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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KATHERINE MOUSSOURIS, et al.,
Plaintiffs,
v.
MICROSOFT CORPORATION,
Defendant.

Case No. [16-mc-80170-MEJ](#)

**ORDER RE: MOTION TO QUASH
THIRD PARTY SUBPOENAS AND
ASSOCIATED DOCUMENTS AND/OR
FOR PROTECTIVE ORDER**

Re: Dkt. Nos. 1, 4, 11, 16, 25, 26

INTRODUCTION

Plaintiff Katherine Moussouris (“Moussouris”) sued Defendant Microsoft Corp. (“Microsoft”) on behalf of a proposed class in *Moussouris et al. v. Microsoft Corp.*, 2:15-cv-01483-JLR, pending in the Western District of Washington (the “Underlying Action”). The Underlying Action alleges, among other things, that Microsoft violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) et seq., by discriminating against female employees in technical and engineering roles. The matter is now before this Court because Moussouris has moved to quash Microsoft’s subpoenas to three of her prior employers, all of whom reside in this District. Mot., Dkt. No. 1. The Court ordered the parties to meet and confer regarding the Motion. Order, Dkt. No. 20. The parties successfully narrowed their dispute but ask the Court to resolve several outstanding issues. Joint Status Report (“Jt. Rept.”), Dkt. No. 26. This Order resolves those outstanding disputes as well as the parties’ related administrative motions.

MOTIONS TO SEAL

Northern District of California Civil Local Rule 79-5(b) permits parties to file under seal documents, or portions thereof, that are shown to be “privileged, protectable as a trade secret or otherwise entitled to protection under the law.” The request to “must be narrowly tailored to seek

1 sealing only of sealable material.” *Id.* Where the motion at issue is tangentially related to the
2 underlying cause of action, the party seeking to seal information need only show there is “good
3 cause” to seal the information “to protect a party or person from annoyance, embarrassment,
4 oppression, or undue burden or expense.” *See Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809
5 F.3d 1092, 1097-1101 (9th Cir. 2016) (quoting Fed. R. Civ. P. 26(c)). The parties here agree the
6 motion to quash is tangentially related to the underlying action and urge the Court to apply to good
7 cause standard. *See* Pl.’s First Sealing Mot. at 1, Dkt. No. 4; Def.’s Sealing Mot. at 3, Dkt. No.
8 11. Additionally, under Civil Local Rule 79-5, a party filing documents under seal may indicate
9 that it has done so because another party designated certain documents or portions thereof as
10 confidential, in which case it is up to the party that seeks the information to remain confidential to
11 come forward with a declaration establishing the information is sealable. *See* Civ. L.R. 79-5(e).

12 The parties have filed four motions to seal, which the Court addresses in turn.

13 **A. Moussouris’ First Motion to Seal**

14 Moussouris moves to seal Exhibit E to the Declaration of Katrina Eiland. *See* Pl.’s First
15 Sealing Mot.; First Eiland Decl., Ex. E, Dkt. No. 7. Exhibit E consists of approximately fifteen
16 pages from the transcript of Moussouris’ deposition, which has been designated as confidential by
17 Moussouris and highly confidential by Microsoft. Pl.’s First Sealing Mot. at 1. Microsoft did not
18 submit a “declaration establishing that the document sought to be filed under seal, or portions
19 thereof, are sealable[.]” as required by Local Rule 79-5. As to Moussouris’ request, the Court
20 finds it is not narrowly tailored to seek the sealing only of sealable material; the majority of the
21 exhibit describes at a relatively high level of generality the interview process Plaintiff experienced
22 at HackerOne, her compensation and benefits at HackerOne and Microsoft, the evolution of her
23 role with HackerOne, the process she went through to obtain permission from Microsoft to be an
24 advisor at HackerOne while still employed by Microsoft. With the exception of the sensitive
25 financial information stated at 19:9, 20:2, 20:8, the Court finds there is not good cause to seal the
26 remainder of the exhibit as it does not contain privileged information, trade secrets, or information
27 likely to cause any party annoyance, embarrassment, oppression, or undue burden or expense.
28

