UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NICK PEARSON, FRANCISCO PADILLA, CECILIA LINARES, AUGUSTINA BLANCO, ABEL GONZALEZ, and RICHARD JENNINGS,

On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

NBTY, INC., a Delaware corporation; and REXALL SUNDOWN, INC., a Florida corporation; TARGET CORPORATION, a Minnesota Corporation

Defendants.

THEODORE H. FRANK,

Objector/Intervenor.

Case No. 11-CV-07972

CLASS ACTION

Hon. John Robert Blakey

INTERVENOR THEODORE H. FRANK'S MOTION TO UNSEAL AND MEMORANDUM OF LAW IN SUPPORT

INTRODUCTION

Intervenor Theodore H. Frank moves to unseal [redacted] (Dkt. 377), [redacted]. The [redacted] is central to the inquiry that the Seventh Circuit remanded to this Court to conduct. *Pearson v. Target Corp.*, 893 F.3d 980, 982 (7th Cir. 2018) ("*Pearson II*"). Yet the defendants contend that [redacted] must be designated as "confidential" under the Protective Order and maintained under seal.

Defendants' position is untenable.[1] Frank has asked the Court to rule on his Motion to Disgorge Side-Payments (Dkt. 381). Both the Memorandum in Support of the Motion (Dkt. 382) and objectors' opposition briefs (Dkts. 386, 390) rely on [redacted]. The Court would have difficulty explaining its decision on Frank's motion to disgorge [redacted] without alluding to [redacted]. "Documents that affect the disposition of federal litigation are presumptively open to public view, even if the litigants strongly prefer secrecy, unless a statute, rule, or privilege justifies confidentiality." *In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010). Because the defendants did not and cannot demonstrate that continued sealing overcomes the strong presumptive right to access, [redacted] (Dkt. 377) should be unsealed, along with all other documents filed under seal due to [redacted] sealing.

ARGUMENT

I. A strong presumption against sealing public court records exists.

The public has a presumptive right to access judicial proceedings and records. *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999). "This right is derived from the common-law principle that courts are public institutions that operate openly—a principle codified at 28 U.S.C. § 452—and judicially imposed limitations on this right are subject to the First Amendment." *Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009) (citing *Globe Newspaper Co. v. Super. Ct. for Norfolk County*, 457 U.S. 596, 603-06 (1982)). The presumption of openness derives from fundamental judicial principles:

> Even disputes about claims of national security are litigated in the open. Briefs in the Pentagon Papers case, *New York Times Co. v. United States* . . . , and the hydrogen bomb plans case, *United States v. Progressive, Inc.* . . . , were available to the press. . . . When [parties] call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Judicial proceedings are public rather than private property, *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 27-29, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994); *In re Memorial Hospital of Iowa County, Inc.*, 862 F.2d 1299, 1302-03 (7th Cir.1988), and the third-party

[1] Pursuant to the Protective Order, Dkt. 378 at 8, Frank met and conferred with defendants several times. Defendants maintain their opposition to de-designating [redacted] under the Protective Order and unsealing them. Plaintiffs take no position on this motion.

> effects that justify the subsidy of the judicial system also justify making records and decisions as open as possible. . . . Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.

Union Oil Co. of California v. Leavell, 220 F.3d 562, 567-68 (7th Cir. 2002) (Easterbrook, J.).

Local Rule 26.2 provides that "[t]he court may for good cause shown enter an order directing that one or more documents be filed under seal." N.D. Ill. L. R. 26.2(b). "[I]n class actions—where by definition some members of the public are also parties to the case—the standards for denying public access to the record should be applied with particular strictness." *Shane Grp. Inc., v. BCBS of Mich.*, 825 F.3d 299, 305 (6th Cir. 2016) (quoting *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001)). Good cause to seal only exists for a few categories of information: "In civil litigation only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault), is entitled to be kept secret. . . ." *Baxter Int'l, Inc. v. Abbott Laboratories*, 297 F.3d 544, 546 (7th Cir. 2002); *accord Shane Grp.*, 825 F.3d at 307. "The determination of good cause cannot be elided by allowing the parties to seal whatever they want." *Citizens First Nat'l Bank*, 178 F.3d at 945. A party that seeks to maintain a document under seal bears a "heavy burden" to show good cause for such maintenance. *In re Bank One Sec. Litig.*, 222 F.R.D. 582, 589 (N.D. Ill. 2004).

