

STATE OF NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
20 CVS 916

MONTE L. PERRY,

Plaintiff,

v.

FRIGI-TEMP FRIGERATION, INC.  
and JOHN T. ("TIM") GRAY,

Defendants.

**ORDER ON PLAINTIFF'S MOTIONS  
TO SEAL**

1. **THIS MATTER** is before the Court upon Plaintiff Monte L. Perry's Motion to Seal Brief in Support of Motion to Amend Case Management Order or for Leave to File an Amended Complaint and Exhibits (the "First Motion to Seal"), (ECF No. 31), and Motion to Seal Amended Complaint (the "Second Motion to Seal"), (ECF No. 33), (collectively, the "Motions to Seal") in the above-captioned case.

2. In the First Motion to Seal, filed March 4, 2020, Plaintiff sought to seal his Brief in Support of Plaintiff's Motion to Amend Case Management Order or for Leave to File Amended Complaint (the "Brief in Support"), (ECF No. 30), and Exhibits 1 and 2 attached thereto, (ECF Nos. 30.1–30.5). (*See* ECF No. 31.) Exhibits 1 and 2 included a redline of the proposed Amended Complaint compared to the original Complaint, the proposed Amended Complaint, and twenty-eight supporting exhibits. (*See* ECF Nos. 30.1–30.5.)

3. Separately, on March 5, 2020, the Court entered an Order on Plaintiff's Motion to Amend the Case Management Order or for Leave to File an Amended Complaint (the "Motion to Amend"), (ECF No. 29), in which the Court (i) denied the

Motion to Amend as moot; (ii) deemed filed as of March 5, 2020 Plaintiff's proposed Amended Complaint (with exhibits), included as Exhibit 2 to his Brief in Support; and (iii) directed Plaintiff to file the Amended Complaint (with exhibits) on the Court's electronic docket. (*See* ECF No. 32.) Plaintiff promptly filed the Second Motion to Seal, (ECF No. 33), and provisionally filed under seal his Amended Complaint, (ECF No. 34), and twenty-eight attached exhibits, (ECF Nos. 34.1–34.28).

4. On March 9, 2020, Plaintiff filed a Certificate of Service of Plaintiff's Motions to Seal, (ECF No. 35), in compliance with Rule 5.2(b)(5) of the North Carolina Business Court Rules ("BCRs"), because the Motions to Seal indicate that third party TWC Services, Inc. ("TWC") was the designating party of all materials provisionally filed under seal, (*see* ECF Nos. 31, 33).

5. On March 11, 2020, TWC filed its Supplemental Brief in Support of Plaintiff's Motion to File the Amended Complaint Under Seal<sup>1</sup> (the "Supplemental Brief"), (ECF No. 37), pursuant to BCR 5.3. Two days later, Defendants Frigi-Temp Frigeration, Inc. ("Frigi-Temp") and John T. Gray ("Gray") (together, "Defendants") also filed a Supplemental Memorandum in Support of Plaintiff's Motions to Seal<sup>2</sup> (the "Supplemental Memorandum"), (ECF No. 40). Plaintiff timely filed public redacted

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<sup>1</sup> TWC has styled its brief as "Supplemental Brief in Support of Plaintiff's Motion to File the Amended Complaint Under Seal," but the Supplemental Brief states that the arguments made in support of sealing apply to both Motions to Seal. (*See* ECF No. 37.)

<sup>2</sup> Although Defendants acknowledge that they are not the designating parties under BCR 5.3, Defendants believe that the documents provisionally filed under seal are in fact "Confidential" and, as such, filed their Supplemental Memorandum "out of an abundance of caution" in the event TWC decided to "withdraw its designations of the subject documents as 'Confidential.'" (ECF No. 40.)

versions of (i) his Brief in Support, (ECF No. 38); (ii) Exhibits 1 and 2 thereto, (ECF Nos. 38.1–38.2); (iii) his Amended Complaint, (ECF No. 39); and (iv) Exhibits 1–28 thereto, (ECF Nos. 39.1–39.28).

