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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ALLIANCE OF LOS ANGELES COUNTY PARENTS, an unincorporated association

Petitioner and Plaintiff,

v.

COUNTY OF LOS ANGELES COUNTY DEPARTMENT OF PUBLIC HEALTH; MUNTU DAVIS, in his official capacity as Health Officer for the County of Los Angeles; BARBARA FERRER, in her official capacity as Director of the County of Los Angeles Department of Public Health; and DOES 1 through 25, inclusive,

Respondents and Defendants.

Case No. 22STCP02772

NON-PARTY X CORP.'S REPLY TO THE ALLIANCE FOR LOS ANGELES COUNTY PARENTS' OPPOSITION TO MOTION TO SEAL

Date: September 21, 2023
Time: 9:30 a.m.
Dept.: 69
Judge: William F. Fahey

Complaint Filed: July 26, 2022
Trial Date: October 16, 2023

I. INTRODUCTION[1]

The Alliance -- by filing its opposition (the "Opposition") to the Motion -- continues to flout its agreement with X Corp., whereby the Alliance agreed in writing that it would move to seal the X Corp. Emails given their "CONFIDENTIAL" designation. More egregiously, the Opposition describes in detail the contents of the X Corp. Emails, contravening the basic purpose and procedures of California Rule of Court 2.551. Opp. at 2, 7-10.

The Alliance's pattern of bad faith conduct directed at a non-party seems motivated not by any true legal concern with sealing the X Corp. Emails, but rather by the Alliance's desire to post the X Corp. Emails on its website and argue its case on the internet, just as the Alliance has selectively done with many other documents related to this matter.[2] Nonetheless, the Opposition's arguments opposing the Motion lack merit for several reasons.

First, the Opposition misses the mark in arguing that X Corp. waived confidential protections over the X Corp. Emails by purportedly disclosing trade secrets to third parties. As made clear in the Motion, the sensitive business information in the X Corp. Emails is how X Corp. evaluates and responds to third-party reports of alleged user violations, including contextual analyses of specific user-generated content under the circumstances at the time the reports were submitted. Mot. at 4-5. X Corp. is not "disclosing trade secrets" simply by responding to the third parties who report potential user violations. *See Colgate v. JUUL Labs, Inc.*, 402 F. Supp. 3d. 728, 766 (N.D. Cal. 2019) (finding good cause to seal portion of letter that entity sent to consumers

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[1] All capitalized terms not defined herein shall have the meanings assigned to them in the Motion. Further, X Corp. is filing this reply given today's deadline, but will nonetheless work with the Alliance as discussed with the Court at the hearing in this matter on September 14, 2023 in efforts to resolve the Motion.

[2] The Alliance's true motivation to request that the X Corp. Emails are filed publicly rather than under seal is illustrated by its repeated practice of publishing case materials and information on its website, including emails it received in discovery from the County and X Corp.'s Objection Letter to the Subpoena. *See* https://www.laparents.org/our-lawsuit. Moreover, counsel for the Alliance often posts on her personal X Account about the lawsuit and her interactions with X Corp, including posting screenshots of emails with X Corp.'s counsel, to help garner support for the lawsuit and raise money for her cause. *See* https://twitter.com/hamill_law.

For example, after X Corp. filed the Motion, the Alliance's counsel sent an email alleging it made "many false misrepresentations," listing eight points, and publicly posted her email on her account on the X platform. Supp. Decl. of J. Jonathan Hawk, ¶¶ 2-3, Exs. E-F. X Corp.'s counsel responded, pointing to the evidence and showing how each of the Alliance's allegations was clearly incorrect and disproven. *Id.*, ¶ 4, Ex. G. The email from the Alliance's counsel is still accessible on her account, but it seems she has not posted X Corp.'s response. *Id.*

identifying entities to which it had produced documents in response to investigatory demands; information was "non-public," the entity that sent it treated it as confidential, and "release could result in reputational harm"); *see generally Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665, 678-679, 679 n.5 (9th Cir. 2010) (vacating district court's order denying motion to seal and remanding for reconsideration; "whether third-party has sought access is immaterial when a party moves to seal documents already filed with the court").

The confidential business information is X Corp.'s communication of its evaluation of the alleged user violations, including contextual analyses of specific user-generated content under the circumstances at the time of the reports. X Corp. can communicate its decision to a small, non-public group of persons comprised of X Corp. and the reporting party without jeopardizing the sensitivity of its business information. The Opposition's proposed bright-line rule would mean that a company could never confer generally with any third party about issues specific to them, without jeopardizing the company's ability to later maintain that information as proprietary. There is no support for the Opposition's over-simplified position, and adopting such a rule could result in companies choosing to not engage in discussions with third parties about issues that are specific to that small group.

