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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**

9
10 Case No. 13-CV-2519-GPC(WVG)

11 ART COHEN, Individually and
12 on Behalf of All Others Similarly
Situating,

13 Plaintiffs,

14 v.

15 DONALD J. TRUMP,

16 Defendant.

**ORDER RE: CONFIDENTIAL
PORTIONS OF DEPOSITION
TRANSCRIPT**

17
18 **1. OVERVIEW**

19 The present dispute arises from Defendant's January 21, 2016, deposition.
20 Under the terms of the parties' Protective Order, Defendant designated portions of
21 the transcript as confidential. Plaintiffs hereby challenge the propriety of that
22 designation for three topics discussed by Defendant. Plaintiffs challenge whether
23 statements concerning (1) public figures; (2) a licensing agreement between Trump
24 University, LLC, and a third party; and (3) profits shared between Defendant and the
25 university bearing his name, can maintain a confidential designation. Plaintiffs move
26 the Court for an order de-designating these portions from their confidential status.

27 On February 18, 2016, counsel for the parties notified the Court of the dispute.
28 The parties lodged the disputed portions of the transcript and a Joint Statement

1 explaining their respective positions. On February 25, 2016, at 7 a.m., the Court
2 convened a telephonic Discovery Conference. Mr. Jason Forge, Ms. Rachel Jensen,
3 and Amber Eck appeared on behalf of Plaintiffs. Mr. David Kirman, appeared as lead
4 counsel on behalf of Defendant. Following the Discovery Conference, the parties
5 lodged additional briefing concerning the issues in dispute.

6 The Court has reviewed the parties' Joint Statement, supplemental briefing,
7 supporting exhibits, other relevant documents filed in this action and the related
8 action of *Makaeff v. Trump University, LLC, et al.*, 10-cv-940-GPC(WVG), and
9 listened to the arguments asserted by counsel for all parties during the Discovery
10 Conference. For the reasons set forth below, the Court hereby GRANTS IN PART
11 and DENIES IN PART Plaintiffs' request for an Order to de-designate portions of
12 Defendant's January 21, 2016, deposition transcript.

13 2. ARGUMENT

14 This dispute involves Defendant's deposition transcript and three categories of
15 testimony, which were designated as confidential pursuant to the controlling
16 Protective Order.¹ Plaintiffs dispute whether three categories of testimony can be
17 designated as confidential including (1) statements concerning public figures, (2)
18 statements concerning a licensing agreement between Trump University, LLC, and a
19 third party, and (3) statements concerning monetary exchanges between Defendant
20 and Trump University, LLC. Each is addressed in turn below.

21 a. PLAINTIFFS' ARGUMENTS

22 Plaintiffs argue that Defendant has misused the Protective Order and "over-
23 designated" portions of Defendant's deposition transcript. They point to the
24 Protective Order, which states that, "Any party may designate information as
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26 ¹ The Protective Order was entered on November 17, 2011, in the corresponding case of *Makaeff*
27 *v. Trump University, LLC, et al.*, Case No. 10-cv-940-GPC(WVG). ("Makaeff"). (*Makaeff* Doc.
28 No. 91). On March 21, 2014, several months after the above captioned case was filed, the parties
filed a First Amended Protective Order in the *Makaeff* case. (Doc. No. 316.) The First Amended
Protective Order simply granted the parties' request for the same protections to apply to the instant
case. (*Id.*) This controlling document is herein referred to as "the Protective Order."

1 ‘CONFIDENTIAL’ only if, in the good faith belief of such party and its counsel, the
2 unrestricted disclosure of such information could be potentially prejudicial to the
3 business or operations of such party.” (*Makaeff* Doc. Nos. 91, 316.) Plaintiffs assert
4 that Defendant has ignored the narrow provisions of the Protective Order by
5 designating large portions of non-sensitive, non-prejudicial information as
6 confidential. They argue that even where the transcript includes legitimately
7 confidential information, only that specific information which is protected from the
8 public view, may be designated confidential.

9 Plaintiffs also contend that the disputed confidentiality designations are
10 tremendously burdensome. Plaintiffs argue that Defendant’s “over designation” adds
11 significant additional costs and fees for future substantive motion filings because the
12 transcript portions designated as confidential must be filed under seal.

