

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
20 CVS 4609

PDF ELECTRIC & SUPPLY  
COMPANY, LLC and AGS  
ASSOCIATES, LLC d/b/a MRO  
ELECTRIC AND SUPPLY  
COMPANY INC.,

Plaintiffs,

v.

WILLIAM JACOBSEN;  
CHRISTIAN JACOBSEN;  
VISION CONTROLS LLC; and  
INDUSTRIAL AUTOMATON  
CO.,

Defendants.

**ORDER ON PLAINTIFFS' MOTION  
TO SEAL**

THIS MATTER comes before the Court on Plaintiffs PDF Electric & Supply Company, LLC and AGS Associates, LLC d/b/a MRO Electric and Supply Company Inc.'s ("MRO") (collectively, "Plaintiffs") Motion to Seal. ("Motion to Seal," ECF No. 22.)

MRO seeks to seal unredacted versions of their brief in support of their Motion for Preliminary Injunction ("Brief"), the affidavit of Charles Dougherty ("Affidavit"), and each of the exhibits attached to the Affidavit ("Exhibits"). (ECF Nos. 20, 21, 21.1–21.14.) In compliance with BCR 5.2(d), MRO filed public versions with redactions of the Brief and Affidavit but seeks to seal the entire contents of the Exhibits. (ECF Nos. 29, 28, 38.1–38.14.) MRO represents that counsel for Defendants consents to the Motion to Seal.

THE COURT, having considered the Motion to Seal, Plaintiffs' brief in support of the Motion to Seal (ECF No. 23), the discussion in the Affidavit regarding the confidential nature of MRO's information, the documents provisionally filed under seal, the redacted versions of the Brief and Affidavit, Defendants' consent to the Motion to Seal, and other appropriate matters of record, CONCLUDES, in its discretion, that the Motion to Seal should be GRANTED, in part, and DENIED, in part, for the reasons set forth below.

**A. Background Facts.<sup>1</sup>**

MRO is a small, independent wholesale distributor of factory automation parts which sources its parts from suppliers all over the world. MRO alleges it is in "a niche business that leverages its experience, vast industry knowledge and Internet marketing and sales platform to globally source and sell these parts." (ECF No. 28, at ¶ 7.) MRO conducts its operations exclusively via the Internet, and it does not use print advertisements, direct mail, or any in-person sales force to market its parts. MRO contends that "[i]f MRO does not successfully appear prominently in Internet searches such as Google, its business will decline and eventually fail." (*Id.* at ¶ 9.)

MRO employed Defendant William Jacobsen ("Jacobsen") until February 2019 when he resigned. MRO alleges that Jacobsen established competing companies during and after his employment with MRO, and that he used MRO's trade secrets, and proprietary and confidential information to establish the competing businesses and to unfairly compete with MRO. (ECF No. 28, at ¶¶ 61–107.)

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<sup>1</sup> Further background facts underlying this lawsuit are set forth in *PDF Elec. & Supply Co., LLC v. Jacobsen*, 2020 NCBC LEXIS 50 (N.C. Super. Ct. April 16, 2020).

On March 26, 2020, Plaintiffs filed a Verified Complaint for injunctive relief and damages alleging a number of claims arising from Jacobsen’s alleged misuse of MRO’s trade secrets and confidential information, and violation of William Jacobsen’s employment contract with MRO. (ECF No. 4.)

On June 2, 2020 Plaintiffs filed a Motion for Preliminary Injunction (ECF No. 19), a brief in support (ECF No. 20), and the Affidavit. On the same date Plaintiffs filed the Motion to Seal, and a brief in support of the Motion to Seal. (ECF No. 23.)

Pursuant to BCR 7.4, the Court elects to decide the Motion to Seal without a hearing. Accordingly, the Motion to Seal is ripe for decision.

## **B. Analysis**

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).

