UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

THE UNITED STATES OF AMERICA *ex rel.* KASSIE WESTMORELAND, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 06-10972-WGY
AMGEN INC., et al.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF RELATOR'S MOTION CHALLENGING CONFIDENTIALITY DESIGNATIONS ASSERTED WITH RESPECT TO CERTAIN DEPOSITION TRANSCRIPTS

Pursuant to this Court's June 11, 2010 Stipulated Amended Protective Order Regarding Confidentiality of Records Produced During Discovery (No. 244) (the "Protective Order), Relator Kassie Westmoreland hereby challenges the confidentiality designations relating to the depositions of six non-party witnesses. During discovery in this case, five former Amgen Inc. employees, and the office manager of a medical provider who purchased Aranesp from Amgen, refused to provide any substantive deposition testimony, and instead chose to invoke their Fifth Amendment rights against self-incrimination.

Following their depositions, counsel for those witnesses, as well as counsel for Amgen, designated as "confidential" or "highly confidential" any portion of the deposition transcript where the witness had declined to testify and instead invoked his or her Fifth Amendment rights. Because neither the Protective Order nor Rule 26 permits a witness to shield his or her refusal to provide discovery, and because materials to be filed with this Court (or any other) should

presumptively be accessible to the public, Relator requests that this Court order these deposition transcripts be reclassified as not subject to the Protective Order.

BACKGROUND

On February 17, 2011, Relator notified counsel for the individual deponents who had asserted confidentiality based on the invocation of their Fifth Amendment rights that she was challenging the basis for those confidentiality designations. Declaration of Joseph Hall ("Hall Dec.") ¶3. Relator's counsel requested the basis for the witnesses' confidentiality designations in accordance with Paragraph 4 of the Protective Order in these proceedings. *Id.* ¶4. One week later, counsel for one of the deponents (referred to herein as "Lead Deponent Counsel"), responded that his client would not withdraw his confidentiality designations. *Id.* ¶5. Lead Deponent Counsel provided no basis for such designation at that time, and instead indicated that he was available to meet and confer on March 4, 2011. *Id.* ¶6.

Relator's counsel responded that same day, objecting that Lead Deponent Counsel had failed to provide any basis for his prior designations as required by the Protective Order. *Id.* ¶7. Relator's counsel also objected that a meet and confer on March 4, 2011 was unreasonable given a dispositive motion deadline of March 1, 2011, and noted that the Protective Order contained a three-day notice period and a two-day response time. *Id.* ¶8. Lead Deponent Counsel subsequently responded that the designation of his client's testimony was based on the "risk of embarrassment and harassment," and that he was available on February 25, 2011. *Id.* ¶9. Counsel representing the other deponents who had invoked their Fifth Amendment privileges rather than testify thereafter notified Relator's counsel that they adopted the argument made by Lead Deponent Counsel. *Id.* ¶10.

Counsel for the deponents, Amgen and Relator subsequently met and conferred telephonically on February 25, 2011. *Id.* ¶11. Counsel for Amgen confirmed that Amgen was withdrawing its confidentiality designations. *Id.* ¶12. Counsel for the individual deponents declined to withdraw their designations. *Id.* ¶13.

ANALYSIS

There is a presumptive right of the public to access materials "which properly come before the court in the course of an adjudicatory proceeding and which are relevant to that adjudication." *In re Providence Journal Co., Inc.*, 293 F.3d 1, 10 (1st Cir. 2002) (quoting *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 412-13 (1st Cir. 1987)). That common-law right of access extends to "materials on which a court relies in determining the litigants' substantive rights." *Id.* (citing *Anderson v. Cryovac, Inc.*, 805 F. 2d 1, 13 (1st Cir. 1986)). Because of this strong presumption in favor of public access, "only the most compelling reasons can justify non-disclosure of judicial records." *Standard Fin. Mgmt. Corp*., 830 F.2d at 410 (quotation and alteration omitted). The party advocating secrecy bears "the heavy burden of exhibiting the existence of special circumstances adequate to overcome the presumption of public accessibility." *Id.* at 413.

