UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NEAL PETERSON	*	
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	*	
VS.	*	
	*	
	*	**CASE NUMBER:** 3:09CV00644(VLB)
MTD PRODUCTS, INC., ET AL	*	DECEMBER 9, 2010

OBJECTION TO MTD'S MOTION TO SHOW CAUSE AND MOTION TO SEAL PLAINTIFF'S SUMMARY JUDGMENT PAPERS

I. Plaintiff's Objection to MTD's Motion to Show Cause

On August 20, 2009, Plaintiff filed a Motion to Compel the defendants to produce their Rule 26a initial disclosure (docket #21). In response, on August 21, 2009, the Court ordered the defendants to produce the discovery, but under a blanket protective order (docket #22). The Defendants then produced the discovery through a website, and the Plaintiff complied with the protective order.

The defendants recently elected to move for summary judgment, which sets a certain chain of events into motion, including the application of a body of law (described further below) that establishes: (1) a distinction between protective orders issued during discovery and orders to seal summary judgment papers, and (2) a heavy presumption against sealing summary judgment papers. This is because a summary judgment motion is a dispositive motion which, if granted, terminates the plaintiff's case. Therefore, it is considered a major

judicial event. It is an adjudication on the merits, and as such, it is a formal act of government subject to public scrutiny.

Once the Defendants moved for summary judgment against the Plaintiff, the Plaintiff had a right to respond by showing the evidence creating fact issues for the jury. Since the defendants' discovery was produced exclusively through their discovery website, the evidence cited in Plaintiff's summary judgment papers came largely from this website. This did not violate the Court's umbrella protective order, because under Local Rule 5(e)(3), "A confidentiality order or protective order entered by the Court to govern discovery shall not qualify as an order to seal documents for purposes of this rule."

This Court has never issued an order to seal documents in this case. Therefore, the Plaintiff has violated no order of the Court, and there is no need for a show cause hearing.

II. Plaintiff's Objection to MTD's Motion to Seal Plaintiff's Summary Judgment Papers

MTD argues in its Motion to Seal that a blanket protective order is justified for the vast storehouse of documents on its discovery website, some of which contain pricing, profit, cost, customer lists, and other information traditionally deemed confidential, and MTD cites cases where courts issued blanket protective orders during discovery, and cases where courts refused to modify existing protective orders. But these are not the issues before this Court. The Court already granted a blanket protective order for MTD's discovery website on

August 21, 2009, and nobody is requesting a modification of that order at this time.

The issue now before the Court is whether to seal the Plaintiff's summary judgment papers. As explained further below, a motion to seal summary judgment papers is governed by a different legal standard than the one governing a motion to grant or modify a protective order during discovery.

Summary Judgment papers are "judicial documents" and there is a heavy presumption against sealing them

There is a strong common law presumption that the public is entitled "to inspect and copy public records and documents, including judicial records and documents," Nixon v. Warner Communications, Inc., 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed. 2d 570 (1978). The Second Circuit has stated that, "The common law right of public access to judicial documents is firmly rooted in our nation's history," and has explained the rationale for this right as follows:

> The presumption of access is based on the need for federal courts, although independent - indeed, particularly because they are independent - to have a measure of accountability and for the public to have confidence in the administration of justice. Federal courts exercise powers under Article III that impact upon virtually all citizens, but judges, once nominated and confirmed, serve for life unless impeached through a process that is politically and practically inconvenient to invoke. Although courts have a number of internal checks, such as appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control. Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring, moreover, the public could have no confidence in the conscientiousness,

> reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.

United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995) ("Amodeo II").

In addition to the common law right of access, it is well established that the public and the press have a "qualified First Amendment right to attend judicial proceedings and to access certain judicial documents." Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 91 (2d Cir. 2004), and because it is constitutional the First Amendment right establishes an even higher standard for sealing than the common law presumption.

The threshold question under the legal framework is whether the documents at issue are "judicial documents." The cases cited by MTD in its brief deal with non-judicial documents, for which a different standard applies. But the correct legal analysis should begin with the Second Circuit precedents which indicate that documents submitted to a court for its consideration in a summary judgment motion are - as a matter of law - judicial documents to which *the highest* presumption of access attaches, under both the common law and the First Amendment. For example, in Joy v. North, 692 F.2d 880 (2d Cir. 1982), the Second Circuit stated that "documents used by parties moving for, or opposing, summary judgment should not remain under seal *absent the most compelling reasons*." 692 F.2d at 893 (emphasis added). The justification offered in Joy v. North for this conclusion is that summary judgment is an adjudication, and "an adjudication is a formal act of government, the basis of which should, absent

exceptional circumstances, be subject to public scrutiny." Id. This remained unchanged by the Second Circuit in United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995) ("Amodeo I") and United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995) ("Amodeo II"), which effectively state that there is a presumption of access to documents submitted on a summary judgment motion. In Lugosch v. Pyramid Co., 435 F.3d 110 (2d Cir. 2006), the Second Circuit stated: "As a matter of law, then, we hold that the contested documents - by virtue of having been submitted to the court as supporting material in connection with a motion for summary judgment - are unquestionably judicial documents under the common law." Id. at 123.