II. Defendants cannot satisfy their heavy burden for sealing [redacted].

Frank understands that defendants believe that public knowledge of [redacted] could be embarrassing to them, but their [redacted] do not merit protection for this reason. *Bernstein Litowtiz Berger & Grossman LLP*, 814 F.3d 132, 145 (2d Cir. 2016) (addressing allegations of repeated kickback arrangements between lead counsel and named plaintiffs). "A corporation very well may desire that the allegations lodged against it in the course of litigation be kept from public view to protect its corporate image, but the First Amendment right of access does not yield to such an interest." *Company Doe v. Public Citizen*, 749 F.3d 246, 269 (4th Cir. 2014). "A claim that public disclosure of information will be harmful to a [litigant]'s reputation is not 'good cause' for a protective order. Although the information . . . may be embarrassing and incriminating, this alone is insufficient

to bar public disclosure." *Culinary Foods v. Raychem Corp.*, 151 F.R.D. 297, 301 (N.D. Ill. 1993). "Many a litigant would prefer that the subject of the case . . . 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." *Union Oil Co.*, 220 F.3d at 567.

To overcome the strong common law presumption of access, the party requesting sealing shoulders the burden of showing good cause and must "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations." *Baxter*, 297 F.3d at 548.

None of the limited exceptions to public judicial proceedings apply to [redacted]. No recognized privilege (e.g., attorney-client) covers the documents. Nor does any statute protect their disclosure (e.g., [redacted] contain no protected health information). Other exceptions are even less plausible. For example, undercover government agents will not be exposed by disclosure. *See United States ex rel. Littlewood v. King Pharms., Inc.*, 806 F. Supp. 2d 833, 842 (D. Md. 2011) (granting motion to unseal docket over government objection).

Frank expects defendants may try to assert that [redacted] constitute trade secrets, but just as in *Baxter*, no facts support treating [redacted] as protectable trade secrets. *Baxter* controls, because [redacted] are central to the disposition of Frank's motion to disgorge.

A. [redacted] are not "trade secrets."

While [redacted], such terms do not make them trade secrets. "Calling [the information] confidential does not make it a trade secret." *Union Oil*, 220 F.3d at 567. Nor would it be enough for defendants to point to [redacted] and assert "that confidentiality promotes their business interests." *Baxter*, 297 F.3d at 547.

> Beyond asserting that the document must be kept confidential because we say so (the "agreement is, by its terms, confidential"), this contends only that disclosure "could . . . harm Abbott's competitive position." How? Not explained. Why is this sort of harm (whatever it may be) a legal justification for secrecy in litigation? Not explained. Why is the fact that some other document contains references to a license sufficient to conceal the referring document? Not explained. . . . So all we have is ukase. Indeed, this joint motion—filed by two of the nation's premier law firms (Sidley Austin Brown & Wood for Baxter, Winston & Strawn for Abbott)—does not cite a single statute,

> rule, or opinion, although the prior motion's denial stressed the need for detailed analysis.

Id.

Here defendants cannot advance any plausible argument that [redacted] are trade secrets, let alone answer the questions *Baxter* requires them to confront. How could disclosure harm defendants' competitive position? Why is this harm a legal justification for secrecy in litigation?

[redacted] are simply not trade secrets as defined by most states, including Illinois.[2] The Illinois Uniform Trade Secrets Act defines a trade secret as "information, including but not limited to, technical or nontechnical data, a formula, pattern compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers, that: (1) is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality." 765 ILCS 1065/2(d). [redacted] do not meet either prong of this common definition. It is preposterous that defendant's [redacted] would be a source of actual or potential economic value. That [redacted] is a well-known matter of public record. *See, e.g., In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 635, 639 (N.D. Ohio 2016).

Defendants may not want to be known as the sort of companies who [redacted] for fear of [redacted], but this is a very marginal interest and does not provide economic value. Defendants agree to a finite number of class action settlements each year, and the number of [redacted] is small. [redacted] (which is why Frank's motion to disgorge is necessary).

[2] According to the Uniform Law Commission, the Uniform Trade Secrets Act has been adopted in 48 states—every state except New York and North Carolina.

