

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GREEN MOUNTAIN CHRYSLER PLYMOUTH
DODGE JEEP, *et al.*,

Plaintiffs,

ASSOCIATION OF INTERNATIONAL
AUTOMOBILE MANUFACTURERS,

Plaintiff,

v.

GEORGE CROMBIE, *et al.*,

Defendants.

Case Nos. 2:05-CV-302, and
2:05-CV-304
(Consolidated)

**MOTION TO PRESENT CERTAIN TESTIMONY IN CAMERA
TO PROTECT TRADE SECRETS**

Plaintiffs Green Mountain Chrysler-Plymouth-Dodge-Jeep, *et al.* (collectively, “plaintiffs”) respectfully seek an Order allowing certain testimony related to certain trade secrets and confidential business information to be taken *in camera* and related trial exhibits to be filed under seal. In support thereof, plaintiffs state:

Preliminary Statement

Plaintiffs are mindful of the important role the public and the press play in the judicial process. Nonetheless, they are obliged to seek the Court’s permission to have certain testimony taken *in camera* and to have certain exhibits filed under seal in order to protect highly confidential and proprietary business trade secrets and confidential business information as to

which there is neither a First Amendment, nor a common law right of access.¹ To minimize any restrictions on access, while honoring the proprietary nature of certain information, plaintiffs propose a plan, as discussed below, whereby they will edit daily transcript of testimony and exhibits from which the public has been excluded, and release so much of it each day which does not reveal this information.

Historically, courts have taken testimony *in camera* and received exhibits under seal in situations where highly confidential or trade secret information is presented. The testimony in this case will involve some of the most confidential information of various vehicle manufacturers, including highly confidential information about the costs and fuel economy effects of a variety of vehicle designs and hardware systems, future product plans, and profit and loss information. Vehicle manufacturers have spent millions and sometimes hundreds of millions of dollars developing new-vehicle fuel economy technologies in a highly competitive marketplace. They have gone to great lengths to protect this information from access to their competitors. Past and future product-line profit and loss information and hardware cost estimates cannot be published without severe competitive impact on the affected manufacturers. Similarly, disclosure of technical data and estimates that have never been put in the public domain will unfairly provide competitive vehicle manufacturers with one another's trade secrets and negatively impact the incentive to develop new technologies designed to improve fuel economy, a result no party wants.

¹ The parties have been in agreement as to the management of these highly confidential trade secrets throughout the development of this case. In order to prevent any vehicle manufacturer from unfairly benefiting from the engineering and business secrets of another, the parties entered into a detailed Protective Order, a copy of which is attached hereto as Exhibit A. Only signatories to the Protective Order are permitted access to the highly confidential information, and signatories are limited to outside counsel, counsel for state agencies, certain employees of state agencies, and retained experts.

Argument

I. Courts Have Traditionally Received Trade Secret Evidence *In Camera* Despite The Public's and the Press's Strong Rights to Access Judicial Proceedings.

Courts have traditionally adapted their procedures to allow resolution of issues involving trade secrets without forcing disclosure of those trade secrets. It is beyond dispute “that the right to inspect and copy judicial records is not absolute.” *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 598 (1978). Courts have refused to permit their files to serve as “sources of business information that might harm a litigant’s competitive standing.” *Id.* “Potential damages from release of trade secrets is a legitimate basis for sealing documents and restricting public access during trial.” *Encyclopedia Brown Prod., Ltd. v. Home Box Office, Inc.*, 26 F. Supp. 2d 606, 612 (S.D.N.Y. 1998); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 600 n. 5 (1980) (Stewart, J., concurring) (“The preservation of trade secrets, for example, might justify the exclusion of the public from at least some segments of a civil trial.”); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 664 (8th Cir. 1984) (affirming the sealing of a transcript from a contempt hearing where transcript contained trade secrets); *Crane Helicopter Serv., Inc. v. United States*, 56 Fed. Cl. 313, 327 (Fed. Cl. 2003) (maintaining trial exhibits and trial testimony under seal).

There are two bases by which the public and the press may claim the right to access court records and to be present in court during trials: (1) a qualified First Amendment right and (2) a common law right. *Lugosch v. Pyramid Co. of Ononagu*, 435 F.3d 110, 119-20 (2d Cir. 2006). The Second Circuit has created both substantive and procedural tests to ensure that the right to access, which “is firmly rooted in our nation’s history,” is not easily overcome. *Id.* at 119.