13 b. DEFENDANT’S ARGUMENT

14 Defendant opposes Plaintiffs’ arguments, asserting that his confidential
15 designations are proper and only span a relatively small portion of the several
16 hundred pages of deposition testimony. Defendant argues that there is no basis to
17 order the de-designation of the disputed portions of the transcript, either in whole or
18 in part, because they are properly protected under the terms agreed to by the parties.
19 Further, Defendant asserts that Plaintiffs’ piecemeal confidentiality designation
20 proposal is impractical and unduly burdensome to require a party to parse the
21 confidentiality status of the deposition transcript on a line by line basis as requested
22 by Plaintiffs. Defendant also argues that much of the disputed testimony stems from
23 documents that are properly designated as confidential, a designation not challenged
24 by Plaintiffs.²

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26 ² During the Discovery Hearing, counsel for Defendant noted that these underlying documents were
27 produced over the course of the litigation, and Plaintiffs are just now disputing their confidentiality
28 designations. However, the Protective Order states that any party may object to a designation of
materials as confidential “[a]t any stage of these proceedings.” (*Makaeff* Doc. No. 91 at 5; Doc.
No. 316 at 6.) Accordingly, Plaintiffs’ objections to the deposition testimony referencing these
documents are not untimely.

3. LEGAL STANDARD

The burden of proof to maintain the confidentiality of any document is on the party seeking to maintain the confidentiality. *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 424 (9th Cir. 2011) (“When the protective order ‘was a stipulated order and no party ha[s] made a ‘good cause’ showing,’ then ‘the burden of proof ... remain[s] with the party seeking protection.’”). There are several factors the Court must consider in determining whether to protect discovery materials from disclosure under Rule 26(c), including: (1) whether the party seeking protection has shown particularized harm; (2) whether the balance of public and private interests weighs in favor of maintaining a protective order; and (3) the possibility of redacting sensitive material. *Id.* at 425. Even when first two factors weigh in favor of protecting the discovery of material, a court must still consider whether redacting portions of the discovery material will nevertheless allow disclosure. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003). In *Foltz*, an insurer argued that documents produced in discovery “contained confidential information that would satisfy the ‘good cause’ standard of Rule 26(c).” *Foltz*, 331 F.3d at 1131. Specifically the documents included confidential financial information, third-party medical records, personnel files, and trade secrets. *Id.* at 1136. There, the court concluded that “the limited number of third-party medical and personnel records [could] be redacted easily to protect third-party privacy interests while leaving other meaningful information.” *Id.* at 1137. The Court looks to these guiding principles in determining the parties’ present dispute.

4. ANALYSIS AND RULING

In this dispute, Defendant carries the burden to demonstrate that the disputed portions of his deposition transcript merit a confidential designation. Plaintiffs dispute the designation in three categories of Defendant’s deposition testimony including statements concerning (1) public figures, (2) a licensing agreement

1 between Trump University, LLC, and a third party, and (3) monetary exchanges
2 between Defendant and Trump University, LLC.

3 a. PUBLIC FIGURE COMMENTS

4 Over twenty pages of Defendant's deposition transcript concern questions and
5 answers regarding Defendant's prior statements about various public figures. The
6 disputed portions span pages 192:9-201:17 and 454:23-471:4 and implicate
7 deposition exhibits 519, 520, and 489. Defendant contends that these portions of the
8 transcript are properly designated as confidential. He argues that the designation is
9 necessary to protect against the likelihood that such testimony will be publicly
10 disseminated and used against him in the current presidential campaign. However,
11 Plaintiffs argue that these statements by Defendant are already publicly available,
12 and, as such, merit no further protection. Nonetheless, Defendant asserts that "[e]ven
13 if this information is already "public" in some sense, it does not mean that there is
14 not value in preventing Plaintiffs from using the discovery process to aggregate that
15 data for public consumption." (Joint Statement, at 5:28-6:2.)

