

STATE OF MINNESOTA

TAX COURT

REGULAR DIVISION

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Macy's Retail Holdings, Inc.,

Petitioner,

vs.

County of Hennepin,

Respondent.

**ORDER GRANTING COUNTY'S
MOTION TO COMPEL
DISCOVERY**

File No: 27-CV-13-07833
(Men's & Home Store)

Dated: January 10, 2014

This matter came before the Honorable Bradford S. Delapena, Chief Judge of the Minnesota Tax Court, on the County's motion to compel discovery.

Thomas R. Wilhelmy, Judy S. Engel, and Christopher A. Stafford, Attorneys at Law, represented petitioner.

Lisa Hahn-Cordes and John March, Assistant Hennepin County Attorneys, represented respondent.

Based upon all the files, records, and proceedings herein, the court now makes the following:

ORDER

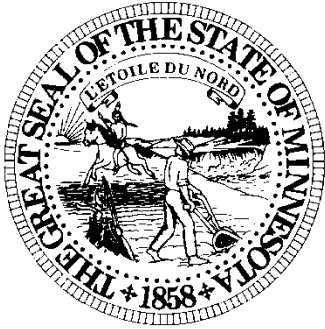
1. The County's motion to compel discovery is granted. Macy's shall within ten days of the date of this order fully respond to the County's written discovery served on September 30, 2013.

2. Macy's request for a protective order is denied.

3. Each party shall bear its own expenses and attorney fees.

IT IS SO ORDERED.

BY THE COURT,



Bradford S. Delapena, Chief Judge
MINNESOTA TAX COURT

DATED: January 10, 2014

MEMORANDUM

At issue in this case is the value of the Macy's Men's and Home Department Store at the Ridgedale Center in Minnetonka as of January 2, 2012. The County served Macy's with written discovery requests. Macy's responded to some requests and proposed a stipulated protective order for certain other responsive materials. Concluding that a protective order was not warranted, the County filed a motion to compel discovery. Macy's opposes the County's motion to the extent it seeks disclosure without a protective order. We grant the County's motion to compel discovery and deny Macy's request for a protective order.

BACKGROUND

On the relevant valuation date, Macy's operated two anchor department stores at Ridgedale Center: the Men's and Home Store, and the Women's and Children's Store. Through contemporaneous transactions during September 2013, Macy's sold the Men's and Home Store to Ridgedale Center, LLC, and agreed to renovate and expand the Women's and Children's Store.

On September 30, 2013, the County served Macy's with written interrogatories and requests for production of documents. Macy's responded to some requests but interposed objections to three interrogatories and two document requests on the ground, among others, that

they sought confidential and proprietary business information relating to the negotiation and terms of Macy's agreements with Ridgedale Center. Macy's informed the County it was prepared to produce responsive information, but only subject to a protective order. Macy's enclosed with its response a proposed stipulated protective order for the County's review.

The County concluded that the proposed protective order was not appropriate for the disputed materials and so informed Macy's. When Macy's persisted in its refusal to produce, the County filed a motion to compel discovery. Macy's opposes the motion to the extent that it seeks disclosure without a protective order. The County replies that a protective order is not warranted, and that its motion to compel should be granted without modification.

ANALYSIS

Parties may obtain discovery by methods including written interrogatories and requests for production of documents. Minn. R. Civ. P. 26.02(a). *See also id.* at 33.01(a) ("Any party may serve written interrogatories upon any other party."); *id.* at 34.01 ("Any party may serve on any other party a request (1) to produce ... any designated documents"). Trial courts, however, have broad discretion to regulate discovery and to issue suitable protective orders. *In re Paul W. Abbott Co., Inc.*, 767 N.W.2d 14, 17-18 (Minn. 2009); *Baskerville v. Baskerville*, 246 Minn. 496, 507, 75 N.W.2d 762, 769 (1956). As relevant here, Minnesota law provides:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

* * *

(g) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way

Minn. R. Civ. P. 26.03(g). “Generally, the burden of demonstrating good cause rests with the party seeking a protective order.” *Star Tribune v. Minnesota Twins P’ship*, 659 N.W.2d 287, 293 (Minn. App. 2003) (citations omitted).

A party seeking discovery may move for an order compelling an answer or production. Minn. R. Civ. P. 37.01(b)(2). If the court denies such a motion, or grants it only in part, the court may enter any protective order authorized under Rule 26.03. *See* Minn. R. Civ. P. 37.01(d).

In this case, Macy’s seeks a protective order making confidential four separate documents related to its September 2013 transactions with Ridgedale Center: (1) a 12-page January 9, 2013 Letter of Intent; (2) a 23-page September 11, 2013 Purchase and Sale Agreement; (3) a 20-page September 11, 2013 Exchange Agreement; and (4) a 87-page September 11, 2013 Separate Agreement. During the hearing on the County’s motion to compel discovery, Macy’s submitted these documents to the court for *in camera* review. We find Macy’s application exaggerated in scope, lacking in evidentiary support, and wanting in substance.

Macy’s contends that “[i]n the course of the negotiations involving these interrelated transactions, Macy’s agreed to maintain the confidentiality of the proposed business terms and transactions.”¹ The only mention of confidentiality in any of the four documents, however, is contained in the January 9, 2013 Letter of Intent, which provides: “The parties agree to keep the terms and conditions *set forth in this LOI* confidential.”² By its express language, this provision has no bearing upon terms and conditions contained in separate documents, and it does not provide for the confidentiality of the contemplated “transactions” themselves.

The documents Macy’s and Ridgedale Center executed in September 2013 do not expressly address confidentiality. The Exchange Agreement provides merely that “[t]his

¹ Macy’s Mem. Opp’n Mot. Compel at 2.