In determining whether the First Amendment right exists, the Second Circuit uses two substantive tests. First, under the experience and logic approach, the court considers “both whether the documents have historically been open to the press and the general public and

whether public access plays a significant positive role in the functioning of the particular process in question.”² *Lugosch*, 435 F.3d at 120 citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (internal quotations omitted). “The second approach considers whether the judicial documents are derived from or are a necessary corollary of the capacity to attend the relevant proceedings.” *Id.*

Historically, trade secret information has not been open to the public. *Nixon*, 435 U.S. at 120 citing *Schmedding v. May*, 48 N.W. 201, 202 (Mich. 1891). Courts have long protected trade secrets by taking testimony related to those secrets *in camera*. *E.I. Du Pont Nemours Powder Co. v. Masland*, 244 U.S. 100, 103 (1917); *Herold v. Herold China & Pottery Co.*, 257 F. 911, 917 (6th Cir. 1919) (“The practice of making such disclosures *in camera* is well established.”); *State ex rel. Ampco Metal, Inc. v. O’Neill*, 78 N.W.2d 921, 926 (Wis. 1956); *Stone v. Goss*, 55 A. 736, 738 (N.J. 1903). This historic protection of trade secrets by the courts weighs against according the public and the press First Amendment rights to access documents or trial testimony involving trade secrets.

Public access is actually antithetical to “the functioning of the particular process in question.” See *Lugosch*, 435 F.3d at 120. A trade secret’s value comes from its secrecy; disclosure to the general public destroys its value. Roger M. Milgrim et al., *Milgrim on Trade Secrets* §1.03 (Rel. No. 83 2006).

² By way of example, the Second Circuit held that the presence of the public plays an important role in sentencing proceedings. “[S]entencing proceedings are of paramount importance to friends and family members of the defendant being sentenced. The proceedings are also extremely important to victims of crime, to family members of victims, and to members of the community in which the crime occurred.” *United States v. Alcantura*, 396 F.3d 189, 198 (2d Cir. 2005). The Court also noted that historically sentencing proceedings were open to the public. *Id.* at 197-98.

Even if there is no First Amendment right to access, the Court must still analyze whether a common law right exists. The Second Circuit employs a balancing test to determine whether the public or the press may exercise the common law right to access. *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995). The Court should evaluate “the weight of the presumption” in favor of common law access against “competing considerations.” *Id.* To determine the weight of the presumption, the Court must consider “the role of the material at issue in the exercise of Article III judicial powers and the resultant value of such information to those monitoring the federal courts.” *Id.* at 1049. In *Amodeo*, the Second Circuit evaluated the “competing considerations” of the privacy of a law firm in a client relationship, law enforcement concerns, and judicial efficiency. *Id.* at 1050-1053. Subsequent Second Circuit cases have recognized that the issues in *Amodeo* were not an exhaustive list of “competing considerations.” *Lugosch*, 435 F.3d at 120.

II. Information Presented at Trial Will Contain Trade Secrets and Highly Confidential Business Information.

The information that may be introduced into evidence during trial is so sensitive that the court is warranted in sealing the courtroom and any resulting transcripts under any standard. To establish the need for protection, the proponent must show that: (1) the information has independent economic value that is not readily ascertainable by others and (2) reasonable efforts were made to maintain the information’s secrecy. *Dicks v. Jensen*, 172 Vt. 43, 47 (2001). Information from direct examination and that may be elicited on cross examination includes highly confidential information about the costs and fuel economy effects of a variety of advanced vehicle designs,³ cost estimates, profit and loss estimates, and future product plans.⁴

³ See *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 23 (1998) (affirming preliminary injunction and holding that “Although retail prices are public, the overall costs of the [package to improve performance of the Dodge Viper], the cost of items sold separately, the cost of components and sub-assemblies, and the cost of labor associated with

(Continued...)

The trade secrets and confidential business information at issue here have tremendous economic value. The automobile industry is extraordinarily competitive. (Morrissett Decl. ¶¶ 5-6) Vehicle manufacturers have spent millions and, in some cases, hundreds of millions of dollars developing the technology at issue in this litigation. (See Morrissett Decl. ¶ 9; Alden ¶ 11) The ability of manufacturers to compete depends directly on their ability to bring new technologies to market ahead of competitors. (See Morrissett Decl. ¶¶ 5-6) Premature disclosure of development process and product plans would dramatically and irreparably harm vehicle manufacturers. (See Morrissett Decl. ¶ 12) Public disclosure of this information would unfairly place competitive engineering and other trade secrets in the public domain and negatively impact the incentives to innovate and to create the very technologies that lead to future improvements in fuel economy. No one, including the public, will benefit from the disclosure of trade secret information.