1 **B. Microsoft’s Motion to Seal**

2 Microsoft moves to seal portions or the entirety of six exhibits to the Declaration of Lauri
3 Damrell and portions of its Opposition to the Motion. *See* Def.’s Seal. Mot.; Damrell Decl., Dkt.
4 No. 11-1; Opp’n (corrected), Dkt. No. 24. They are:

- 5 ○ Opposition at 2:2-3, 2:7-9, 3:26-4:7, 4:10-16, 7:21-8:9, 8:13, 12:16-10;
- 6 ○ Exhibit C, which includes excerpts from the deposition of Plaintiff Dana
7 Piermarini;
- 8 ○ Exhibit D, which includes excerpts from Moussouris’ deposition;
- 9 ○ Exhibit E, which is the employment agreement between HackerOne and
10 Moussouris;
- 11 ○ Exhibit K, which is a 2014 performance review for Moussouris;
- 12 ○ Exhibit L, which is Moussouris’ 2007 employment application to Microsoft; and
- 13 ○ Exhibit M, which is Piermarini’s 2006 employment application to Microsoft.

14 Microsoft argues Exhibit K should be filed under seal because it contains confidential
15 information regarding customers, strategies, products, and information that is “highly sensitive as
16 it could inform competitors regarding Microsoft’s business strategies.” Def.’s Seal. Mot. at 3.
17 Microsoft moved to seal the other exhibits or portions of those exhibits because Moussouris had
18 designated the information contained in those exhibits as confidential. *Id.*; *but see* Second Eiland
19 Decl. ¶ 4, Dkt. No. 15 (indicating Moussouris only designated Exhibits D and E as confidential
20 and that remaining exhibits were designated as such by Microsoft). Moussouris submitted the
21 required declaration supporting Microsoft’s motion to seal Exhibits D, E, K, L, and M, and did not
22 address Exhibit C. *See* Second Eiland Decl. The Court has reviewed the documents and rules as
23 follows:

Document	Ruling
Ex. C	No good cause to seal portions of exhibit designated as confidential (pages 216-218). Motion denied.
Ex. D	No good cause to seal majority of exhibit. Motion is not “narrowly tailored.” <i>See</i> Civ. L.R. 79-5(b). Motion granted as to 19:9, 20:2, 20:8, 22:13 as these portions of the deposition contain sensitive financial information; otherwise denied.

1 2 3	Ex. E	No good cause to seal majority of exhibit. Employer agreement does not indicate it is confidential. Motion granted as to paragraphs 2, 4, and 7-9 as they contain sensitive financial information; otherwise denied without prejudice to submitting supplemental declaration supporting sealing within 4 days of the date of this order.
4 5 6 7	Ex. K	Neither party explains how information regarding “core priorities” from March 2014 or publications, public speaking, and outreach activities looking back from that date could inform competitors about Microsoft’s business strategies in October 2016. Motion denied without prejudice to submitting supplemental declaration supporting sealing within 4 days of the date of this order.
8 9	Ex. L	Granted as to personal contact and salary information; supervisor names and contact information; reference names and contact information; otherwise denied.
10 11	Ex. M	Granted as to personal contact and salary information; supervisor names and contact information; reference names and contact information; otherwise denied.
12 13 14	Redactions to Opposition (corrected)	Denied. None of these passages refer to trade secrets or privileged information; none are likely to subject the parties to annoyance, embarrassment, oppression, or undue burden or expense; all pertain to issues the parties have addressed generally in their publicly-filed briefs.