A party seeking to seal information in a court’s files bears

a heavy burden. The party asking to keep a court filing under seal must articulate its reasons with specificity, giving “information sufficient for the Court to determine whether sealing is warranted.” BCR 5.2(b). That means the Court needs enough information to know whether the party’s private interest in keeping the matter secret outweighs the public’s interest in open courts. Cryptic or conclusory claims of confidentiality won’t do. *See, e.g., Potts v. KEL, LLC*, 2018 NCBC LEXIS 254, at \*3–4, 2018 NCBC Order 6 (N.C. Super. Ct. Oct. 19, 2018); *Beroz v. Nuvotronics, Inc.*, 2018 NCBC LEXIS 249, at \*3, 2018 NCBC Order 10 (N.C. Super. Ct. Apr. 3, 2018).

*Addison Whitney, LLC v. Cashion*, 2020 NCBC LEXIS 74, at \*4 (N.C. Super. Ct. June 10, 2020)

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). However, as recently stated by our Court of Appeals:

Calling a [document] confidential does not make it a trade secret, . . . Many a litigant would prefer that the subject of the case — how much it agreed to pay for the construction

of a pipeline, how many tons of coal its plant uses per day, and so on — be kept from the curious (including its business rivals and customers), but the tradition that litigation is open to the public is of very long standing. People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.

*Doe v. Doe*, 823 S.E.2d 583, 602 (N.C. Ct. App. 2018).

In addition, “[w]hen sealing is justified, the extent of sealing must be narrowly tailored to protect the party’s interest in secrecy while preserving, as much as possible, the public’s interest in open courts. Sealing an entire document should be a ‘rare circumstance,’ and ‘redactions or omissions should be as limited as practicable.’ BCR 5.2(d).” *Addison Whitney, LLC*, 2020 NCBC LEXIS 74, at \*6.

Finally, 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. *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.

Here, Plaintiffs contend that the information it seeks to seal is “MRO’s confidential information and trade secrets.” (ECF No. 22.) Plaintiffs allege that the

information at issue consists of: “MRO’s Suppliers; MRO’s Top Selling Parts and sales data; MRO’s analysis of its sales and advertising spend [sic] on over 32,000 parts; MRO’s Adwords<sup>2</sup> for online marketing; MRO’s geographic scope of its sales; internal MRO communications containing trade secrets and confidential information; MRO’s sales data for parts; MRO’s search engine optimization and marketing strategies; MRO’s bidding strategies for online Adwords.” (ECF No. 23, at p. 2.) Plaintiffs’ explanation in its brief of the reason that the information should be maintained under seal is that it

contain[s] non-public, protected information regarding MRO’s sales, profits, suppliers, advertising, analysis and strategies derived from the underlying information. This information is compilation of MRO’s sales and advertising activity. This information has been put together through trial and error over time and provides a competitive advantage to MRO. This information represents the core of MRO’s business. If this information were publicly disclosed, the trade secret protection would be lost[,] and MRO would lose its competitive advantage in its market.

(ECF No. 23, at pp. 3–4.)

While this explanation, standing by itself, is not sufficiently specific to justify sealing, the Court notes that (a) the Affidavit provides further, detailed information regarding what makes the information at issue proprietary or otherwise confidential, and (b) a review of the documents reveals that much of the information contained in

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<sup>2</sup> MRO describes Adwords as follows: “Google Ads, formerly known as Google Adwords, is an online advertising platform offered by Google where businesses pay to display advertisements on Google’s search results page and on third party websites in the Google Display Network. The Google Display network is an extensive network of independent websites that have partnered with Google to display Google Ads. Adwords, i.e., keywords likely to be used in Internet searches, are sold through an Adwords auction.” (ECF No. 28, at ¶ 30.)

the Exhibits consists of compilations of Plaintiffs' non-public sales information and confidential analysis of Plaintiffs' sales and advertising expenditures that warrants protection. *See* N.C.G.S. § 66-152(3).