16 The Court finds that these portions of the transcript are not entitled to a
17 confidential designation. Most, if not all, of Defendant's original statements about
18 various public figures appear to originate from public sources, including past blog
19 articles published by Trump University, LLC. The corresponding deposition
20 testimony (i.e. affirming or denying these past statements) merely reiterates this
21 already public information. Based on documents presented by Plaintiffs, these prior
22 statements by Defendant have also been subjected to media attention in the current
23 presidential election. Thus, the Court finds that de-designating Defendant's
24 deposition questions and answers concerning various public figures will not result in
25 particularized harm to Defendant and therefore these portions of the transcript do not
26 merit a confidential designation. Accordingly the Court ORDERS that deposition
27 pages 192:9-201:17 and 454:23-471:4 be de-designated from their confidential status.
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1 b. LICENSING AGREEMENT BETWEEN TRUMP
2 UNIVERSITY AND THIRD PARTY

3 Plaintiffs next challenge the confidential designation of deposition pages
4 264:24-267:2, which concern testimony regarding a licensing agreement between
5 Trump University, LLC, and a third party.³ Plaintiffs argue that Defendant's
6 testimony regarding the licensing agreement is not entitled protection because Trump
7 University, LLC, is a shell entity with no current operations. Plaintiffs also argue
8 that a ten year old agreement could not possibly implicate Defendant's present
9 business dealings. Defendant argues that the testimony is protected from disclosure
10 because it reveals operating and fee information that may impact Defendant's future
11 business dealings, and thereby the agreement meets the definition of a trade secret
12 under federal law.

13 The Court finds that Defendant has demonstrated good cause and that the
14 challenged testimony is entitled to a confidential designation. Because the parties do
15 not challenge the confidential designation of the underlying licensing agreement, the
16 Court declines to rule on the issue of whether the licensing agreement is in fact a
17 "trade secret." Nonetheless, trade secret law is instructive. In order to constitute a
18 protectable trade secret, information must "(1) Derive[] independent economic value,
19 actual or potential, from not being generally known to the public or to other persons
20 who can obtain economic value from its disclosure or use; and (2) Is the subject of
21 efforts that are reasonable under the circumstances to maintain its secrecy." Cal. Civ.
22 Code § 3426.1(d); *SkinMedica, Inc. v. Histogen, Inc.*, 869 F.Supp.2d 1176, 1192
23 (S.D. Cal. 2012); *Religious Tech Ctr. v. Netcom On-Line Commc'n Serv., Inc.*, 923
24 F.Supp. 1231, 1250-51 (N.D. Cal. 1995). Material, otherwise individually not
25 protectable, may also be a protectable trade secret if combined in a compilation. *See*
26 *SkinMedica, Inc. v. Histogen, Inc.*, 869 F.Supp.2d at 1194. A trade secret may consist

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28 ³ The underlying licensing agreement, Deposition Exhibit 487, was produced as confidential and
Plaintiffs do not challenge that designation.

1 of several elements, each of which is generally known, put together in a novel and
2 previously unknown combination. *Id.*; citing *O2 Micro Intern. Ltd. v. Monolithic*
3 *Power Sys., Inc.*, 420 F.Supp.2d 1070, 1089–90 (N.D.Cal. 2006) (“Combinations of
4 public information from a variety of different sources when combined in a novel way
5 can be a trade secret. It does not matter if a portion of the trade secret is generally
6 known, or even that every individual portion of the trade secret is generally known,
7 as long as the combination of all such information is not generally known.”) Here,
8 the law supports shielding sensitive business information from public disclosure,
9 including that which represents a compilation of private figures and data.

10 Accordingly, the Court finds that Defendant’s testimony regarding the
11 licensing agreement is entitled to protection from public disclosure. Regardless of
12 when the agreement was drafted, the challenged testimony meets the parties’ own
13 definition for “confidential information” in the Protective Order.⁴ Moreover, the
14 testimony summarizes many details about business operations and fee schedules,
15 which has not been made public to date. Plaintiffs rely principally, if not exclusively
16 on the “moribund” status of Trump University, LLC, to support their argument that
17 no harm could result by the de-designation of the testimony. Moreover, Plaintiff
18 contends that any revitalization of Trump University, LLC, is purely speculative in
19 nature. While this may all be true, Trump University, LLC, is not the Defendant in
20 this case. Regardless of the outcome of Defendant’s presidential campaign, it is not
21 speculation to believe the Defendant will continue his own private business dealings.
22 If this portion of the testimony is not protected as confidential, this information may
23 likely impact Defendant’s future business dealings as the licensing agreement
24 invariably reflects Defendant’s business strategy and acumen. Accordingly, the Court
25 upholds the confidential designation.