6. Documents filed in the courts of this State are “open to the inspection of the public[.]” except as prohibited by law. N.C.G.S. § 7A-109(a); *see Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 463, 515 S.E.2d 675, 685 (1999). Nevertheless, “‘a trial court may, in the proper circumstances, shield portions of court proceedings and records from the public[.]’ ” *France v. France*, 209 N.C. App. 406, 413, 705 S.E.2d 399, 405 (2011) (emphasis omitted) (quoting *Virmani*, 350 N.C. at 463, 515 S.E.2d at 685).

7. BCR 5 governs the process for filing documents under seal in this Court and includes specific procedural instructions designed to ensure a proper balance between the interests of the litigants and the public. When a motion to seal is filed by a party who is not the designating party, BCR 5.3 gives the designating party the opportunity to file a supplemental brief that provides the Court with additional information to determine whether sealing is warranted under BCR 5.2(b). *See* BCR 5.3. Until the Court can make this determination, BCR 5.2(d) provides the public with notice that documents have been provisionally sealed and allows access to public redacted versions or non-confidential descriptions of those documents. *See* BCR 5.2(d). TWC, as the designating party, bears the burden of overcoming the presumption that court records should be open to the public. *See* BCR 5.1(b); *Preiss v. Wine & Design Franchise, LLC*, 2018 NCBC LEXIS 55, at \*7 (N.C. Super. Ct. June 4, 2018).

8. In its Supplemental Brief, TWC, as the designating party, first contends that sealing is necessary because it has designated certain information as “Confidential” under the Consent Protective Order, (ECF No. 28), entered in this case. (See ECF No. 37.) In their Supplemental Memorandum, Defendants additionally contend that sealing is proper because much of the information TWC seeks to have sealed is also subject to two nondisclosure agreements, one between TWC and Frigi-Temp, (ECF No. 40.1), and one between Plaintiff and Frigi-Temp, (ECF No. 40.2), both of which were executed in relation to the potential sale of Frigi-Temp’s assets to TWC. (See ECF No. 40.)

9. Although parties may agree to designate certain information as “Confidential,” our Court of Appeals has recently emphasized that “freedom of contract must be balanced with the presumptive right of public access to court proceedings.” *Doe v. Doe*, 823 S.E.2d 583, 600 (N.C. Ct. App. 2018); *see also Taylor v. Fernandes*, 2018 NCBC LEXIS 4, at \*5 (N.C. Super. Ct. Jan. 18, 2018) (“A court . . . is not bound by the parties’ designation of material as ‘confidential,’ even if the designation is made in accordance with a confidentiality agreement executed by the parties.”).

10. While the parties’ designation of material as “Confidential” is one factor the Court may consider when determining whether sealing is warranted, “the reason the court seals [documents] is not because the parties have agreed to keep them confidential but instead because their disclosure would cause serious harm to [the]

parties . . . .” *Lovell v. Chesson*, 2019 NCBC LEXIS 76, at \*5 (N.C. Super. Ct. Oct. 28, 2019).

11. Here, in addition to its agreement-based arguments, TWC contends that sealing references to its confidential and proprietary business information is necessary because public disclosure of such information would “significantly disadvantage” TWC in the marketplace if it was acquired by its competitors and “severely compromise[]” TWC’s negotiation and acquisition strategies if it was available to potential acquisition targets.<sup>3</sup> (See ECF No. 37.) Defendants not only join with and incorporate TWC’s arguments in their Supplemental Memorandum but additionally contend that sealing Defendants’ confidential and proprietary business information is necessary because “Frigi-Temp’s ability to achieve earnout markers will be jeopardized if such information is made public and available to TWC’s competitors.” (ECF No. 40.)

