,
7 1210-11 (9th Cir. 2002). “Broad allegations of harm, unsubstantiated by specific
8 examples or articulated reasoning, do not satisfy the Rule 26(c) test.” *Beckman Indus.,*
9 *Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (quotation and citation omitted).
10 Instead, the party seeking protection must make a “particularized showing of good cause
11 with respect to [each] individual document.” *San Jose Mercury News, Inc. v. U.S. Dist.*
12 *Court – N. Dist. (San Jose)*, 187 F.3d 1096, 1103 (9th Cir. 1999).

13 The good cause standard also applies to documents attached to non-dispositive
14 motions because those documents are often “unrelated, or only tangentially related, to
15 the underlying cause of action.” *Phillips*, 307 F.3d at 1213 (citation omitted).
16 Documents attached to dispositive motions, by contrast, are governed by the compelling
17 reasons standard. *See Pintos*, 605 F.3d at 678-79. This higher standard applies because
18 the resolution of a dispute on the merits “is at the heart of the interest in ensuring the
19 ‘public’s understanding of the judicial process and of significant public events.’”
20 *Kamakana*, 447 F.3d at 1179 (citation omitted).

21 **II. Discussion**

22 MDHI seeks to seal information contained within the parties’ *Daubert* and
23 summary judgment filings. The Court discusses each in turn.

24 **A. *Daubert* Filings**

25 MDHI outlines two categories of information contained in the parties’ *Daubert*
26 filings it seeks to have filed under seal: “(1) private employment and salary information
27 of current and former MDHI employees; and (2) commercially sensitive financial
28 information related to MDHI’s pricing and compensation practices.” (Doc. 512 at 3-4.)

1 Because these documents are attached to non-dispositive motions, the good cause
2 standard applies.

3 **1. Third Party Information**

4 MDHI seeks to seal “sensitive personnel information regarding third parties—
5 other current or former employees of MDHI not involved in this litigation.” (Doc. 512 at
6 4.) Finding good cause to maintain under seal private, personnel information of non-
7 parties, the Court grants MDHI’s motion to seal in part. The names of current and former
8 employees found in Doc. 461-4; Doc. 464-1; and Doc. 468-1 shall remain under seal.
9 The only information MDHI seeks to maintain under seal in Doc. 464-3 is Marsteller’s
10 salary. Because Marsteller is party to this action and his salary is central to any damage
11 calculations, the Court finds no good cause for sealing this information.

12 **2. Financial Information**

13 MDHI requests that certain “commercially sensitive information,” like MDHI’s
14 “pricing and compensation strategy,” remain under seal. (Doc. 512 at 5.) MDHI
15 contends that “disclosure of such information risks competitive harm to MDHI” (*Id.*)
16 Although there is some plausibility to this concern, the Court has doubts about the
17 concreteness of the harm MDHI claims would result from public disclosure of the
18 documents at issue, given the age of this information. *See Saint Alphonsus Med. Ctr.-*
19 *Nampa, Inc. v. St. Luke’s Health Sys., Ltd.*, No. 12-CV-560-BLW, 2014 WL 3101716, at
20 *3 (D. Idaho July 3, 2014) (finding “no reason to seal” document memorializing business
21 negotiation that was five years old “given its age”). MDHI fails to explain how
22 disclosure of pricing, compensation, and contract information that is several years old
23 would inflict a financial or competitive injury.

24 MDHI also argues that the information reveals underlying strategies that remain
25 competitively sensitive. (Doc. 527 at 9.) After reviewing the documents under seal, the
26 Court disagrees that they reveal any specific business strategy. To the extent that the
27 information contains such strategies, the Court will not keep that information under seal
28 because doing so will interfere with the public’s interest in understanding the judicial

1 process. *See e.g., Aviva USA Corp. v. Vazirani*, 902 F. Supp. 2d 1246, 1273-74 (D. Ariz.
2 2012). For instance, Marsteller alleges that he engaged in protected activity after
3 learning that MDHI had priced its helicopters in violation of the law. Central to
4 understanding this allegation and the underlying pricing structure are MDHI's pricing
5 dashboards, which MDHI seeks to seal. On the whole, concerns over the potentially
6 sensitive nature of these materials are outweighed by the public's interest in
7 understanding these proceedings.