In this case, the deponents who have invoked their Fifth Amendment rights rather than testifying cannot meet the necessary burden. First, while counsel for the witnesses has designated the testimony "highly confidential," which under the Protective Order is limited to "highly sensitive commercial information that has a significant competitive value as determined in good faith by the Producing Party." Relator's Motion for Partial Summary Judgment relies on the fact that former employees of Amgen – at every level of the corporation from sales

representative to senior management – were unwilling to answer even basic questions about their tenure with Amgen for fear of exposing themselves to criminal prosecution. Relator's counsel will also rely on the fact that one of the office managers to whom Amgen marketed Aranesp was similarly unwilling to answer any questions for fear of criminal liability.[1] Thus, the portions of the deposition transcripts where witnesses have asserted their Fifth Amendment rights rather than testify are relevant evidence in support of Relator's claims and motions for summary judgment and should be made a part of the public record in this case.

The only justification for the confidentiality designation offered by deponents' counsel is that "embarrassment and harassment" might accompany a public record that a deponent has invoked the Fifth Amendment rather than provide discovery. But court after court has rejected such possible embarrassment and harassment as legitimate basis for confidentiality. *See Nursing Home Pension Fund v. Oracle Corp.*, No. C01-00988 MJJ, 2007 WL 3232267, at *5 (N.D. Cal. Nov. 1, 2007) (rejecting request by non-party for protective seal for deposition transcript where non-party had asserted Fifth Amendment privilege; any potential for "embarrassment" or public impression that invocation of privilege was "tacit admission of guilt" failed to satisfy "good cause" requirement to seal filings with court); *Morrow v. City of Tenaha*, Civil Action No. 2-08-cv-288-TJW, 2010 WL 3927969, at *1 (E.D. Tex. Oct. 5, 2010) (refusing to grant protective order to prevent plaintiffs from providing deposition transcripts of video depositions – including depositions where witness asserted Fifth Amendment protections – to

[1] A former employee's invocation of the Fifth Amendment is admissible evidence against his employer. *Rad Services, Inc. v. Aetna Casualty & Surety Co*., 808 F.2d 271 (3d Cir. 1986) (concluding that there was no error when the trial court admitted non-party depositions in which the deponents invoked the Fifth Amendment and permitted the jury to infer that the deponents' testimony would have been unfavorable to the plaintiff corporation). Indeed, this Court has recognized that "legally it would be warranted" to make an adverse inference against a corporation based on the invocation of the Fifth Amendment by a former employee. *See Brookridge Funding Corp. v. Aquamarine, Inc*., 675 F. Supp. 2d 227, 233-234 (D. Mass. 2009).

television station; witness's embarrassment was not good cause, nor was there any specific showing of risk of taint to the jury pool or that release of information would mislead the public); *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 122 F.R.D. 433, 434 (S.D.N.Y. 1988) (ordering removal of confidentiality designations from deposition transcripts where witnesses had asserted Fifth Amendment rights; any possible embarrassment to witness from public disclosure did not warrant protection under Rule 26). *See also Bank of Amer. v. First Mutual Bancorp of Ill.*, Nos. 09 C 5108, 09 C 5109, 2010 WL 2364916, at *1 n.2 (N.D. Ill. June 14, 2010) (noting doubt that deposition transcripts and discovery responses "consisting almost entirely of the assertion of Fifth Amendment privilege should be under seal").[2]

Indeed, courts have rejected the claim that "embarrassment" is a proper basis for a protective order, noting that sealing a deposition transcript where the deponent asserts Fifth Amendment privileges is especially inappropriate given that Rule 26(c) is designed to protect parties that provide discovery, not parties who wish to avoid it:

> The logic of movant's "embarrassment" argument suggests that anyone invoking the Fifth Amendment to preclude discovery should be entitled to a protective order. There is no authority for such a proposition, and with good reason. The provisions of Rule 26(c) authorize sealing as a means of accommodating the interests of litigants in obtaining pretrial discovery with the interest of witnesses in avoiding unfair prejudice by virtue of public disclosure of sensitive information that is being given to the parties. In this case, however, the witness is refusing to provide information, and is seeking to keep that fact a secret.