The weight of authority in other circuits supports this conclusion. The Fourth Circuit has commented that "because summary judgment adjudicates substantive rights and serves as a substitute for a trial, we fail to see the difference between a trial and the situation before us now" (where documents were submitted to the court on a summary judgment motion), concluding that a presumption of access attaches to "documents filed in connection with a summary judgment motion in a civil case." Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 252-53 (4th Cir. 1988). The Ninth Circuit has explained that "the unbroken string of authorities . . . leaves little doubt" that "the federal common law right of public access extends to materials submitted in connection with motions for summary judgment in civil cases prior to judgment." San Jose Mercury News, Inc. v. U.S. District Court, 187 F.3d 1096, 1102 (9th Cir. 1999);

see also In re Continental Illinois Sec. Litig., 732 F.2d 1302, 1309 (7th Cir. 1984) (where motion to terminate "was designed to (and did) result in the dismissal of claims against several defendants" and "district court was required to make complex factual and legal determinations in a proceeding which has been characterized as a 'hybrid summary judgment motion,' . . . the presumption of access applies to the hearings held and evidence introduced in connection with [the party's] motion to terminate"); In re "Agent Orange" Product Liability Litig., 98 F.R.D. 539, 545 (E.D.N.Y. 1983) ("Clearly, then, documents attached to and referred to in the parties' papers on the summary judgment motions are part of the court record and are entitled to the presumption of public access.")

The presumption of access to judicial documents is not rebutted by this Court's earlier blanket confidentiality order

An umbrella protective order entered during discovery does not reverse the presumption of access to judicial documents:

> The argument that the defendants' reliance on [the confidentiality order] during years of discovery shields them now from the burden of justifying protection of the documents ignores the fact that civil litigants have a legal obligation to produce all information "which is relevant to the subject matter involved in the pending action," Fed. R. Civ. P. 26(b)(1), subject to exceptions not involved here. Thus, defendants cannot be heard to complain that their reliance on the protective order was the primary cause of their cooperation during years of discovery: even without [the confidentiality order], I would eventually have ordered that each discoverable item be turned over to the plaintiffs. Umbrella protective orders do serve to facilitate discovery in complex cases. However, umbrella

> protection should not substantively expand the protection provided by Rule 26(c)(7) or countenanced by the common law of access. To reverse the burden in this situation would be to impose a significant and perhaps overpowering impairment on the public access right.

In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 101 F.R.D. 34, 43-44 (C.D. Cal. 1984). See also Foltz v. State Farm Mutual Auto Insurance Company, 331 F.3d 1122, 1135 (9th Cir. 2003) ("the presumption of access is not rebutted where documents which are the subject of a protective order are filed with the court as attachments to summary judgment motions.")

And under our Local Rule 5(e)(3), "A confidentiality order or protective order entered by the Court to govern discovery shall not qualify as an order to seal documents for purposes of this rule."

This Court issued what is known as a "blanket" or "umbrella" protective order early in the discovery process, and the purpose of such orders is efficiency, as it allows the parties to proceed with discovery under presumptive protection and involve the court only when there is a concrete dispute about a particular document. See, e.g., Uniroyal Chemical Co. Inc. v. Syngenta Crop Protection, 224 F.R.D. 53, 57 (D.Conn. 2004). But these orders do not govern judicial documents filed with dispositive motions. See Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1183 (9th Cir. 2006).

Before sealing documents, a Court must make particularized findings on the record of a compelling need, and must narrowly tailor the order to serve that need – but MTD has given this Court no basis to do this

Due to the high presumption of openness discussed above, a Court cannot seal documents without first conducting a rigorous inquiry into the need for sealing, and if a compelling need is demonstrated by the movant, the Court must find the narrowest means of serving that need. This is reflected in Local Rule 5(e)(1)(a), which states that the power to close a courtroom "shall be used sparingly and only for clear and compelling reasons," and the rule also provides that particularized findings must be made on the record demonstrating the need for sealing, and any such order must be narrowly tailored to serve that need.

But the defendants have provided no record that would allow the Court to conduct the required inquiry and to make any particularized findings. "Broad and general findings by the trial court, however, are not sufficient to justify closure." In re New York Times, 828 F. 2d 110, 116 (2d Cir. 1987). MTD spends much time in its Motion to Seal citing cases to justify a discovery protective order for a number of documents on its website dealing with pricing, profit, cost, and other information traditionally deemed proprietary, and MTD makes an argument to justify an umbrella protective order during the discovery phase as to the website in general. But as to the specific documents included in the Plaintiff's summary judgment papers, and whether these specific judicial documents should be sealed, MTD is able to provide no basis for this Court to make any particularized findings of a compelling need to seal them. When the correct legal

standard is applied, the sealing of these summary judgment papers is not justified.

The fact is that all the evidence in these summary judgment papers pertain to defective plastic rims used by MTD between 2004 and 2006 as those are the rims at issue in this case, but those plastic rims have been discontinued by MTD have been replaced by a steel rim. The documents in these summary judgment papers refer only to plastic rims that MTD no longer uses on the 300 Series snow throwers. A concern for confidentiality with respect to proprietary secrets about the steel rims currently competing on the market might be understandable, but none of that information is mentioned in these summary judgment papers. Only the discontinued plastic rims are discussed.

Furthermore, while MTD's discovery website does include some documents that contain what may have once been proprietary details about these discontinued plastic rims (such as the chemical makeup of the plastic, the vendors from whom MTD purchased the material for the rims, pricing and marketing information, etc.), none of those types of documents are included in these summary judgment papers.

Whether these papers contain any information that would be protected if they were non-judicial documents is not the issue before the Court. The fact is that these summary judgment papers are judicial documents, which are given special treatment. The legal analysis in MTD's Motion to Seal does not support the sealing of these judicial documents.

To the extent that MTD wishes to seal these summary judgment papers because they contain evidence that might be embarrassing or incriminating, "a litigant who might be embarrassed, incriminated, or exposed to litigation through dissemination of materials is not, without more, entitled to the court's protection." Foltz v. State Farm Mutual Auto Insurance Company, 331 F.3d 1122, 1136 (9th Cir. 2003).

MTD's Motion to Seal should therefore be denied.

Respectfully Submitted,

THE PLAINTIFF,
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By: ____/s/_____

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CERTIFICATION OF SERVICE

I hereby certify that on December 9, 2010, a copy of foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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