In any event, if defendants truly wanted to keep professional objectors from targeting their cases, they ought not to have [redacted]. "That if once you have paid him the Dane-geld | You never get rid of the Dane." Rudyard Kipling, *Dane-Geld (A.D. 980-1016)*, A KIPLING ANTHOLOGY: VERSE 184-85 (1922).[3]

Moreover, defendants have expended very little effort to keep [redacted] confidential in these proceedings. Even though defendants knew that the Sweeney objectors may reference [redacted] in their oppositions to Frank's motion to disgorge, defendants did not act when (1) Randy Nunez disclosed [redacted], Dkt. 387 at 5, and (2) Steven Buckley repeatedly referenced his settlement with defendants. Dkt. 386 at 5. In spite of defendant's abstract wish to keep [redacted] secret, Buckley's disclosure remains publicly accessible on the docket, and Nunez only attempted to withdraw his disclosure (presumably at defendants' urging) five days after it was filed and therefore publicly accessible to anyone who wished to see it. Dkt. 388.

That key details of [redacted] are already public is an independent reason to unseal them. It would be asinine to require Frank—or the Court—to perpetually tiptoe around [redacted] given that Buckley has already spilled the beans. *See* Dkt. 386 at 5 ("payment to Mr. Buckley was made entirely by NBTY"). Trade secret law does not protect information that is publically available. *See*, *e.g.*, *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1314 (7th Cir. 1984) (reversed on other grounds) (holding that "[t]here is little interest in the confidentiality of documents which have been publicly discussed by their custodian."). This Court therefore should unseal [redacted].

B. [redacted] are vital to the decision the Court will render.

Because [redacted] do not constitute trade secrets nor fall under any other plausible protection, they must be unsealed because they are central to proceedings in this case. The case closely resembles *Baxter*, where confidential contracts (licensing agreements) were also central to the court's decision. Even though the parties there *agreed* to seal the material, the Seventh Circuit found their

[3] Frank intends no offense toward Danes.

rationale for doing so deficient. "As we remarked in *Union Oil*, many litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed." *Baxter*, 297 F.3d at 547. As in this case, the parties in *Baxter* asserted no legitimate trade secret that the documents would disclose, but instead relied on [redacted]. Because Seventh Circuit precedent is clear that only genuine trade secrets may be secreted (see *Union Oil Co.*, 220 F.3d at 568), the court denied the motion to maintain the seal on the documents. *Baxter*, 297 F.3d at 548.

Perhaps even more dispositive of *Baxter* is the Seventh Circuit's decision in *Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002). There, the parties attempted to seal an agreement that resolved federal litigation. *Id.* at 927. The district court ordered the suit dismissed and all documents related to the settlement sealed, maintaining that order over the objector of an intervening publisher. *Id.* Judge Posner, writing for the Court held this error: when a private agreement is entered into the court's files and becomes a topic of judicial consideration "the document is presumptively a public document." *Id.* at 930. And in the case of an ordinary private settlement, there is no compelling interest in secrecy that overrides the public's right of access to judicial documents. *Id* at 928 (noting trade secrets, identity of informers, privacy of children as examples of compelling interests).

Following *Jessup*, the Seventh Circuit in *Goesel v. Boley International (H.K.) Ltd.* again held that a settlement submitted to the district court could not be maintained under seal. 738 F.3d 831, 834 (7th Cir. 2013). When settlement terms require judicial approval "or they become an issue in a subsequent lawsuit, or the settlement is sought to be enforced," "the presumption of a right of public access to court documents should apply." *Id.* at 834. Though Frank seeks to [redacted] here, what matter is that they are at ultimate issue, so the presumption of access attaches. "[I]t's difficult to imagine what arguments or evidence parties wanting to conceal the amount or other terms of their settlement (apart from terms that would reveal trade secrets or seriously compromise personal or institutional privacy or national security) could present to rebut the presumption of public access to judicial records." *Id.* at 835. As in *Goesel*, they "haven't even tried." *Id.*

III. Frank's assent to preliminarily file [redacted] under seal does not justify their continued secrecy.

Frank and defendants agreed that [redacted] should be filed under seal to expedite discovery and briefing—to quickly determine whether Frank's hunch of objector blackmail was correct and proceed accordingly. *See* Protective Order, Dkt. 379 at 2. Even though Frank agreed to treat the information as confidential for the time being, he reserved his right to challenge the designation. *Id.* Frank now challenges the designation, and defendants cannot carry the heavy burden to *maintain* its secrecy.