C. Moussouris’ Second Motion to Seal

Moussouris also moves to seal portions or the entirety of Exhibits K and O to the Reply Reply Declaration of Katrina Eiland (Third Eiland Decl., Dkt. No. 18), and one paragraph of its Reply in support of the Motion (Reply at 12, Dkt. No. 17). *See* Pl.’s Second Sealing Mot., Dkt. No. 16. Exhibit K consists of four pages excerpted from Moussouris’ deposition transcript (pp. 57-59, 285), which were already attached as Exhibit E to the First Declaration of Katrina Eiland (Dkt. No. 7). Exhibit O contains redacted Notices of Violation issued by the Office of Federal Contract Compliance Programs of the United States Department of Labor. Third Eiland Decl., Ex. K; Dkt. No. 18-11. Microsoft filed the required declaration in support of the motion to seal Exhibit O. *See* Perry Decl., Dkt. No. 21.

The Court already articulated why it finds no good cause to seal these pages from the Moussouris deposition transcript, and therefore denies the request to seal Exhibit K. Microsoft seeks to seal Exhibit O because the non-public document includes “sensitive company information, including information pertaining to employment structure and statistics, promotion

1 protocols, average employee compensation, and stock award data. How Microsoft provides for
2 employee advancement and compensation is a critical component of its businesses' success.”
3 Perry Decl. ¶ 9. The Court has reviewed the document and finds it does not appear to reflect
4 specifics about Microsoft's practices but rather observes discrepancies in how those practices
5 impact employees of different genders. As such, the Court does not find there is good cause to
6 seal the majority of the document; the Court does find good cause to seal footnote 11 on page
7 0065727 and footnote 12 on page 0065707 as these portions of the document contain sensitive
8 financial information.

9 Finally, the Court also finds no good cause to seal the paragraph on page 12 of the Reply.

10 **D. Moussouris' Third Motion to Seal**

11 Moussouris moves to file under seal portions of the Joint Status Report. *See* Pl.'s Third
12 Sealing Mot., Dkt. No. 26; *see also* Jt. Rptr. The Court finds no good cause to seal any portions of
13 the document, as none of the redactions pertain to trade secrets, privilege information, or
14 information that is likely to embarrass, annoy, or oppress the parties.

15 **E. Civil Local Rule 79-5(f)(3)**

16 The Court has denied in part and granted in part the parties' motions to seal. Pursuant to
17 Civil Local Rule 79-5(f)(3), the documents that parties requested be sealed “will not be considered
18 by the Court unless the Submitting Party files a revised redacted version of the document which
19 comports with the Court's order within 7 days after the motion is denied.” The parties shall file
20 revised versions of appropriate documents as required by the Local Rules, and clearly indicate in
21 the ECF docket the documents that are being replaced by the revisions. Should the parties ask this
22 Court to resolve additional discovery disputes, they should consider relying on detailed
23 declarations by counsel rather than providing this type of supporting documentation.

24 **MOTION TO REMOVE INCORRECTLY FILED DOCUMENT**

25 Microsoft moves to remove a document it incorrectly filed (Dkt. No. 12) from the ECF
26 docket. Admin. Mot., Dkt. No. 25. Moussouris did not object. The Court GRANTS the motion;
27 the Clerk shall strike Dkt. No. 12 from the ECF docket.

28

1 **MOTION TO QUASH**

2 Through the meet and confer process, the parties successfully narrowed the scope of their
3 disputes briefed in relation to Plaintiff’s Motion to Quash and/or Motion for a Protective Order.¹
4 The Court accordingly decides only the remaining issues as framed in the parties’ Joint Report.

5 **A. Legal Standard**

6 A party may serve a subpoena that commands a non-party “to produce documents,
7 electronically stored information, or tangible things.” Fed. R. Civ. P. 45(a)(1)(C). The scope of
8 discovery a party may obtain through a subpoena is the same as that applicable under Federal Rule
9 of Civil Procedure 26(b). *See Garedakis v. Brentwood Union Sch. Dist.*, 2016 WL 1133715, at *1
10 (N.D. Cal. Mar. 23, 2016) (citing advisory committee note to 1970 amendment of Rule 45). As
11 such, a party may subpoena only information that is relevant to the claims and defenses in the
12 action, and is proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1) (“Parties may
13 obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or
14 defense and proportional to the needs of the case, considering the importance of the issues at stake
15 in the action, the amount in controversy, the parties’ relative access to relevant information, the
16 parties’ resources, the importance of the discovery in resolving the issues, and whether the burden
17 or expense of the proposed discovery outweighs its likely benefit.”).