12. Specifically, TWC and Defendants seek to file the following documents under seal:

- (i) those portions of the redline of the proposed Amended Complaint, attached as Exhibit 1 to Plaintiff’s Brief in Support, (ECF No. 30.1), that discuss and quote from the exhibits attached to the proposed Amended Complaint and refer to valuations, estimates, and the purchase price of Frigi-Temp;

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<sup>3</sup> The Court notes that TWC’s interest in protecting its confidential and proprietary business information may now extend to Defendants’ confidential and proprietary business information because Gray became an employee of TWC and the asset sale of Frigi-Temp to TWC was finalized in mid-January 2020. (See ECF No. 40.)

- (ii) those portions of the proposed Amended Complaint, attached as Exhibit 2 to Plaintiff's Brief in Support, (ECF No. 30.2), that discuss and quote from the exhibits attached thereto and refer to valuations, estimates, and the purchase price of Frigi-Temp;
- (iii) the twenty-eight exhibits filed in support of the proposed Amended Complaint,<sup>4</sup> also attached as Exhibit 2 to Plaintiff's Brief in Support, (ECF Nos. 30.2–30.5), which consist of emails between Plaintiff and Gray, an employment/partnership agreement between Plaintiff and Gray, an independent contractor agreement between Plaintiff and Frigi-Temp, an engagement letter and valuation report for Frigi-Temp, emails between Gray and TWC employees, Gray's responses to TWC's confidential acquisition questionnaire, TWC's employee benefits summary, the nondisclosure agreement between Frigi-Temp and TWC, Frigi-Temp's current and historical financial performance information, a company overview of TWC, Plaintiff's performance improvement plan, a termination of the independent contractor agreement between Plaintiff and Frigi-Temp, Plaintiff's shareholder inspection request, an asset purchase agreement between TWC and Frigi-Temp, and Gray's employment agreement with TWC;

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<sup>4</sup> Both the Supplemental Brief and Supplemental Memorandum indicate that most, but not all, of the exhibits filed in support of the proposed Amended Complaint were designated as "Confidential" by TWC. (See ECF Nos. 37, 40.) Because neither TWC nor Defendants specifically indicate which exhibits were designated as "Confidential" by TWC, (see ECF Nos. 37, 40), the Court, out of an abundance of caution, shall assume that TWC and Defendants seek to file all twenty-eight exhibits to the proposed Amended Complaint under seal.

- (iv) those portions of Plaintiff's Brief in Support that discuss the aforementioned documents, (ECF No. 30);
- (v) those portions of the Amended Complaint, (ECF No. 34), that discuss and quote from the exhibits attached thereto and refer to valuations, estimates, and the purchase price of Frigi-Temp; and
- (vi) the twenty-eight exhibits filed in support of the Amended Complaint,<sup>5</sup> (ECF Nos. 34.1–34.28), which consist of the same documents described in Paragraph 12(iii) above.

13. “ ‘A corporation may possess a strong interest in preserving the confidentiality of its proprietary and trade-secret information, which in turn may justify partial sealing of court records.’ ” *Doe*, 823 S.E.2d at 598 (quoting *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014)). TWC specifically seeks to seal references to its internal operations, core functions, acquisition process, and growth strategy. (See ECF No. 37.) Defendants also seek to seal references to Frigi-Temp's financial information, the identities of Frigi-Temp's and TWC's customers, and employment information related to Gray's salary and profit incentives. (See ECF No. 40.) Internal business operations and strategies, financial information, customer information, and employee compensation are included within the categories that North Carolina courts have treated as confidential and proprietary trade secrets warranting protection. *See, e.g., GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 234, 752

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<sup>5</sup> The Court, out of an abundance of caution, shall assume that TWC and Defendants seek to file all twenty-eight exhibits to the Amended Complaint under seal for the same reasons as those set out in the prior footnote.