For example, generally the publicly available names of a party's vendors and suppliers would not be confidential. However, Plaintiffs contend that the list of the approved vendors (ECF Nos. 38.1 and 21.1 [SEALED]) that supply MRO with automation parts is proprietary because it was developed through years of experience during which Plaintiffs have determined those vendors that provide timely service and quality parts. Plaintiffs contend that "[t]he vetting process was carried out at great expense over the last decade and we have tried many suppliers that we currently deem unqualified as a source. It would be advantageous for our competitors to obtain our list of qualified suppliers to avoid the years of effort and investment made by MRO in the vetting of its suppliers." (ECF No. 28, at ¶ 19.)

With regard to its list of top selling parts (ECF Nos. 38.3 and 21.3 [SEALED]), Plaintiffs allege that the information is confidential and proprietary because:

MRO has analyzed its sales, pricing and profitability, and determined which of its 9000+ parts offer the best return on investment. We maintain a list of our top selling parts which are identified in attached Exhibit 3. It is not apparent from looking at the different parts we offer which parts are our top sellers unless you have our internal list. Although this list contains sales data for 2017, our top selling parts have remained relatively constant.

Knowledge of the top selling parts is useful to our business, and would be useful to our competitors, for several reasons. For example, we use information about the top selling parts to manage our inventory and to inform marketing strategies for our company.

(ECF No. 28, at ¶¶ 20–21.) Plaintiffs further contend that the information regarding its top selling parts is used to help MRO maintain an efficient mix of inventory and to determine how best to spend its marketing dollars. (*Id.* at ¶¶ 22–26.) Plaintiffs argue that the information regarding MRO’s top selling parts would benefit its competitors by permitting them to shortcut the usual, lengthy process of determining the parts that are most in demand and developing the proper inventory mix. (*Id.*)

Plaintiffs further contend that it is critical to online sellers to appear at or near the top of Internet searches. MRO uses “sophisticated search engine optimization (SEO) strategies to make sure that we appear at the top of search result lists when a potential customer searches for products in Internet search engines, such as Google and Bing,” and Plaintiffs describe in detail how its particular strategies are unique to MRO and have been developed through its years of experience selling factory automation parts online. (ECF No. 28, at ¶¶ 27–46.) Plaintiffs contend that information regarding its SEO strategies, the underlying data for which appears in some of the Exhibits, would be very valuable to a competitor.

On the other hand, Plaintiffs seek to seal a list of the foreign countries in which it has sales (but not the amount of sales or any other information). (ECF Nos. 21.6 and 38.6 [SEALED].) Plaintiffs offer no explanation for why this information should be considered confidential or shielded from public view. In addition, Plaintiffs have not provided a sufficient explanation for why most of the internal company emails they wish to seal are confidential.



With this understanding of the reasons that Plaintiffs believe the information is confidential, the Court now turns to a review of the specific documents for which Plaintiffs seek sealing.

### **1. Brief and Affidavit**

The redacted Brief and Affidavit filed by Plaintiffs in this case (ECF Nos. 29 and 28) are models for the appropriate redaction of such documents. The redactions from both documents are limited and precisely targeted to information that is genuinely proprietary and confidential. Plaintiffs have established that the public's right to open proceedings is outweighed by a countervailing public interest of maintaining the secrecy of the information redacted from the Brief and Affidavit. Accordingly, the Motion should be GRANTED as to the Brief and Affidavit

### **2. Exhibits**

Plaintiffs seek to seal the entirety of the Exhibits attached to the Affidavit in support of their Motion for Preliminary Injunction. The non-confidential descriptions of the Exhibits provided by Plaintiffs are as follows:

- ECF No. 21.1 – Exhibit 1: Excel spreadsheet containing MRO's suppliers of parts;
- ECF No. 21.2 – Exhibit 2: Excel spreadsheet containing MRO's suppliers of parts;
- ECF No. 21.3 – Exhibit 3: List of MRO's top selling parts;
- ECF No. 21.4 – Exhibit 4: Excel spreadsheet containing confidential analysis and classification of parts MRO sold over time;