18 **B. Subpoenas to Oracle and Symantec**

19 Initially, Microsoft sought to subpoena documents for Moussouris’ former employers
20 Oracle Corporation and Symantec Corporation; however, the parties have agreed that Microsoft
21 will not seek documents from these third parties at this time but may renew its request after the
22 class certification determination in the Underlying Action. *Jt. Rept.* at 1. Nonetheless, the parties
23 disagree about how the Court should decide Plaintiff’s Motion at this point (e.g., whether to grant
24 or deny the Motion or hold it in abeyance).

25 Because the Motion to Quash as to Oracle and Symantec presently is moot, the Court will
26 **DENY** it at this juncture **WITHOUT PREJUDICE**. Microsoft will inform these third parties

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28 ¹ The Court resolves the dispute by ruling on the Motion to Quash, and does not need to reach the merits of the Motion for Protective Order.

1 that they need not comply with the subpoenas at this juncture and provide them with a copy of this
2 Order. If Microsoft decides to revisit the issue after class certification, it shall promptly inform
3 Plaintiffs of its decision, and the parties shall meet and confer anew regarding the scope of the
4 subpoenas. If the parties cannot agree to the scope of the subpoenas at that time, Plaintiffs shall
5 file a notice reopening their Motion to Quash, the parties shall file a second Joint Status Report in
6 this case, and the Court may order additional briefing as necessary.

7 **C. Subpoena to HackerOne**

8 Microsoft requests documents from another one of Plaintiff’s former employers,
9 HackerOne, Inc. Jt. Rept. at 2. Specifically, it seeks documents relating to two broad topics: (1)
10 documents related to Moussouris’ employment performance at HackerOne after she left Microsoft,
11 and (2) documents relating to Moussouris’ efforts to mitigate her damages. *Id.*

12 1. Employment Performance at HackerOne

13 Moussouris previously produced to Microsoft (1) her employment agreement with
14 HackerOne, and (2) all correspondence on her HackerOne email account that discussed her
15 employment at, or lawsuit against, Microsoft. Microsoft argues this production is insufficient, and
16 that HackerOne may be in possession of relevant documents Plaintiff does not have access to.
17 Specifically, Microsoft believes HackerOne may have documents that reveal Moussouris lacked
18 certain job skills, which Microsoft contends supports its defense that it fired her for performance
19 reasons, not because of her gender. Jt. Rept. at 4-6. But Microsoft is best-placed to have evidence
20 regarding Moussouris’ work-related performance during the period relevant in this employment
21 discrimination action—her employment at Microsoft. To the extent Moussouris’ performance
22 with any other employer is relevant, the cases Microsoft cites all address the potential relevance of
23 a plaintiff’s performance with *former* employers (Opp’n at 8-9), not subsequent employers such as
24 HackerOne. The Court finds Moussouris’ performance at HackerOne is not relevant to her
25 performance when she was earlier employed by Microsoft, and that any marginal relevance her
26 post-Microsoft performance might have is outweighed by proportionality concerns. *See Fed. R.*
27 *Civ. P. 26(b)(1).*

28 //

1 2. Efforts to Mitigate Damages

2 At this juncture, Microsoft no longer seeks wage information from HackerOne, but seeks
3 two categories of documents related to mitigation of damages: (1) information about the fringe
4 benefits HackerOne offered to Moussouris; and (2) information about Moussouris' departure from
5 HackerOne. While mitigation evidence may be relevant, Microsoft is not entitled to discover the
6 information it seeks from HackerOne here. Jt. Rept. at 2, 6-10.

