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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON AT EUGENE

ADVANCED ARMAMENT CORPORATION,

Plaintiff,

v.

IAN HALE GARNER, an individual,

Defendant.

Case No. 08-CV-6142-TC

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE UNDER SEAL

I. INTRODUCTION

Plaintiff offers no sufficient justification to be allowed to file documents under seal in this matter. There is nothing so exceptional about plaintiff's business records to overcome the presumption against sealing documents out of the public record. Plaintiff has already made those records relevant, and waived any claim to secrecy by repeatedly referring to the substance of those documents in this lawsuit. It would place an unjustified burden on Court staff and on defendant to give such special treatment to plaintiff's records. This case is no exception to the general rule that filing affidavits and declarations under seal is frowned upon, and to be allowed only in exceptional circumstances.

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II. LEGAL AUTHORITY

There is a "strong presumption" against sealing documents that are filed in court proceedings. *Hagestad v. Tragesser*, 49 F3d 1430, 1434 (9th Cir. 1995). The Ninth Circuit recognizes a common law right of public access to documents filed in connection with pretrial motions. *San Jose Mercury News, Inc. v. U.S. District Court – Northern District (San Jose)*, 187 F3d 1096, 1102 (9th Cir. 1999). That presumption may be overcome "only by an overriding right or interest based on findings that closure is essential to preserve higher values . . . ." *Oregonian Publishing Co. v. United States District Court (Oregon)*, 920 F2d 1462, 1465 (9th Cir. 1990).

Further, the party seeking to seal all or part of a document in connection with a dispositive motion must articulate "compelling reasons" supported by specific factual findings. *Kamakana v. City and County of Honolulu*, 447 F3d 1172, 1178-79 (9th Cir. 2006). It is more difficult to justify sealing documents that are used in court, or attached to a pleading or substantive motion than to restrict documents exchanged in discovery and never used in court. *Confederated Tribes of Siletz Indians of Oregon v. Weyerhaeuser Co.*, 340 F Supp 2d 1118, 1122 (D.C. Or. 2003). *Id.*

III. ANALYSIS

Plaintiff has failed to present compelling reasons with specific factual support to justify filing its records under seal. Plaintiff has not shown that its business records are any more secret or private than any other relevant business records that are typically revealed in the course of litigation. Plaintiff's claim that it will be injured by public filing is in fact belied by plaintiff's own actions.

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Plaintiff has itself publicized the information it now claims is so secret. Plaintiff now relies upon a purported non-disclosure agreement about "information related to the SCAR Program and the products that Plaintiff is producing." (Plaintiff's Memorandum In Support of Motion for Leave to File under Seal.) However, plaintiff has previously discussed that information when it suited plaintiff. For example, plaintiff's Complaint openly discusses its relationship with Fabrique Nationale and the United States Special Forces. Plaintiff admits it also uses that information for marketing purposes. (Brittingham Declaration at ¶ 5.)

When plaintiff wanted a Temporary Restraining Order, plaintiff swore that it had an ongoing relationship to supply "FN" with silencers for the SCAR program, and that FN had not replaced plaintiff with other competitors, sold off plaintiff's product, or complained about any defects in those products. (Affidavit of Kevin Brittingham In Support of Temporary Restraining Order, ¶ 12-15, 17.) Brittingham's Affidavit is replete with this kind of self-serving hearsay about plaintiff's contracts. It is disingenuous in the extreme for plaintiff to complain that it is now being forced to either breach those contracts, or continue with this lawsuit.

Plaintiff also tries to cloak itself in its association with the military to try to keep its records secret. (See Plaintiff's Memorandum In Support of Motion For Leave to File Under Seal at p. 3.) That argument is unavailing as well. Plaintiff does not assert any official rule or policy that would prohibit public filing of plaintiff's records. Plaintiff only argues that plaintiff voluntarily "maintains" the confidentiality of those documents. Plaintiff's vague reliance upon "sensitivity to United States military concerns" (Brittingham Declaration at p. 3) in its motion to seal would also seem to belie plaintiff's argument in its opposition to defendant's anti-SLAPP motion, where plaintiff denies that its products and business

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relationships implicate United States military interests.

Plaintiff has not shown any sufficiently important interests to justify its request and to overcome the presumption against sealing documents filed with the court. The documents plaintiff wants sealed appear to concern past events, as opposed to future projections or intellectual analysis. *See Confederated Tribes of Siletz Indians*, *supra*, 240 F Supp 2d at 1123 (reviewing, among other factors, whether the information concerns future acts, the age of the information, the value of the information to competitors, the secrecy of the information, the relevancy of the information, the public's interest, and whether the proponent has described particular harm that would come from disclosure). Plaintiff's documents are not alleged to involve current projects or bids. (*See* Declaration of Kevin Brittingham.) The records do not contain design secrets or manufacturing specifications. (*Id.*) Rather, the documents appear to be ordinary shipping and receiving records that do not reveal "trade secrets" or contain any information of significant value.

The relevancy of the documents to this action also militates against sealing the records. *Confederated Tribes of Siletz Indians*, *supra*, 240 F Supp 2d at 1123. Plaintiff put the existence of its purported contract squarely at issue by its Complaint. In order to survive defendant's anti-SLAPP Motion and prove its claims, plaintiff must establish a current contractual relationship to supply silencers to Fabrique Nationale for the SCAR program, and must prove that defendant's statements were false. Plaintiff's records of that relationship go to the core of plaintiff's complaint.

Finally, plaintiff had since June 4, 2008, when defendant filed its Special Motion to Strike to request leave to file under seal. Plaintiff asked for two extensions of time to respond to defendant's Motion to Strike, but waited until the very last day of those

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extensions to file its Motion for Leave to File Records under Seal. As a result, the support for plaintiff's opposition to defendant Motion to Strike has still not been provided to defendant. This delay obviously impairs defendant's ability to reply to plaintiff's Response. Plaintiff's delay in requesting leave to file under seal provides another ground for denying plaintiff's Motion.

IV. CONCLUSION

Plaintiff has failed to overcome the strong presumption against sealing records. "Unsupported hypothesis or conjecture" about speculative harm is not enough. *Kamakana*, *supra*. Rather than "articulating compelling reasons based on specific facts" to justify filing under seal, *id.*, plaintiff rests on vague entitlements of secrecy and privacy. Plaintiff's interest in secrecy does not override the presumption in favor of keeping the court record open. Plaintiff should not be allowed to use public allegations about its business relationships to its advantage against defendant, and then keep the proof for those allegations secret once a defense has been raised.

Defendant respectfully requests that plaintiff's Motion be denied.

Dated this 30th day of June, 2008.

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