Second, the Opposition provides no support for the existence of yet another purported bright line rule that a company must "pre-mark[]" all materials as "confidential" at the time they are drafted or sent, or any confidentiality will be destroyed and the documents cannot be later sealed in litigation. The former X Corp. employees who exchanged the X Corp. Emails had no obligation to pre-mark the emails as confidential while exchanging them. X Corp. has not revealed the X Corp. Emails to the general public and, until it was subpoenaed in this litigation, had no reason to believe the X Corp. Emails had been shared with anyone beyond those on the email threads. X Corp. marked the X Corp. Emails as "CONFIDENTIAL" when it produced them to the Alliance, and further demonstrated their confidentiality by securing the agreement that the Alliance has since flagrantly and in bad faith breached (thus placing additional undue burden on X Corp. as a non-party to the litigation). These circumstances maintain the confidentiality of the X Corp. Emails, without them having been marked as confidential at the time they were created, and X Corp. is

aware of no authority holding otherwise.

Third, it is irrelevant that some pages of the X Corp. Emails were produced by the County of Los Angeles to the Alliance during party discovery. Non-party X Corp. generally has no control over, let alone knowledge of, what is exchanged during discovery between the parties to a lawsuit. X Corp. was unaware that the County of Los Angeles was producing such materials before they were produced. That the Alliance had copies of these pages from the County but still issued the Subpoena for the same materials to non-party X Corp., and then filed versions produced by X Corp. that were marked "CONFIDENTIAL," is yet another example of the Alliance's pattern of bad-faith conduct. In any event, this argument has no legal consequence. The Alliance cites no case law to suggest that it has any bearing on the standard to seal records under California law.

X Corp. respectfully requests that the Court grant the Motion.

II. GOOD CAUSE EXISTS TO SEAL THE X CORP. EMAILS

The X Corp. Emails are a series of communications between former X Corp. personnel and third parties who reported accounts on the X platform for alleged violations of X Corp.'s terms and policies. Mot. at 1, 4-5. The X Corp. Emails contain X Corp.'s rationale for decisions that it made with regard to such specific accounts. Hawk Decl., ¶ 20. The confidential business information in the X Corp. Emails is whether X Corp. responds to such third party reports and, if so, how X Corp. communicates its evaluation of the alleged user violations, including any contextual analyses of specific user-generated content under the circumstances at the time the reports about that content were submitted. Mot. at 4-5; Hawk Decl., ¶ 20.

The Opposition does not meaningfully address the principal risk in publicly disclosing the X Corp. Emails (discussed below). Rather, it cites a single, factually distinguishable decision from 20 years ago regarding telemarketing scripts read to customers that stands for the basic principle that trade secrets may not receive protection from courts when they are disclosed to the public or to persons who are under no obligation to protect the confidentiality of the information. *See* Opp. at 6-7 (citing *In re Providian Credit Card Cases,* 96 Cal. App. 4th 292 (2002)).

In re Providian Credit Card Cases involved the defendants' appeal of the trial court's decision to grant a motion unsealing telemarketing scripts and memoranda on marketing strategies

from an individual who served as a consultant for the defendants. The defendants argued that the documents contained trade secrets and thus should remain sealed. The court found that the customer scripts containing sales pitches that had been used on (and thereby disclosed to) customers were not trade secrets that warranted sealing. *Id.* at 304.

Unlike telemarketing scripts, X Corp. has not widely disclosed the X Corp. Emails to users of the X platform. X Corp. revealed the information in the X Corp. Emails only to the third parties who reported the alleged user violations. Moreover and perhaps more importantly, *In re Providian Credit Card Cases* declined to establish a bright-line rule as to when sealing was appropriate. That court recognized the sealing of purported trade secrets was a question of fact that may require "a number of related factual determinations." *Id.* at 300-01.

Indeed, the Opposition does not address the risk of competitive harm to X Corp. that would result from disclosure of the X Corp. Emails to the public, which constitutes good cause for sealing. As X Corp. set out in the Motion, the public may misunderstand the nuances of the particular content that is reported, the circumstances surrounding the content at that time, and the application of then-effective rules. Mot. at 5. Misguided criticisms of online platforms in the context of content moderation decisions can cause serious competitive harm to a platform provider. Hawk Decl., ¶ 20. This risk of competitive harm increases with the volume of communications that are made public -- in other words, how X Corp. responds to one particular user's reported violation via email, as compared to its response to another user's reported violation, exacerbates the possibility of misguided criticisms.

Competitive harm is an "overriding interest" that justifies the sealing of the X Corp. Emails. Mot. at 4. Courts frequently find that the risk of competitive harm that would stem from disclosure of confidential business information warrants sealing. *See, e.g., In re Qualcomm Litig.*, 2017 WL 5176922, at *2-3 (S.D. Cal. Nov. 8, 2017) (finding confidential business information should be sealed to "prevent competitors from gaining insight into the parties' business model and strategy," which could "harm the parties in future negotiations with existing customers, third-parties, and other entities with whom they do business"); *Powertech Technology, Inc. v. Tessera, Inc.*, 2013 WL 1234116, at *19 (N.D. Cal. Apr. 15, 2013) (granting motion to seal defendant's draft license

agreement due to risk of competitive harm).