8 **B. Summary Judgment Filings**

9 MDHI also seeks to seal four categories of information contained within the
10 parties' summary judgment filings, including: "(1) non-public investigatory activity; (2)
11 the names of third parties . . . ; (3) commercially sensitive business information, including
12 trade secrets; and (4) identifying information regarding MDHI's security software."
13 (Doc. 512 at 6.) Because these documents are attached to dispositive motions, the
14 compelling reasons standard applies.

15 **1. Non-Public Investigatory Activity**

16 MDHI seeks to keep under seal references to Agent Stamper's criminal
17 investigation, involvement of federal agencies in this investigation, and activities that
18 Marsteller and Stamper undertook in investigating MDHI. MDHI's request is denied
19 because compelling reasons do not support it. This information furthers the public's
20 understanding of Marsteller's cooperation with the government and its investigation of
21 MDHI and affiliated individuals and entities. Moreover, this information already is part
22 of the public record. (*See, e.g., Doc. 555.*)

23 **2. Third Party Information**

24 MDHI seeks to keep under seal the name of Mike Kelley, "whose abrupt
25 departure, caused by [Marsteller's] inappropriate disclosure of confidential personnel
26 information, led to [Marsteller's] termination." (Doc. 512 at 8.) MDHI contends that
27 inclusion of his name "has no relevance" and "can only cause potential and unnecessary
28 harm to the individual[.]" (*Id.*) The Court disagrees. MDHI argues that Marsteller's

1 firing was a direct result of him overhearing a conversation regarding MDHI's interview
2 of a potential replacement for Kelley, and relaying that information to him. (Doc. 555 at
3 4-5.) Given the centrality of this information to the public's understanding of this case,
4 the Court sees little reason for sealing it. Moreover, Kelley's name already has shown up
5 in the public filings in this case. (*See, e.g.*, Doc. 1-1 ¶ 55; Doc. 141 ¶ 39, Doc. 555 at 4-
6 5.)

7 MDHI also seeks to keep under seal the names of "other third parties where those
8 names are raised in a context that reveals private personnel information, including actual
9 or contemplated adverse employment actions." (Doc. 512 at 8.) Finding compelling
10 reasons for some of these requests, the Court grants in part MDHI's request to seal. Doc.
11 441-6 (¶ 19); Doc. 446 (DX 32); Doc. 449 (DX70); and Doc. 450 (DX105) will remain
12 under seal. Many other of these requests, however, concern the names of third parties
13 central to the underlying facts in this matter.

14 MDHI contends that the names of individuals Marsteller shared information with
15 in breach of his confidentiality agreement should remain under seal in order to minimize
16 the risk of further dissemination. (Doc. 512 at 9.) The Court finds MDHI's proffered
17 reason for keeping this information under seal speculative. *See Kamakana*, 447 F.3d at
18 1182. It has been nearly 5 years since the alleged recipients received information from
19 Marsteller, yet MDHI offers no specific evidence that in that time any of the recipients
20 have further disseminated the information. Absent such evidence, the Court is
21 unpersuaded that this risk is anything more than conjecture. Moreover, the names of the
22 purported recipients already are part of the public record. (*See, e.g.*, Doc. 555.)
23 Therefore, MDHI's request is denied with respect to this information.

24 **3. Commercially Sensitive Information**

25 As discussed above, MDHI requests that certain "commercially sensitive
26 information" like "MDHI's pricing and compensation strategy, internal performance
27 assessments, and the specific terms and conditions of contracts to which MDHI has
28 agreed" remain under seal. (Doc. 512 at 10.) MDHI contends that "[s]uch information is

1 commercially sensitive and, if disclosed, would have economic value to MDHI's
2 customers . . . and its competitors" (*Id.*) For the reasons discussed above, the Court
3 finds most of the financial information is central to the public's understanding and not
4 properly sealed. With that said, the Court will keep the following documents under seal
5 because the information contained therein is not central to the public's interest in
6 understanding this proceeding: Doc. 445 (DX26, DX27); Doc. 448 (DX55); Doc. 449
7 (DX64, DX75); and Doc. 479 (DX158).