- ECF No. 21.5 – Exhibit 5: Excel spreadsheet showing the status of Adwords and keywords MRO currently uses;
- ECF No. 21.6 – Exhibit 6: List of foreign countries MRO has sold products in;
- ECF No. 21.7 – Exhibit 7: Email from William Jacobsen to MRO management regarding MRO’s Repair and Exchange program and attached analysis for online marketing research and strategy;
- ECF No. 21.8 – Exhibit 8: Email from Daniel Mason to MRO management regarding transition of online [marketing] responsibility to Will Jacobsen;
- ECF No. 21.9 – Exhibit 9: Email correspondence between Joe Kaminski and Will Jacobsen regarding Jacobsen’s request for pricing and sales information;
- ECF No. 21.10 – Exhibit 10: Excel spreadsheet containing MRO’s sales data from September 2016 to September 2017;
- ECF No. 21.11 – Exhibit 11: Email exchange between Will Jacobsen and Joe Kaminski regarding Jacobsen’s request for MRO sales information;
- ECF No. 21.12 – Exhibit 12: Email from Will Jacobsen to MRO management regarding Adwords campaign proposal and analysis;
- ECF No. 21.13 – Exhibit 13: Email exchange between Will Jacobsen and Joe Kaminski regarding status of MRO’s online marketing;
- ECF No. 21.14 – Exhibit 14: Excel spreadsheet containing MRO’s to [sic] 100 selling parts based upon ROAS.

(Notice of Filing of Non-Confidential Descriptions of Documents Filed Provisionally  
Under Seal, ECF No. 38.)

*i. Exhibits 1, 2, 4, 5, 8, 10, and 14*

These exhibits contain: a list of Plaintiffs' vetted and approved vendors along with detailed contact information; a proprietary analysis and classification of parts sales; compilation of information related to specific SEO strategies used by Plaintiffs; an internal email discussing specific steps to be taken regarding the transition of Will Jacobsen's online marketing duties; MRO's confidential sales data; and a proprietary analysis of MRO's top 100 selling parts. Plaintiffs have established that exposure of these exhibits could cause them competitive harm, and accordingly, the documents located at ECF Nos. 21.1, 21.2, 21.4, 21.5, 21.8, 21.10, and 21.14 should remain under seal.

*ii. Exhibits 6, 9, 11, and 12*

These exhibits contain: a list of foreign countries in which MRO has sold parts, and internal email correspondence regarding requests for sales information and a marketing campaign proposal that does not contain any actual sales figures or proprietary analysis. The Court is not persuaded that these documents contain any competitive business information. As a result, the documents located at ECF Nos. 21.6, 21.9, 21.11, and 21.12 should be unsealed.

*iii. Exhibits 3, 7, and 13*

These exhibits contain a list of part numbers and internal emails with attachments. While parts of these documents contain confidential business information, the Court finds that the documents, in their entirety, do not warrant sealing. Exhibit 3 (ECF Nos. 21.3 and 38.3 [SEALED]), should be refiled with the

parts numbers redacted but with the remainder of the document unredacted. Exhibits 7 and 13 (ECF Nos. 21.7, 38.7 [SEALED], and 21.13, 38.13 [SEALED]) should be refiled with the emails unredacted and only the attachments to the emails redacted. Accordingly, Plaintiffs' counsel should refile with the Court these documents with appropriate redactions.

### **C. Conclusion**

THEREFORE, IT IS ORDERED that:

1. The Motion is GRANTED as to the documents filed as ECF Nos. 20, 21, 21.1, 21.2, 21.4, 21.5, 21.8, 21.10, and 21.14, and these documents shall be maintained under seal until further order of the Court.
2. The Motion is DENIED as to the documents filed as ECF Nos. 21.6, 21.9, 21.11, and 21.12, and these documents shall be unsealed by the Court.
3. The Motion is GRANTED, in part, and DENIED, in part, as to the documents filed as ECF Nos. 21.3, 21.7, and 21.13, and Plaintiffs' counsel is directed to refile the documents with the redactions directed by the Court in this Order. When refiling the documents on the docket, Plaintiffs' counsel shall label the documents "Refiled and Redacted," along with the exhibit number.

SO ORDERED, this the 8th day of July, 2020.

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