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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

LAMONTE TUMBLING,	)	1:08cv1801 LJO DLB
	)	
	)	
	)	ORDER TAKING MOTION FOR
	)	DETERMINATION OF CONFIDENTIAL
Plaintiff,	)	DESIGNATION OF DEPOSITION
	)	TESTIMONY UNDER AGREED
v.	)	PROTECTIVE ORDER
	)	OFF CALENDAR WITHOUT PREJUDICE
MERCED IRRIGATION DISTRICT,	)	
	)	(Documents 54, 56)
	)	
Defendant.	)	

Defendant Merced Irrigation District (“Defendant” or “MID”) filed the instant motion for determination of confidential designation of Robert Blum's deposition testimony on December 23, 2009. The matter was heard on January 15, 2010, before the Honorable Dennis L. Beck, United States Magistrate Judge. Matthew Racine appeared telephonically on behalf of Defendant. Lawrence Murray appeared telephonically on behalf of Plaintiff LaMonte Tumbling (“Plaintiff”).

**RELEVANT FACTUAL BACKGROUND**

Plaintiff filed the instant employment discrimination action on November 21, 2008, against MID. The complaint states causes of action under Title VII, California’s Fair Housing and Employment Act and other federal and state statutes based mainly on allegations of race and gender discrimination.

On May 5, 2009, pursuant to the parties’ stipulation, the Court entered a protective order (“Protective Order”). In part, the Protective Order permits a party to designate any personnel,

1 private or confidential information involving a former or current MID employee or applicant for  
2 employment as Confidential-Attorney/Expert Eyes Only. Protective Order ¶1(b).

3 On November 16 and 17, 2009, Plaintiff deposed Robert Blum, MID's Director of  
4 Administrative Services. During the deposition, counsel for the parties discussed on the record  
5 issues related to designation of the transcript as confidential.

6 On November 25, 2009, defense counsel wrote to Plaintiff's counsel regarding  
7 confidentiality of the transcript. Defense counsel asserted its belief that the confidentiality  
8 designation on the record at Mr. Blum's deposition was sufficient and requested that Plaintiff's  
9 counsel treat all information related to "third-party MID employee witnesses" as  
10 "CONFIDENTIAL - ATTORNEY/EXPERT EYES ONLY" under the Protective Order. Exhibit  
11 C to Declaration of Matthew T. Racine ("Racine Dec.").

12 On December 3, 2009, Plaintiff's counsel responded and objected to the confidentiality  
13 designation, contending it was a blanket assertion without basis and was untimely. Exhibit D to  
14 Racine Dec.

15 On December 9, 2009, defense counsel wrote to Plaintiff's counsel regarding the  
16 designation. Defense counsel asserted that the Protective Order permitted designation by the  
17 method used at Mr. Blum's deposition. Defense counsel also proposed the following resolution:

18 We will go through Mr. Blum's transcript once it is finalized and  
19 certified by the court reporter and list all portions we believe are  
20 confidential because they are "dealing with personnel action  
21 involving third party employees." We will then provide you with  
that list. Once you receive that list, we could meet and confer  
regarding any portions of the transcript you continue to believe are  
not entitled to protection under the Order.

22 Exhibit E to Racine Dec.

23 Plaintiff's counsel responded on December 11, 2009, contending that the Protective Order  
24 required counsel to designate the portions of the transcript for which protection was sought  
25 before the end of the deposition. Plaintiff's counsel claimed that to invoke the order, defense  
26 counsel "should have said that the statements dealing with a particular employee and particular  
27 actions were evoked." Exhibit F to Racine Dec.

1 On December 21, 2009, defense counsel e-mailed Plaintiff's counsel. The e-mail attached  
2 a rough copy of Mr. Blum's transcript with portions highlighted that counsel believed were  
3 entitled to protection under the Protective Order. Defense counsel asked Plaintiff's counsel if it  
4 was agreeable to designate the protected portions of the transcript by highlighting. Exhibit G to  
5 Racine Dec. Plaintiff's counsel did not respond.

