

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

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| United States of America, <i>ex rel.</i> Donald, | : |  |
| E. Howard, <i>et al.</i>                         | : | Case No. 1:99-cv-285                   |
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| Relators and Plaintiffs,                         | : | Chief Judge Susan J. Dlott             |
|  | : |  |
| v.   | : | Order Granting in Part and Denying in  |
|  | : | Part Lockheed’s Motion for Order       |
| Lockheed Martin Corporation,                     | : | Determining Certain Documents Should   |
|  | : | Continue to be Treated as Confidential |
| Defendant.                                       | : |  |
|  | : |  |

This matter is before the Court on Lockheed Martin Corporation’s Motion for Order Determining Certain Documents Should Continue to be Treated as Confidential under the Parties’ Agreed Confidentiality and Protective Order (Doc. 344). Relators have objected to Lockheed’s designation of certain documents as subject to the Amended Confidentiality Agreement and Protective Order (“Protective Order”) (Doc. 145). The disputed documents were filed under seal at CM/ECF Doc. 336. For the reasons that follow, Lockheed’s Motion will be **GRANTED IN PART AND DENIED IN PART.**

**I. THE PROTECTIVE ORDER**

The Protective Order in this case was signed by the Court on May 19, 2009. (Doc. 145 at PageID 2033.) The Protective Order at paragraph 4 allows the parties to designate materials as subject to the Protective Order as follows:

Documents and other tangible things that constitute a risk of imposing serious competitive or financial harm to the designating party if made public or private personnel data may be designated by a party as “Subject to Protective Order,” either by a stamped legend if it is produced in hard copy, by other means if the data is produced in electronic form, or by counsels’ statement on the record if the information is elicited in oral form.

(*Id.* at PageID 2036.) Any document to be filed with the Court that contains material subject to the Protective Order must be filed under seal pursuant to paragraph 9 of the Protective Order.

(*Id.* at PageID 2039.)

The Protective Order states at paragraph 14 that any party can object to the designation of a document or exhibit as subject to the Protective Order with written notice to the designating party. (*Id.* at PageID 2041.) If the parties are unable to reach an agreement about a contested designation, the designating party can file an application to the Court that the designated material be treated as subject to the Protective Order. (*Id.*) The party making the designation shall have the burden of proving that the material should be treated as designated. (*Id.*)

## **II. LEGAL STANDARD**

Federal Rule of Civil Procedure 26 authorizes the Court, “for good cause,” to issue a protective order “requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.” Fed. R. Civ. P. 26(c)(1)(G). The discretion of the Court to shield court-filed documents from public scrutiny “‘is circumscribed by a long-established legal tradition’ which values public access to court proceedings.” *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (quoting *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983)). A party’s fear of embarrassment or harm to reputation generally is not sufficient to justify the sealing of court records. *See Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179–80; *Jacobs v. Lambda Research, Inc.*, No. 1:10-cv-536, 2012 WL 748578, at \*2 (S.D. Ohio Mar. 8, 2012). Nor is simple harm to a business’s commercial self-interest sufficient to justify keeping court records under seal. *See Procter & Gamble*, 78 F.3d at 225. “Where a business is the party seeking protection, it will have to show that disclosure would cause significant harm to its

competitive and financial position.” *Tinman v. Blue Cross & Blue Shield of Mich.*, 176 F. Supp. 2d 743, 745 (E.D. Mich. 2001) (quoting *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 653 (D. Md. 1987)).

### **III. ANALYSIS**

#### **A. “LMPI” Documents**

Lockheed asserts that Relators Exs. 356, 359, 362, 363, 364, 369, 373, 375, 376, 377, 378, 382, and 399 should be deemed subject to the Protective Order because Lockheed stamped the documents as “Lockheed Martin Proprietary Information” or “LMPI.” The Court disagrees. The LMPI stamp is not dispositive of whether a document is subject to the Protective Order. Lockheed employees stamped documents as LMPI pursuant to Lockheed’s written policy CRX-015c. Policy CRX-015c defined information as proprietary, and appropriate for the LMPI stamp, which could “provide [Lockheed] with a business, technological, or economic advantage over its competitors” or which if used by a third party “might be detrimental to [Lockheed’s] interests.” (Doc. 344 at PageID 29345.)<sup>1</sup> The CRX-015c standard was broader and less strict than the standard for material which is subject to the Protective Order. Material cannot be designated as subject to the Protective Order unless it “constitute[s] a risk of imposing serious competitive or financial harm to the designating party if made public.” (Doc. 145 at PageID 2036.) Lockheed might have properly designated a document as LMPI because it was seen as providing *some* business or economic advantage to Lockheed, but the Court cannot deem it subject to the Protective Order, and maintain the document under seal, unless the disclosure of the document risks imposing *serious* competitive or financial harm upon Lockheed.

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<sup>1</sup> Lockheed did not file a copy of policy CRX-015c to the Court. Lockheed provided an excerpt from the CRX-015c in its brief and Relators have not objected to the accuracy of that excerpt.

Additionally, the LMPI-stamped documents are not presumed to contain confidential information for all purposes pursuant to paragraph 5 of the Protective Order. The Protective Order states in paragraph 5 as follows:

Documents and other tangible things produced by the United States pursuant to subpoena which are marked “Lockheed Martin Proprietary Information” or “LMPI” on the face of a hard copy or electronic document shall be treated as subject to the provisions of this Protective Order, without regard to whether they are also marked “Subject to Protective Order.” This provision is intended to allow the United States to produce documents and other tangible things in response to subpoenas from the parties without having to separately review the production for Lockheed proprietary information.

(Doc. 145 at PageID 2036–37.) This provision appears to be intended to reduce the discovery burden imposed on the Government. LMPI-stamped documents produced by the Government—as opposed to those produced by Lockheed—are presumed to be confidential without the Government being required to conduct a pre-production confidentiality review.