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27 ⁴ The Protective Order at issue states that “Any party may designate information as
28 ‘CONFIDENTIAL’ only if, in the good faith belief of such party and its counsel, the unrestricted
disclosure of such information could be potentially prejudicial to the business or operations of such
party.” (*Makaeff* Doc. No. 316.)

1 Plaintiffs suggest that Defendant has waived his right to designate testimony
2 concerning the licensing agreement as confidential. They point to a single question
3 asked at the deposition of former Trump University President, Michael Sexton, that
4 concerned the agreement. Mr. Sexton responded that he did not recall a provision of
5 the licensing agreement. Plaintiffs imply that because this question and answer were
6 not designated as confidential in Mr. Sexton's deposition transcript, that somehow
7 impacts the Court's ruling regarding the instant dispute. The Court is not persuaded.
8 Failing to designate such a question and non-affirming response as confidential has
9 no impact on the instant dispute. The Court DENIES Plaintiffs' request to de-
10 designate this portion of the deposition transcript, and therefore it retains the
11 confidential designation.

12 c. TESTIMONY CONCERNING PROFIT SHARING BETWEEN
13 DEFENDANT AND TRUMP UNIVERSITY, LLC

14 Lastly, Plaintiffs challenge the confidential designation of pages 441:14-
15 444:11, which concern testimony regarding profits shared between Trump
16 University, LLC, and Defendant.⁵ Plaintiffs argue that Defendant's testimony
17 regarding the profits shared between Defendant and the university bearing his name
18 are entitled to minimal protection as Defendant has publicly disclosed information
19 regarding his finances during the presidential campaign. Plaintiffs also assert that
20 Defendant has improperly over-designated the entire line of questioning as
21 confidential. Plaintiffs contend that any concerns can be addressed by redacting and
22 protecting specific numerical figures from disclosure. Defendant argues that the
23 testimony is properly designated as confidential because it reveals highly sensitive
24 financial information that is not publicly available.

25 While the Court agrees that specific dollar amounts merit a confidential
26 designation, the Court disagrees that the entire line of questioning regarding the

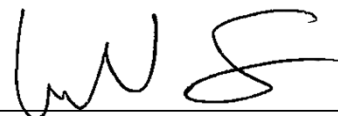
27
28 ⁵ The underlying financial documents, including Deposition Exhibit 517 and 517A,
were produced as confidential and Plaintiffs do not challenge that designation.

1 profits shared between Defendant and Trump University, LLC, is subject to
2 protection. Accordingly, the Court ORDERS Defendant de-designate as confidential
3 this portion of transcript for all but the following four provisions: 442:12-13 (starting
4 with “2 on line 12, and ending with “.” on line 13); 443:19 (numerical figure only);
5 443:22 (numerical figure only); 443:25 (numerical figure only). These four portions
6 of this disputed portion of the transcript shall maintain a confidential designation.

7 5. CONCLUSION

8 The Court has reviewed the parties’ Joint Statement, supplemental briefing,
9 supporting exhibits, other relevant documents filed in this action and the related
10 action of *Makaeff v. Trump University, LLC et al.*, 10-cv-940-GPC(WVG), and
11 listened to the arguments asserted by counsel for all parties during the Discovery
12 Conference. For the reasons set forth below, the Court hereby GRANTS IN PART
13 and DENIES IN PART Plaintiffs’ request for an Order to de-designate portions of
14 Defendant’s January 21, 2016, deposition transcript as follows: Defendant is
15 ORDERED to de-designate pages 192:9-201:17 and 454:23-471:4 as the Court finds
16 these pages are not entitled to confidential protection. Defendant is also ORDERED
17 to de-designate pages 441:14-444:11, with the exception of four provisions including
18 pages 442:12-13 (starting with “2 on line 12, and ending with “.” on line 13); 443:19
19 (numerical figure only); 443:22 (numerical figure only); 443:25 (numerical figure
20 only). These four portions of this disputed portion of the transcript shall maintain a
21 confidential designation. Plaintiffs’ request for an order de-designating pages
22 264:24-267:2 as confidential is DENIED, as the Court finds these are properly
23 protected from public disclosure. IT IS SO ORDERED.

24 Dated: March 14, 2016



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26 Hon. William V. Gallo
27 United States Magistrate Judge
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