6 On December 23, 2009, defense counsel filed the instant motion for determination of  
7 confidential designation of Mr. Blum's deposition testimony.

8 On January 8, 2010, the parties filed a joint statement of discovery dispute.

### 9 DISCUSSION

#### 10 A. Protective Order

11 In relevant part, the Protective Order provides:

12 1. (a) Any party may designate as "CONFIDENTIAL" any documents,  
13 discovery responses, electronic data, deposition transcripts, exhibits or  
14 other materials produced or generated in this matter that it reasonably  
believes qualify for protection under standards developed under Federal  
Rule of Civil Procedure 26 (c) and orders of the court herein.

15 (b) Further, subject to the same standards set forth in paragraph  
16 1(a), Either party may designate as "CONFIDENTIAL -  
ATTORNEY/EXPERT EYES ONLY" any documents, discovery  
17 responses, electronic data, transcripts, exhibits or other materials  
of: (a) any Merced Irrigation District current or former employee  
18 including, but not limited to, his or her personnel file; (b) any  
harassment, discrimination, workplace violence and/or retaliation  
19 complaint or investigation by or against the Merced Irrigation  
District involving any of its former or current employees; or, (iii)  
20 any other confidential personnel, private or confidential information  
involving a former or current Merced Irrigation District employee  
or applicant for employment. Documents and information so  
21 designated as "CONFIDENTIAL-ATTORNEY/EXPERT EYES  
ONLY" shall not be disclosed to persons other than those described  
22 in Paragraph 4, infra, subsections (a), (b), (d), (e), (g) and (h);

23 ...

24 2. Parties will exercise restraint and care in designating materials for  
protection.

25 (a) Each party or non-party that designates information or items for  
26 protection under this Order must take care to limit any such designation to  
specific material that qualifies under the appropriate standards. A  
27 designating party must take care to designate for protection only those  
specific parts of material, documents, items, or oral or written  
28 communications that qualify - so that other portions of the material,  
documents, items, or communications for which protection is not  
warranted are not swept unjustifiably within the ambit of this Order.

1 (b) Mass, indiscriminate, or routinized designations are prohibited.  
2 Designations that are shown to be clearly unjustified, or that have  
3 been made for an improper purpose (e.g., to unnecessarily  
4 encumber or retard the case development process, or to impose  
unnecessary expenses and burdens on other parties) are prohibited.

...

5 3. Designations in conformity with this Order may be made as follows:

...

6 (c) for testimony given in deposition or other proceeding, by identifying on  
7 the record, before the close of the proceeding, all testimony that is  
8 considered "CONFIDENTIAL" or  
"CONFIDENTIAL-ATTORNEY/EXPERT EYES ONLY"....

9 Protective Order ¶¶ 1-3. The parties disagree as to whether or not Defendant properly designated  
10 portions of Mr. Blum's deposition testimony as confidential. The parties seek sanctions against  
11 each other.

12 B. Analysis

13 A request for protection of the entire transcript of Robert Blum's deposition testimony as  
14 confidential is overbroad. As discussed at the hearing, within ten (10) days, Defendant shall  
15 specifically designate, by page and line number, the portions of Mr. Blum's testimony it contends  
16 are properly subject to the Protective Order and the reasons for that contention. Following  
17 Defendant's designation, Plaintiff shall have ten (10) days to submit written objections. By so  
18 doing, the parties should be able to determine if they disagree as to whether or not certain  
19 portions of Mr. Blum's deposition testimony are confidential under the Protective Order.

20 Accordingly, pursuant to the discussion at the hearing, the Court ORDERS Defendant's  
21 motion OFF CALENDAR without prejudice to renewal if the parties are unable to reach an  
22 agreement.

23 IT IS SO ORDERED.

24 Dated: January 15, 2010

/s/ Dennis L. Beck  
UNITED STATES MAGISTRATE JUDGE