Pursuant to paragraph 14 of the Protective Order, Relators had the right to challenge whether the LMPI-stamped documents at issue here should be subject to the Protective Order. (Doc. 145 at PageID 2041.) Lockheed now has the burden prove that public disclosure of the material might impose serious competitive or financial harm upon it in order to justify treating the material as subject to the Protective Order. (*Id.*) Lockheed must make this showing with particularized facts, not conclusory allegations. *See Tinman*, 176 F. Supp. 2d at 745–46. In a business context, the facts should be proven with concrete examples and by affidavits when possible. *See Waite, Schneider, Bayless & Chesley Co. L.P.A. v. Davis*, No. 1:11-CV-0851, 2012 WL 3600106, at \*5 (S.D. Ohio Aug 21, 2012); *Tinman*, 176 F. Supp. 2d at 746.

Lockheed does not meet its burden. It offers only conclusory arguments, not concrete examples or affidavits in support. It asserts that “[t]he challenged documents contain information regarding Lockheed Martin’s business practices, internal procedures, corrective

action, and work processes.” (Doc. 344 at PageID 29347.) However, Lockheed does not present particularized facts demonstrating how the disclosure of the LMPI-stamped documents risks imposing serious competitive or financial harm upon it. For example, Relators Exs. 356 and 373 appear to contain proprietary material insofar as they discuss internal Lockheed tool inventory and periodic inspection procedures from January 1999 and April 2004, respectively. (Doc. 336 at PageID 29004, 290052.) Nonetheless, the Court cannot assume, without specific supporting facts, that the disclosure of such material fifteen and twenty years later, respectively, imposes a risk of serious competitive or financial harm upon Lockheed today. Such an assumption would be particularly inappropriate in light of the fact that the F-22 is not in current production at Lockheed.<sup>2</sup>

Other disputed exhibits appear to contain no sensitive material at all. Relators Exs. 377 and 378 contain emails to which LMPI-designated material was attached, but the emails themselves are not designated LMPI, nor do they appear to discuss proprietary information. (*Id.* at PageID 29083, 29084.)

In sum, Lockheed has failed to meet its burden to demonstrate that the LMPI-designated exhibits should be treated as subject to the Protective Order.

**B. Relators Exs. 372, 374, 391**

Lockheed asserts that these documents contain confidential business information which should be protected, even though the documents are not designated as LMPI. Relators Ex. 372 is dated August 2003 and discusses the implementation of a corrective action plan in response to CAR #02-E-053. (*Id.* at PageID 29031.) Relators Ex. 374 is dated April 2004 and discusses the

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<sup>2</sup> Lockheed points out that a district court in Kansas treated as confidential documents concerning a contractor’s internal procedures and operations. *See U.S. ex. rel Smith v. The Boeing Co.*, No. 05-1073-WEB, slip op. at 4, 7 (D. Kan. Mar. 29, 2010) (filed herein at Doc. 353 at PageID 29775–29782.) However, the slip opinion is of limited precedential value. The district court does not discuss the evidence it considered, the age of the documents, whether the Boeing operations were currently being used, etc.

implementation of a corrective action plan in response to CAR#02-E-058. (*Id.* at PageID 29054.) Relators Ex. 391 contains a set of emails from May and June 2006 discussing Lockheed's implementation of periodic inspection requirements. (*Id.* at PageID 29103.) Lockheed again offers only conclusory assertions, and not particularized facts, that the disclosure of this material would result in the risk of serious competitive or financial harm. The Court cannot assume the disclosure will impose a risk of serious competitive or financial harm to Lockheed given the passage of time and the cessation of the F-22 program. The Court will not treat these documents as subject to the Protective Order.

### **C. Contractual and Program Documents**

Lockheed asserts that Relators Exs. 400 and 405, both of which contain excerpts from contracts between Lockheed and the Government, should be protected as confidential pursuant to the Protective Order. (*Id.* at PageID 29118, 29122.) Contract documents have been treated as confidential previously in this litigation. For example, Relators redacted an excerpt from the EMD Contract in their Response to Lockheed's Motion for Summary Judgment. (Doc. 269 at PageID 11866.) The EMD Statement of Work (SOF Ex. 38) was filed under seal at CM/ECF Doc. 256-6. Consistent with the treatment of the EMD Statement of Work, the Court will treat Relators Exs. 400 and 405 as subject to the Protective Order.

Finally, Relators Ex. 404 is a cost performance report which contains the budgeted and actual costs for the July 1995 period and cumulatively. (Doc. 336 at PageID 29120.) The cost performance report states on its face that distribution is to be limited to Department of Defense contractors and others approved by the Government's System Program Office. The Court will maintain Relators Ex. 404 as subject to the Protective Order.

#### IV. CONCLUSION

For the foregoing reasons, Lockheed Martin's Motion for Order Determining Certain Documents Should Continue to be Treated as Confidential under the Parties' Agreed Confidentiality and Protective Order (Doc. 344) hereby is **GRANTED IN PART AND DENIED IN PART**. The Motion is **DENIED IN PART** insofar as Lockheed has not met its burden of establishing that Relators Exs. 356, 359, 362, 363, 364, 369, 372, 373, 374, 375, 376, 377, 378, 382, 391, or 399 should be treated as subject to the Protective Order. Relators are granted leave to re-file those exhibits not under seal. The Motion is **GRANTED IN PART** insofar as Relators Exs. 400, 404, and 405 will be treated as subject to the Protective Order and kept under seal.

IT IS SO ORDERED.

S/Susan J. Dlott \_\_\_\_\_  
Chief Judge Susan J. Dlott  
United States District Court