

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
19 CVS 02793

MURPHY-BROWN, LLC and  
SMITHFIELD FOODS, INC.,

Plaintiffs,

v.

ACE AMERICAN INSURANCE  
COMPANY; et al.,

Defendants.

**ORDER ON ACE AMERICAN  
INSURANCE COMPANY'S MOTION  
FOR LEAVE TO FILE UNDER SEAL**

THIS MATTER comes before the Court on ACE American Insurance Company's ("ACE") Motion for Leave to File Under Seal. ("ACE's Motion," ECF No. 327.) Pursuant to North Carolina Business Court Rules ("BCR") 5.1 and 5.2, and the Court's Order Adopting Stipulated Protective Order ("Stipulated Protective Order," ECF No. 192), ACE moves to file the following documents under seal: (1) ACE's Memorandum of Law in Opposition to Plaintiffs Smithfield Foods, Inc. and Murphy-Brown, LLC's ("Plaintiffs") Motion for Partial Summary Judgment on Count I of their Amended Complaint ("ACE's Brief in Opposition"); (2) references in ACE's Brief in Opposition to Exhibits L-2, O, and P-2 of the Affidavit of Parul Stevens in Support of Plaintiffs' Motions for Partial Summary Judgment on Count I and II of their Amended Complaint ("Stevens Affidavit"); and (3) Exhibits A, B-1 to B-4, and C-1 to C-17 of the Affidavit of Marianne G. May ("May Affidavit") in Support of ACE's Brief in Opposition (collectively, the "Exhibits"). (ECF No. 327, at pp. 1-2.)

ACE represents, in general fashion, that the materials it seeks to file under seal consist of

insurance policies issued to Plaintiffs by ACE and [Defendant Old Republic Insurance Company (“ORIC”)], and related correspondence between Plaintiffs and either ACE or [ORIC] concerning notice of the underlying nuisance lawsuits at issue . . . as well as the parties’ respective coverage positions. The materials further include transcript excerpts from the Underlying *Artis, Gillis, McGowan* and *McKiver* Lawsuits.

Preliminarily, the Court notes that Exhibits L-2, O, and P-2 are the subject of the Court’s Order on Plaintiffs’ Motion for Leave to File Under Seal (“Order on Plaintiffs’ Motion to Seal,” ECF No. 340). In the Order on Plaintiffs’ Motion to Seal, the Court denied Plaintiffs’ request to file under seal, *inter alia*, Exhibits L-2, O, and P-2. Therefore, to the extent ACE’s Motion seeks to file under seal those portions of ACE’s Brief in Opposition that make reference to Exhibits L-2, O, and P-2, ACE’s Motion is DENIED.

ACE represents that, pursuant to the Stipulated Protective Order, ACE designated Exhibit A of the May Affidavit as “Confidential”; ORIC designated Exhibits B-1 to B-4 of the May Affidavit as “Confidential”; and Plaintiffs designated Exhibits C-1 to C-17 and Exhibit D<sup>1</sup> of the May Affidavit as “Confidential.” (ECF No. 327, at pp. 1–2.) These respective designations, along with ACE’s brief description of the documents and statement that no reasonable alternative to sealing exists, is the extent of ACE’s justification for filing the materials under seal. (*See id.*)

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<sup>1</sup> While ACE mentions that Plaintiffs designated Exhibit D as confidential, ACE does not seek to file Exhibit D under seal. Moreover, ACE filed a public, unredacted version of Exhibit D. (ECF No. 345, at Ex. D.)

ACE provisionally filed its Brief in Opposition and the various Exhibits under seal. In accordance with BCR 5.2(d), ACE timely filed public, redacted versions of ACE's Brief in Opposition and the May Affidavit. (ECF Nos. 344–345.) ACE did not file public, redacted versions of Exhibits A, B-1 to B-4, and C-1 to C-17, evidently taking the position that redactions to the Exhibits are impracticable. (*See id.*) However, ACE did not file a notice with the Court that the documents are to be filed under seal in their entirety, with a non-confidential description of the materials, as required by BCR 5.2(d).