8 **4. MDHI's Security Software**

9 In connection with MDHI's counterclaims, the parties' summary judgment filings
10 discuss MDHI's specific software systems. "Because disclosure of the particular
11 safeguards MDHI uses to protect its system could make it easier for malicious parties to
12 evade those safeguards" the Court finds compelling reasons to keep such information
13 under seal. *See In re Google, Inc. Gmail Litig.*, No. 13-MD-2430-LHK, 2013 WL
14 5366963, at *3 (N.D. Cal. Sept. 25, 2013). The following therefore will remain under
15 seal: Doc. 441 (all redactions after page 14); Doc. 441-56; Doc. 441-59 (all redactions on
16 page 63); Doc. 441-60; Doc. 441-61; Doc. 441-62; Doc. 479 (all redactions after ¶ 34);
17 Doc. 479-1 (DX137); Doc. 479-2 (DX150); Doc. 501 (redaction on page 19). MDHI
18 notes that Doc. 438 contains redactions of security information on pages 31, 33-34. The
19 Court finds these redactions proper. But, because other redactions in Doc. 438 are not
20 properly subject to redaction, MDHI will be required to publicly file an amended
21 redacted version that redacts only the information on pages 31, 33-34.

22 **IT IS ORDERED**, that MDHI's motion to seal (Doc. 512) is **GRANTED in part**
23 **and DENIED in part** as follows:

24 1. The Clerk of Court shall unseal the following: Doc. 440; Doc. 441-1; Doc. 441-
25 2; Doc. 441-7; Doc. 441-9; Doc. 441-20; Doc. 441-21; Doc. 441-23; Doc. 441-25; Doc.
26 441-26; Doc. 441-27; Doc. 441-28; Doc. 441-29; Doc. 441-30; Doc. 441-33; Doc. 441-
27 36; Doc. 441-37; Doc. 441-39; Doc. 441-40; Doc. 441-41; Doc. 441-43; Doc. 441-44;
28 Doc. 441-46; Doc. 441-47; Doc. 441-48; Doc. 441-49; Doc. 441-64; Doc. 441-65; Doc.

1 442; Doc. 442-1; Doc. 442-2; Doc. 447; Doc. 451; Doc. 452; Doc. 461; Doc. 461-1; Doc.
2 461-2; Doc. 461-3; Doc. 464; Doc. 464-2; Doc. 464-3; Doc. 464-4; Doc. 464-5; Doc.
3 464-6; Doc. 464-7; Doc. 468; Doc. 468-2; Doc. 468-3; Doc. 468-4; Doc. 468-5; Doc.
4 468-6; Doc. 471 (and all accompanying exhibits); Doc. 473 (and all accompanying
5 exhibits); Doc. 476 (and all accompanying exhibits); Doc. 478; Doc. 483; Doc. 484; Doc.
6 488; and Doc. 489.

7 2. The following items shall remain under seal: Doc. 441; Doc. 441-6; Doc. 441-
8 56; Doc. 441-59; Doc. 441-60; Doc. 441-61; Doc. 441-62; Doc. 445; Doc. 446; Doc. 448;
9 Doc. 449; Doc. 450; Doc. 461-4; Doc. 464-1; Doc. 468-1; Doc. 479; Doc. 479-1; Doc.
10 479-2; Doc. 479-3; and Doc. 501. As explained in this order, however, not everything in
11 these documents needs to be shielded from public view. Because MDHI filed exhibits in
12 groups rather than as individual attachments, MDHI will need to publically re-file the
13 exhibits that are not properly sealed (for instance, Doc. 445 will remain entirely under
14 seal, but MDHI shall publicly re-file unredacted versions of Exhibits 23 and 24, which
15 are currently contained within Doc. 445). Accordingly, by no later than **October 12,**
16 **2018,** MDHI shall do the following:

17 A. Publicly re-file the following exhibits to its statement of fact (currently
18 under seal at Docs. 445, 446, 448-50): 23, 24, 29-31, 33, 34, 53, 54, 58-63, 65, 66, 69,
19 78, 79, 81, 84, 88, 89, 92, 95, 97, 98, 101, 102, 104;

20 B. Publicly re-file the following exhibits to its Response to Plaintiffs'
21 Statement of Facts (currently under seal at Doc. 497): 138-149, 151-157, 161, and 164;

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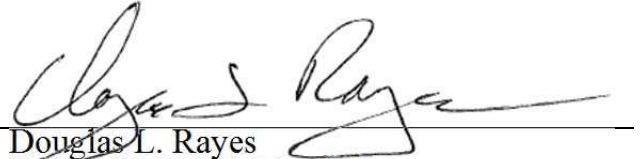
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1 C. Publicly re-file amended redacted versions of Doc. 438; Doc. 441; Doc.
2 441-6; Doc. 441-59; Doc. 461-4; Doc. 468-1; Doc. 479; and Doc. 501 that redact only the
3 information found in this order to be properly sealed.

4 Dated this 27th day of September, 2018.

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9 Douglas L. Rayes
United States District Judge

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