[2] Lead Deponent Counsel provided one case that he claimed supported allowing deponents to maintain as confidential deposition transcripts where the deponent had asserted his Fifth Amendment rights rather than provide testimony. That case, *Hobley v. Burge*, 225 F.R.D. 221 (N.D. Ill. 2004), specifically states that it does not apply to cases such as this one, where the deposition transcripts are at issue in a filing with the Court. *Id.* at 224 ("Movants' motion does *not* raise the issue of whether it would be appropriate to order that any of the deposition transcripts or videotapes at issue be filed under seal if they were submitted to the court as evidence.") (emphasis in original).

Gumowitz v. First Federal Savings and Loan Assoc. of Roanoke, No. 90 Civ. 8083 (MBM), 1994 WL 683431, at *1 (S.D.N.Y. Dec. 6, 1994).[3] Moreover, courts have recognized that while the protections of the Fifth Amendment are available to witnesses in civil cases, those witnesses cannot expect that those protections are available without cost. *Mid-America's Process Serv. v. Ellison*, 767 F.2d 684, 686 (10th Cir. 1985) ("[P]etitioners unquestionably may assert a Fifth Amendment privilege in this civil case and refuse to reveal information properly subject to the privilege . . . in which event they may have to accept certain bad consequences that flow from that action.") (internal citations omitted).

Finally, the good cause deponents are required to demonstrate in order to seal their deposition transcript must be based on a particular factual demonstration of potential harm, not on conclusory statements. *See* 8 C. Wright & A. Miller, Federal Practice and Procedure § 2035, at 264-65 (1970). Here, deponents have simply claimed the potential for embarrassment and harassment without any specific showing of the nature of the harm or its extent. Deponents' failure to offer any tangible prejudice that might result from public disclosure of their deposition transcript is grounds alone for granting Relator's motion.

CONCLUSION

For the foregoing reasons, Relator's motion challenging the classification of deposition testimony as confidential based on the witness's invocation of the Fifth Amendment privilege should be granted.

[3] Nor does the analysis change appreciably based on whether the deponent is a party or a non-party. *Gumowitz*, 1994 WL 683431, at *1 (S.D.N.Y. Dec. 6, 1994) ("In this case I conclude that the fact that movant is not a party, while entitled to some weight, does not make up for the complete absence of any showing by him of good cause, particularly when the sealing order is sought, not to limit dissemination of material produced in discovery, but to limit public knowledge that the witness declined to provide such information.").

March 1, 2011

Respectfully submitted,

RELATOR KASSIE WESTMORELAND

By: /s/ Joseph S. Hall___
Mark C. Hansen (BBO # 541753)
Silvija A. Strikis (pro hac vice)
Joseph S. Hall (pro hac vice)
Derek T. Ho (BBO # 652627)
Andrew C. Shen (pro hac vice)
Bryan A. Carey (BBO # 650570)
KELLOGG, HUBER, HANSEN, TODD
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (facsimile)

Suzanne E. Durrell (BBO #139280)
DURRELL LAW OFFICE
180 Williams Avenue
Milton, Massachusetts 02186
(617) 333-9681
Fax: (617) 333-0014
Email: Suzanne.durrell@verizon.net

Robert M. Thomas, Jr. (BBO #645600)
THOMAS & ASSOCIATES
280 Summer Street, 5th Floor
Boston, MA 02210-1131
(617) 371-1072
Fax: (888) 676-7420
Email: rmt@thomasandassoc.net

Rory Delaney (BBO #655666)
33 Broad Street, 5th Floor
Boston, MA 02109
(857) 498-0384
Email: rory@rorydelaney.com

Charles F. Kester (pro hac vice)
Lawrence M. Isenberg (pro hac vice)
KESTER & ISENBERG
Encino Financial Center

16133 Ventura Boulevard, Suite 260
Encino, California 91436
(818) 728-3300
Fax: (818) 728-3311
Emails ckester@kesterisenberg.com
lisenberg@kesterisenberg.com