Generally, documents filed in the courts of the State of North Carolina are “open to the inspection of the public,” except as prohibited by law. N.C.G.S. § 7A-109(a); *see also Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 463, 515 S.E.2d 675, 685 (1999) (noting that N.C.G.S. § 7A-109(a) “specifically grants the public the right to inspect court records in criminal and civil proceedings.”). 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).

This Court starts with the “presumption that the civil court proceedings and records at issue . . . must be open to the public.” *Id.* at 414, 705 S.E.2d at 406. The party seeking to have a filing sealed bears the burden of overcoming this presumption “by demonstrating that the public’s right to open proceedings [is] outweighed by a countervailing public interest.” *Id.* The determination of whether evidence should

be filed under seal is within the discretion of the trial court. *See In re Investigation into Death of Cooper*, 200 N.C. App. 180, 186, 683 S.E.2d 418, 423 (2009).

Information that is “a trade secret or other confidential research, development, or commercial information” can be sealed by the Court upon motion by the parties, in the interest of protecting confidential and proprietary business information. *See* N.C.G.S. § 1A-1, Rule 26(c)(vii); *see France*, 209 N.C. App. at 416, 705 S.E.2d at 407 (noting that “[c]ertain kinds of evidence may be such that the public policy factors in favor of confidentiality outweigh the public policy factors supporting free access of the public to public records and proceedings,” including “trade secret” information) (citing N.C.G.S. § 66-156).

A court, however, 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. *France*, 209 N.C. App. at 415–16, 705 S.E.2d at 407 (“Evidence otherwise appropriate for open court may not be sealed merely because an agreement is involved that purports to render the contents of that agreement confidential.”). Therefore, “[a party] cannot, by contract, circumvent established public policy—the qualified public right of access to civil court proceedings. [That party] must show some independent countervailing public policy concern sufficient to outweigh the qualified right of access to civil court proceedings.” *Id.* at 415, 705 S.E.2d at 407.

As this Court recently stated:

The party seeking to maintain materials under seal bears the burden of establishing the need for filing under seal.

BCR 5.1(b); *see also Preiss v. Wine & Design Franchise, LLC*, 2018 NCBC LEXIS 55, at \*7 (N.C. Super. Ct. June 4, 2018). Sometimes, that is not the moving party but rather the party that produced the relevant materials and designated them as confidential. In that situation, the rules of this Court give the designating party a chance to brief the issue. *See* Business Court Rule (“BCR”) 5.3. When the designating party does not file a brief, the Court may summarily deny the motion for leave and may direct that the document be unsealed. BCR 5.3.

*Addison Whitney, LLC v. Cashion*, 2020 NCBC LEXIS 73, at \*4, 2020 NCBC Order 25 (N.C. Super. Ct. June 10, 2020) (quotation marks omitted).

Pursuant to BCR 5.3, ORIC and Plaintiffs, as designating parties, had seven (7) days to file a supplemental brief in support of sealing ACE’s Brief in Opposition and the Exhibits. Neither party did so. Aside from ACE’s representations that the various Exhibits were marked confidential pursuant to the Stipulated Protective Order and consist of insurance policies and communications between the parties, no party has explained to the Court why the information at issue should be sealed and excluded from the public record. In other words, ACE, ORIC, and Plaintiffs have failed to establish that public policy concerns for the confidentiality of the information outweigh the public’s right of access to court files. *See Addison Whitney, LLC*, 2020 NCBC LEXIS 73; *Addison Whitney, LLC v. Cashion*, 2020 NCBC LEXIS 74, at \*1, 2020 NCBC Order 24 (N.C. Super. Ct. June 10, 2020).

THE COURT, having considered the Motion, the documents provisionally filed under seal, ORIC and Plaintiffs’ failure to file a supplemental brief in support of sealing the documents, ACE’s failure to file a notice of filing in accordance with BCR 5.2(d), and other appropriate matters of record, CONCLUDES, in its discretion, that

the parties have failed to demonstrate that the public's right to open proceedings is outweighed by a countervailing public interest of maintaining the secrecy of the information in this case.

THEREFORE, the Motion is DENIED, and ACE's unredacted Brief in Opposition and unredacted Exhibits shall be unsealed by the Court.

SO ORDERED, this the 17th day of June, 2020.

/s/ Gregory P. McGuire  
Gregory P. McGuire  
Special Superior Court Judge for  
Complex Business Cases