S.E.2d 634, 649 (2013) (holding that compilation of “pricing information, customer proposals, historical costs, and sales data” may constitute trade secrets); *Sunbelt Rentals, Inc., v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 55–56, 620 S.E.2d 222, 227–28 (2005) (holding that “customer information, preferred customer pricing, employees’ salaries, equipment rates, fleet mix information, budget information and structure of the business” may constitute trade secrets); *Lowder Constr., Inc. v. Phillips*, 2019 NCBC LEXIS 117, at \*19 (N.C. Super. Ct. Dec. 30, 2019) (holding that “cost histories, bid and pricing policies, operating margins and profits, sales and marketing strategies, vendor pricing and relationship histories, and other confidential business information” as a compilation may constitute a trade secret).

14. In compliance with BCR 5.2(d), Plaintiff timely filed public versions of his Brief in Support, (ECF No. 38), the redline of the proposed Amended Complaint, (ECF No. 38.2), the proposed Amended Complaint, (ECF No. 38.1), and the Amended Complaint, (ECF No. 39), all of which omit references to TWC’s and Defendants’ confidential and proprietary business information. Plaintiff consulted with TWC and Defendants regarding appropriate redactions to all three versions of the Amended Complaint, and Defendants and TWC consent to the redactions contained in the public versions of these documents. (See ECF Nos. 37, 40; *see also* ECF Nos. 38.1, 38.2, 39.)

15. Plaintiff also timely filed public versions of the twenty-eight exhibits attached to the proposed Amended Complaint, (ECF No. 38.1), and the twenty-eight exhibits attached to the Amended Complaint, (ECF Nos. 39.1–39.28). In both filings,



Exhibits 1–4, 23, and 25–26 contain no redactions. (*See* ECF Nos. 38.1, 39.1–39.4, 39.23, 39.25–39.26.) The Court therefore assumes that the parties no longer seek to have these exhibits remain under seal and will direct that they be unsealed below.

16. In contrast, Exhibits 5–22, 24, and 27–28 filed in support of the proposed Amended Complaint and the Amended Complaint are redacted in their entirety. (*See* ECF Nos. 38.1, 39.5–39.22, 39.24, 39.27–39.28.) “In the rare circumstance that an entire document is filed under seal, . . . the filing party must file a notice that the entire document has been filed under seal[]” and such notice must contain “a non-confidential description of the document that has been filed under seal.” BCR 5.2(d). Plaintiff has not filed a notice containing a non-confidential description for each “entirely sealed” exhibit as required by BCR 5.2(d). (*See* ECF Nos. 38.1, 39.5–39.22, 39.24, 39.27–39.28.) Moreover, having reviewed the “entirely sealed” exhibits, the Court suspects that many of the documents contain additional non-confidential material that need not be redacted.

17. The Court is satisfied that the proposed redactions to Plaintiff’s Brief in Support, the redline of the proposed Amended Complaint, the proposed Amended Complaint, and the Amended Complaint are as limited as practicable, that disclosure of TWC’s and Defendants’ confidential business information currently serves no useful purpose to the public, and that preserving the confidentiality of TWC’s and Defendants’ proprietary and trade-secret information warrants partial sealing of the documents. *See Beroz v. Nuvotronics, Inc.*, 2018 NCBC LEXIS 249, at \*2 (N.C. Super. Ct. Apr. 3, 2018) (stating that “parties must ‘limit the materials that they seek to file

under seal,’ and ‘[t]he party seeking to maintain materials under seal bears the burden of establishing the need for filing under seal[]’ ” pursuant to BCR 5.1(b)); *see also Thomas Cook Printing Co. v. Subtle Impressions, Inc.*, 2008 NCBC LEXIS 18, at \*10 (N.C. Super. Ct. Oct. 24, 2008) (where the “subject matter does not implicate substantial policy concerns,” filing under seal is proper).

18. With respect to the documents the parties seek to file entirely under seal, however, the Court is not satisfied that Plaintiff, TWC, and Defendants have provided a sufficient basis for the Court to conclude that “entire sealing” is appropriate under North Carolina law.