Furthermore, courts have found that the risk of harm to a company's business reputation constitutes good cause to seal. *See Colgate*, 402 F. Supp. 3d. at 766 (finding good cause to seal because information was "non-public" and "release could result in reputational harm"); *Asuragen, Inc. v. Accuragen, Inc.*, 2018 WL 4855435, at *2 (N.D. Cal. Jan. 30, 2018); *Garrity Power Servs. LLC v. Samsung Elec. Co. Ltd.*, 2021 WL 3473937, at *1-2 (N.D. Cal. July 29, 2021); *Shopify, Inc. v. Express Mobile, Inc.*, 2020 WL 4732334, at *11 (N.D. Cal. Aug. 14, 2020). And courts have found that reputational harm to non-parties can justify sealing the information at issue. *See Sywula v. Teleport Mobility, Inc.*, 2023 WL 362504, at *8-10 (S.D. Cal. Jan. 23, 2023) (court grants plaintiff's motion to seal two internal intel files because "disclosure of the files has the propensity to harm non-party Intel").

III. X CORP. MAINTAINED THE X CORP. EMAILS AS "CONFIDENTIAL"

The Opposition further argues that X Corp. did not make reasonable efforts to maintain the secrecy of the confidential business information that comprises the X Corp. Emails. Opp. at 7. In particular, the Opposition argues that X Corp. should have (1) marked the emails as confidential at the time they were originally sent, rather than at the time they were produced to the Alliance in response to the Subpoena; and (2) ensured it maintained a "confidential relationship" with the third parties who reported the user violations in the X Corp. Emails. *Id*. at 8. In efforts to support this argument, the Opposition again relies on *In re Providian Credit Card Cases*, this time for the naked conclusion that a party needs to make reasonable efforts to maintain the secrecy of trade secrets. *Id*. at 7.

X Corp. did not need to mark the emails as confidential at the time that they were exchanged or to maintain a confidential relationship with the users who reported the alleged violations. As above, X Corp. did not disclose any confidential information in its response to a particular alleged user violation. X Corp. has treated the X Corp. Emails as confidential by not revealing them to the general public or disclosing them to other parties -- as far as X Corp. was aware until being subpoenaed, each communication remained only between the third-party who reported the alleged user violation and X Corp. X Corp. then marked the X Corp. Emails as

"CONFIDENTIAL" when they were produced to the Alliance to maintain their confidentiality, and secured an agreement from the Alliance that it would seek to maintain that designation.[3]

The Opposition provides no support for the existence of a bright line rule that a communication with a small group of third parties destroys the confidentiality of the communications or the ability for them to be sealed, and the Opposition's argument -- which are seemingly confusing principles regarding privilege with those for confidentiality -- should fail.

IV. OTHER PARTIES' PRODUCTIONS ARE IRRELEVANT

The Opposition further argues that "nine pages of the documents X Corp. seeks to seal have already been produced and filed by the Defendants in this action." Opp. at 1. The Opposition appears to argue that X Corp. should have predicted and somehow prevented the Defendants, as the party reporting an alleged user violation, from disclosing those emails to the Alliance during the discovery in this litigation. *Id*. at 8.

The Opposition tellingly cites no case law standing for the principle that a party producing emails previously exchanged with a non-party, without designating them as confidential, precludes the non-party from seeking confidential treatment of the documents. This is likely because a non-party to the litigation has no control over what the parties disclose to each other in discovery. Non-party X Corp. has no access to the County's document productions and would have had no way to discern what the Defendants disclosed. The Defendants may also not have realized the potential impact of their production if it were to be made public. The suggestion that a non-party should be penalized for the Defendant's document production defies logic.

V. CONCLUSION

For all these reasons, X Corp. respectfully requests that the Court grant the Motion and seal the X Corp. Emails.

Dated: September 14, 2023

WHITE & CASE LLP

By: _____
J. Jonathan Hawk

[3] To be clear, X Corp. is not arguing that its agreement with the Alliance is a sufficient basis to seal the documents. Good cause to seal the X Corp. Emails exists separate from that agreement. The agreement nonetheless reflects the other facts before the Court showing that X Corp. treats these records as confidential, and is further indicia of the Alliance's bad faith conduct with respect to a non-party in the litigation.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 555 S. Flower Street, Suite 2700, Los Angeles, California 90071-2007. I am employed by a member of the Bar of this Court at whose direction the service was made.

On September 14, 2023, I served the foregoing document(s) described as:

NON-PARTY X CORP.'S REPLY TO THE ALLIANCE FOR LOS ANGELES COUNTY PARENTS' OPPOSITION TO MOTION TO SEAL

on the person(s) below, as follows:

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☒ **(BY MAIL)** I caused the foregoing document(s) to be sent to the addressees named above. The document(s) were placed in a sealed envelope or package addressed to the person(s) at the address(es) listed above and placed the envelope for collection and mailing at White & Case LLP, Los Angeles, California, following our ordinary business practices. I am readily familiar with White & Case LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed September 14, 2023, at Los Angeles, California.

/s/ Cindy Lopez de Santa Anna
Cindy Lopez de Santa Anna