7 Moussouris represents she "is only seeking lost salary, bonuses, stock grants, and the
8 benefit of the employee stock purchase plan, i.e., compensation in the form of stock." Jt. Rept. at
9 7. She represents HackerOne did not have a bonus plan, and she has produced information
10 regarding stock grants from HackerOne. *Id.* She "disclaims any entitlement to lost fringe
11 benefits, such as health or life insurance or vacation pay," but nonetheless agrees to produce non-
12 duplicative records in her custody sufficient to reflect her vacation day benefits, life insurance, and
13 health plan at HackerOne. *Id.* If Moussouris has not already done so, she shall produce this
14 information within two weeks of the date of this Order.

15 As to the request for additional information about fringe benefits, the cases Microsoft cites
16 for the proposition that this information is still discoverable even where a plaintiff has disclaimed
17 their entitlement are not on-point. *See* Joint Stmt. at 9-10 (citing *Doe v. City of Chula Vista*, 196
18 F.R.D. 562, 568 (S.D. Cal. 1999) (merely listing the "variety of different types of damages" an
19 "employee who brings a discrimination lawsuit may allege"); *Stratton v. Dep't for the Aging for*
20 *the City of N.Y.*, 132 F.3d 869, 882 (2d Cir. 1997) (jury awarded additional 35% of salary to
21 compensate plaintiff for lost fringe benefits based on "rule of thumb" that the value of fringe
22 benefits was 35% of salary); *Koyen v. Consol. Edison Co. of N.Y.*, 560 F. Supp. 1161, 1164
23 (S.D.N.Y. 1983) (awarding plaintiff additional damages to those awarded by jury for back pay to
24 account for anticipated salary increases that are "a normal incident of the way of life in the
25 industrial and commercial world.")). None of these cases stand for the proposition that fringe
26 benefit information is still discoverable under the circumstances of this case.

27 Finally, Microsoft seeks information about the circumstances surrounding Moussouris'
28 departure from HackerOne but concedes "the evidence indicates [Moussouris] was involuntarily

1 terminated” by HackerOne. *See* Jt. Rept. at 5, 10. Microsoft does not explain how an employee’s
2 *involuntary* departure would be relevant to mitigation. *Cf.* Opp’n at 11 (mitigation “analysis
3 considers, for example, whether the individual diligently sought equivalent work or quit
4 alternative employment without good reason.”). Plaintiff now has produced her employment
5 contract with HackerOne, W-2s for 2014 and 2015, and year-to-date paystubs for 2016. *See* First
6 Eiland Decl. ¶¶ 11-12; Jt. Rept. at 6. Microsoft does not represent that those documents show
7 Moussouris’ position at HackerOne was not substantially equivalent to her position at Microsoft.
8 Microsoft also cites no authority for the proposition that under these circumstances it is entitled to
9 “details concerning Moussouris’ negotiations with HackerOne and efforts she made to secure the
10 maximum income and benefits.” Jt. Rept. at 6. In any event, the Court finds evidence relating to
11 mitigation premature given the parties’ agreement in the Underlying Action to defer damages
12 discovery until after a ruling on class certification. *See* Reply at 7 (quoting Third Eiland Decl.,
13 Ex. A (Rept. at 2), Dkt. No. 18-1).

14 The Court accordingly grants the Motion to Quash with respect to mitigation documents,
15 without prejudice to Microsoft propounding a new, narrowly-tailored subpoena seeking
16 mitigation-related documents from HackerOne after the Court in the Underlying Action rules on
17 class certification.

18 **CONCLUSION**

19 As outlined above, the Court accordingly **GRANTS IN PART** and **DENIES IN PART**
20 Plaintiff’s Motion to Quash. The Court also grants in part and denies in part the parties’ motions
21 to seal.

22 **IT IS SO ORDERED.**

23
24 Dated: October 7, 2016

25 
26 _____
27 MARIA-ELENA JAMES
28 United States Magistrate Judge