The range of potential cross examination may involve some of the most sensitive information in the companies' possession. To date, the two manufacturer plaintiffs, non-party manufacturers, and other respondents in discovery have produced several hundred thousand pages of highly confidential business records, which include the following types of information:

- Internal engineering assessments of how various technologies would change the fuel economy performance of current and planned future automobiles, and how fuel economy technologies would affect vehicle performance (such as acceleration and engine stability). These assessments are the product of thousands of hours of testing and analysis by hundreds of engineers employed

assembling and process development is not public.”); see also *Allis-Chalmers Mfg. v. Continental Aviation and Eng'g Corp.*, 255 F. Supp. 645, 654 (E.D. Mich. 1966) (“Allis-Chalmers possesses confidential, proprietary information relating to development, design and manufacture of distributor type fuel injection pumps, which constitute trade secrets.”)

⁴ See *Pepsico, Inc. v. Redmond*, 54 F.3d 1262, 1269 (7th Cir. 1995) (holding that Pepsi's strategic goals for 1995 in sports drinks and new age drinks were trade secrets).

by each manufacturer plaintiff, and are among the most secret engineering projects at each firm. (*See* Morrissett Decl. ¶ 7; Weverstad ¶ 7).

- Estimates of the costs and prices of various future models, and the specific impact of adding new fuel economy technologies to those models on those costs. This information has enormous sensitivity, especially for automobile companies that are now struggling with significant capital constraints and that are under close scrutiny in the financial markets. (*See* Gibson Decl. ¶ 7; Weverstad Decl. ¶ 8; Alden Decl. ¶¶ 4, 10).
- Historical and estimated future profit information, and estimated future sales. Information concerning profits per vehicle is among the most sensitive data possessed by vehicle manufacturers -- indeed, it is so sensitive that very few executives at any given company have access to their respective company's information. (*See* Gibson Decl. ¶ 7; Morrissett Decl. ¶ 14).

The plaintiffs have gone to great lengths to protect this information. All of the above information has very limited, "need-to-know" circulation within a given automobile company.⁵ Some of the information is not even provided by the companies to their own outside or inside counsel in the normal course of business.⁶ Nevertheless, the responding parties have made this information available on a limited basis to outside counsel for the parties for purposes of this litigation, and other persons whose access does not create an undue risk of disclosure, under the terms of the Second Amended Protective Order.

The parties have already agreed to the sealing of testimony and exhibits:

Designation of Highly Confidential Information for Use at Trial.
A Party (or any Non-Party that generated highly confidential testimony or documents) may request judicial designation of testimony or documents as Highly Confidential Information before the affected testimony or documents are offered at trial. Any Reviewing Party intending to offer any Highly Confidential Information at trial must inform the Court, counsel for the Producing Party, and Outside Counsel of Record that such document is subject to the terms of this Order before offering it. If the Court designates any such testimony or documents as Highly Confidential Information, a Party (or the Non-Party that generated

⁵ *See* Weverstad Decl. ¶ 7; Morrissett ¶ 14; Cross Decl. ¶ 5.

⁶ *See, e.g.*, Gibson Decl. ¶ 5; Morrissett Decl. ¶ 14.

such testimony or documents) may request that the Court exclude from the courtroom any person who has not agreed to be bound by this Second Amended Stipulation and Protective Order. If testimony is elicited or documents are referred to that are similarly sensitive, a Party (or the Non-Party that generated such testimony or documents) may also request the Court to designate the testimony just received or documents just referred to as Highly Confidential Information. Furthermore, within seven (7) business days of the time any transcript of these proceedings is produced, a Party (or any Non-Party that either generated highly confidential information or whose highly confidential information was the subject of testimony or contained within documents) may request that the Court order relevant portions of the transcript be designated as Highly Confidential Information and placed under seal.

(Second Amended Protective Order ¶ 14)

The administrative agency in charge of setting future fuel economy standards, NHTSA, already preserves the confidentiality of this information. (Alden Decl. ¶¶ 6, 8). Because of the limited number of competing technological systems, companies and the public can take seemingly minor pieces of information to unravel the vehicle manufacturers' relative abilities. (See Weverstad Decl. ¶ 8).

III. Plaintiffs Plan To Minimize Closure.

Testimony elicited from specific witnesses is likely to include both public information, or information as to which there are no competitive issues, as well as information needing protection against disclosure. Accordingly, plaintiffs propose to offer as much of the testimony as possible in open court, and to ask the Court to close proceedings only for the portions of the testimony that touch upon competitively sensitive information. (Plaintiffs have already designated trial exhibits that contain trade secrets and confidential business information.) In addition, to preserve the right for full cross-examination, plaintiffs recommend that the courtroom be closed during cross-examination of witnesses who have offered confidential business information in their direct testimony.

To increase the amount of material in the public record, plaintiffs will arrange for overnight transcripts. Plaintiffs will arrange for review of the sealed portions of the transcript each evening and release such as will not offend the protected trade secrets.

Conclusion

For the reasons stated, this Court should take testimony related to certain trade secrets *in camera* and receive exhibits under seal.

Respectfully submitted,

/s/ Matthew B. Byrne

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