19. Accordingly, the Court concludes that good cause exists to grant the Motions to Seal as to Plaintiff’s Brief in Support, the redline of the proposed Amended Complaint, the proposed Amended Complaint and Exhibits 5–22, 24, and 27–28 thereto, and the Amended Complaint and Exhibits 5–22, 24, and 27–28 thereto, but that a further showing must be made to support sealing of any of the sealed documents in their entirety.

20. **WHEREFORE**, the Court, in the exercise of its discretion, hereby **ORDERS** as follows:

- a. The Court hereby **GRANTS** the Motions to Seal as to Plaintiff’s Brief in Support, the redline of the proposed Amended Complaint, the proposed Amended Complaint and Exhibits 5–22, 24, and 27–28 thereto, and the Amended Complaint and Exhibits 5–22, 24, and 27–28 thereto, and hereby **ORDERS** that the following documents shall remain under seal

pending further Order of the Court: (i) Plaintiff's Brief in Support of Motion to Amend Case Management Order or for Leave to File Amended Complaint, (ECF No. 30); (ii) Exhibits 1 and 2 attached thereto, (ECF Nos. 30.1–30.5); (iii) the Amended Complaint, (ECF No. 34); and (iv) Exhibits 5–22, 24, and 27–28 attached thereto, (ECF Nos. 34.5–34.22, 34.24, 34.27–34.28);

- b. The Court **DENIES as moot** the Motions to Seal as to Exhibits 1–4, 23, and 25–26 to the proposed Amended Complaint, (ECF Nos. 30.2–30.4), and Exhibits 1–4, 23, and 25–26 to the Amended Complaint, (ECF Nos. 34.1–34.4, 34.23, 34.25–34.26), and hereby **ORDERS** that the Wake County Clerk of Superior Court shall unseal each of those documents no later than June 1, 2020; and
- c. After consultation with TWC and Defendants, Plaintiff shall have through and including June 1, 2020 to file public, redacted versions of Exhibits 5–22, 24, and 27–28 to the proposed Amended Complaint, attached as Exhibit 2 to Plaintiff's Brief in Support, (ECF Nos. 30.2–30.5), and Exhibits 5–22, 24, and 27–28 to the Amended Complaint, (ECF Nos. 34.5–34.22, 34.24, 34.27–34.28), with all such redactions being as limited as practicable.<sup>6</sup> In the event that Plaintiff, Defendants,

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<sup>6</sup> The Court notes that the non-disclosure agreement between Frigi-Temp and TWC, which is redacted in its entirety as part of Exhibit 9 to the proposed Amended Complaint, (ECF No. 38.1), and as part of Exhibit 9 to the Amended Complaint, (ECF No. 39.9), was filed publicly as Exhibit A to Defendants' Supplemental Memorandum, (ECF No. 40.1). The Court further notes that the independent contractor agreement between Plaintiff and Frigi-Temp, which is redacted in its entirety as part of Exhibit 17 to the proposed Amended Complaint, (ECF No.

or TWC contend an entire document must be sealed, Plaintiff must file a separate notice for each such document indicating that the document has been sealed in its entirety. The notice shall contain a non-confidential description of the document and explain why entire sealing of the document is necessary and appropriate under North Carolina law.

**SO ORDERED**, this the 15th day of April, 2020.

/s/ Louis A. Bledsoe, III  
Louis A. Bledsoe, III  
Chief Business Court Judge

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38.1), and as part of Exhibit 17 to the Amended Complaint, (ECF No. 39.17), was filed publicly as Exhibit 2 to the proposed Amended Complaint, (ECF No. 38.1), and as Exhibit 2 to the Amended Complaint, (ECF No. 39.2). Any effort to maintain the entire sealing of either Exhibit must explain why sealing is necessary in light of the prior and ongoing public disclosure of the document.