² *In camera* Ex. 1 at 5 (emphasis added).

Agreement shall not be recorded,”³ and the Separate Agreement provides that “[n]either party shall record (nor permit the recording) of this Agreement nor record any other instrument revealing any term of this Agreement.”⁴ Macy’s directs us to no provision in the parties’ Purchase and Sale Agreement that pertains either to confidentiality or to recording.⁵ In sum, although the Letter of Intent provides that the parties intended to keep its terms confidential, and the Separate Agreement *implies* (at best) an intent to maintain the confidentiality of its terms, the Exchange Agreement provides only that it shall not be recorded, and the Purchase and Sale Agreement contains no provision bearing on either confidentiality or recording. We find that Macy’s motion to secure confidentiality for all four documents, collectively totaling 142 pages, is overbroad.

Macy’s request also lacks proper evidentiary support. Macy’s alleges that the terms contained in the documents bearing on its transactions with Ridgedale Center have in fact been kept confidential. In support of this claim, Macy’s submits the affidavit of Mr. Scott Brown, its Director of Property Tax, which provides in pertinent part:

Macy’s has not at any time disclosed the terms of the sale and expansion transaction to any person outside the Macy’s organization, except to entities affiliated with Ridgedale Center and directly participating in the transaction. To the best of Macy’s knowledge and information, Ridgedale Center has likewise not disclosed the terms of the sale and expansion transaction to any third party.⁶

³ *In camera* Ex. 3 ¶ 20.

⁴ *In camera* Ex. 4 ¶ 16.

⁵ *In camera* Ex. 2. We note with some consternation that in an affidavit Macy’s filed in support of its request for a protective order on November 20, 2013, the affiant avers “the final *agreements* relating to the sale and expansion transaction provided, in relevant part, ‘[n]either party shall record (nor permit the recording) of this Agreement nor record any other instrument revealing any term of this Agreement.’” Affidavit of Scott Brown (Nov. 14, 2013) ¶ 6 (emphasis added). Macy’s submitted the agreements themselves only on November 26, 2013, during the hearing on the County’s motion to compel. As we have already noted, only the Separate Agreement actually contains the quoted provision, and the Purchase and Sale Agreement contains no language even remotely similar.

⁶ Brown Aff. ¶ 7.

This paragraph indicates that Macy's: (1) may have liberally disclosed the relevant terms within its own organization; and (2) has in fact disclosed the terms "to entities affiliated with Ridgedale Center and directly participating in the transaction." This is insufficient to establish protection under our prior cases. *See Mall of Am. Co. v. Cnty. of Hennepin*, Nos. 16076 et al, 1995 WL 461069, at *3 (Minn. T.C. Aug. 2, 1995) (granting a protective order where the "[a]ffidavits filed by Petitioner indicate that the type of data Respondent seeks to discover was made available to Petitioner's employees on a need-to-know basis only and was never disclosed outside of the organization.").

In addition, although Mr. Brown affirmatively states that Macy's disclosed the terms "to entities affiliated with Ridgedale Center," Macy's does not allege that it contractually required those separate entities to protect the information, and it submitted no affidavits establishing that they actually did so. Finally, although Brown asserts that "to the best of Macy's knowledge and information" Ridgedale Center has not disclosed the terms of the parties' agreements to third parties, the quoted phrasing makes plain that Brown lacks personal knowledge concerning these matters. *See* Minn. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). We find that Macy's has not presented sufficient evidence to support its request for a protective order.

Macy's request for protection also fails as a matter of substance. Mr. Brown's affidavit provides in part:

The terms under which [Macy's] has agreed to renovate and expand the Women's and Children's store in connection with the sale of the Men's and Home store contain confidential commercial information constituting a trade secret, which derives independent economic value from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, which is the subject of

reasonable efforts under the circumstances to maintain secrecy, and which that, if made public, could allow a competitor to analyze [Macy's] costs and expenses and thereby obtain a competitive advantage.⁷

First, we attach no weight to Mr. Brown's naked assertion that the terms of Macy's agreements with Ridgedale Center constitute a trade secret. Neither Brown nor Macy's offers us any substantive analysis of that issue. Second, and more importantly, Brown and Macy's fail to explain how a competitor—even if permitted to analyze Macy's costs in renovating and expanding the Women's and Children's Store—would thereby obtain a “competitive advantage” over Macy's. Aside from being entirely conclusory, this assertion of harm is hopelessly vague and unspecific. *See In re Rahr Malting Co.*, 632 N.W.2d 572, 576 (Minn. 2001) (“Conclusory allegations of harm do not support a finding that data constitutes a trade secret.”).

Finally, as the County rightly observes, Macy's has already publicly disclosed much of the cost information it asks us to protect. Macy's commercial building permit application dated April 15, 2013, valued work for exterior renovations of the Women's and Children's Store at \$5,012,000.⁸ Its commercial building permit application dated June 11, 2013, valued work for interior renovations at \$8,379,594.⁹ On June 19, 2013, the City of Minnetonka issued a building permit based on a work value of \$13,391,594 (\$5,012,000 + \$8,379,594).¹⁰ These are all public documents. There is no evidence that any additional specificity concerning expansion and renovation costs in the disputed materials will harm Macy's.

We conclude that Macy's has failed to demonstrate good cause for a protective order. Consequently, we grant in full the County's motion to compel discovery.

B.S.D.

⁷ Brown Aff. ¶ 8.

⁸ County's Reply Mem. Supp. Mot. Compel, Ex. 1.

⁹ County's Reply Mem. Supp. Mot. Compel, Ex. 2.

¹⁰ County's Reply Mem. Supp. Mot. Compel, Ex. 3.