Frank's initial assent to file under seal is no barrier to reclassifying [redacted] now. The Seventh Circuit emphatically rejects the argument that "any document deemed provisionally confidential to simplify discovery is confidential forever." *Baxter*, 297 F.3d at 546. Provisional confidentiality stipulations do not bind the parties, much less the Court.

In fact, even when parties jointly move to seal, the court must make an independent determination that the parties have met their burden; this duty is akin to "the fiduciary burden assumed by federal judges in evaluating a proposed class action settlement under Federal Rule 23(e)." *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994). Thus, even when parties *jointly agree* to "the sort of broad secrecy agreement that often accompanies discovery in order to expedite that process by avoiding document-by-document analysis," this agreement cannot bar key documents from the judicial record. *Baxter*, 297 F.3d at 545; *accord Goesel*, 738 F.3d at 835 (confidentiality agreement is "obviously" "insufficient"). "But those documents, usually a small subset of all discovery, that influence or underpin the judicial decision are open to public inspection unless they meet the definition of trade secrets or other categories of bona fide long-term confidentiality. . . ." *Id.*

IV. Access to [redacted] is particularly important because this is a class action.

The need for public access is especially important in the class action setting. The Third Circuit explained this importance in *In re Cendant Corp.*:

> The right of public access is particularly compelling here, because many members of the "public" are also plaintiffs in the class action. Accordingly, all the reasons we discussed in *Littlejohn* for the right of access to public records apply with even greater force here. See p. 10, supra. Protecting the access right in class actions "promotes [class

> members'] confidence" in the administration of the case. *Littlejohn*, 851 F.2d at 678. Additionally, the right of access diminishes the possibility that "injustice, incompetence, perjury, [or] fraud" will be perpetrated against those class members who have some stake in the case but are not at the forefront of the litigation. *Id.* Finally, openness of class actions provides class members with "a more complete understanding of the [class action process] and a better perception of its fairness." *Id.*

260 F.3d 183, 193 (3d Cir. 2001).

Rule 23 likewise espouses a preference against secrecy. See Fed. R. Civ. P. 23(e)(3) (requiring identification of any secret compacts in connection with a class action settlement). Even before the 2003 amendments to Rule 23, the Seventh Circuit recognized the importance of class members' access to material concerning attorneys' fees in their case. Referring to class counsel fees, the Seventh Circuit remarked:

> To conceal the applications and in particular their bottom line paralyzes objectors, even though inflated attorneys' fees are an endemic problem in class action litigation and the fee applications of such attorneys must therefore be given beady-eyed scrutiny by the district judge. *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 192 (3d Cir. 2000); 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1803, pp. 510-11 (2d ed. 1986).

Reynolds v. Benefit National Bank, 288 F.3d 277, 286 (7th Cir. 2002).

The same logic should apply to [redacted] when objectors have purported to bring claims on behalf of the entire class. Class members ought to know [redacted] so that they can weigh in on the disposition of [redacted].

CONCLUSION

This Court should grant Frank's motion to remove the confidentiality designation of [redacted] under the Protective Order and unseal them (Dkt. 377). This will also permit the Court to unseal documents that were only filed under seal because they discuss [redacted], including this motion, and Dkt. Nos. 381, 382, 389-1, and 391.

Dated: November 1, 2018.

/s/ M. Frank Bednarz
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CERTIFICATE OF SERVICE

The undersigned certifies he electronically filed the foregoing Motion and Memorandum in Support of Motion to Unseal via the ECF system for the Northern District of Illinois under seal, including a redacted publicly-available version of the Memo. Additionally, he caused to be served via email and First-Class mail an unredacted copy of this Reply Memo upon the following attorneys and persons that are authorized to receive material designated as Confidential under the Confidentiality Stipulation and Protective Order, Dkt. 379:

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The undersigned further certifies he caused to be served via First-Class mail a copy of the redacted, publicly available version of the Memo upon the following:

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Dated: November 1, 2018 /s/ M. Frank Bednarz