UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KIRK DAHL, et al., Individually and on Behalf of All Others Similarly Situated,	)	
Plaintiffs,	)	No. 1:07-cv-12388-EFH
v.	)	
BAIN CAPITAL PARTNERS, LLC, et al.,	)	
Defendants.	)	

DEFENDANTS' JOINT OPPOSITION TO THE NEW YORK TIMES' MOTION TO INTERVENE AND UNSEAL THE FIFTH AMENDED COMPLAINT AND ASSOCIATED EXHIBITS

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INTRODUCTION

The New York Times' motion to unseal defendants' confidential, competitively-sensitive information asks for the same basic relief that plaintiffs requested and the Court denied over a year ago. There, as the Times does here, plaintiffs contended that "the public has a compelling interest in disclosure of" defendants' proprietary business records cited in an earlier version of the complaint and found in the discovery record. (Pls.' Mem. In Support of Mot. to Modify Protective Order [Dkt No. 414] at 7.) But the Court summarily refused to unseal the record. As defendants argued in opposing that motion, "[t]he disclosure of [such] sensitive, confidential information … has the potential to prejudice defendants severely, as it would allow competitors (and other defendants) to review and copy their business strategies and proprietary work product." (Defs.' Joint Opp. to Mot. to Modify Protective Order [Dkt. No. 431] at 2.) That same risk is equally present here. Defendants compete with each other and myriad others for potential investments, debt financing, and investors; and their portfolio companies compete with other firms in their respective industries. The disclosure of the entire Fifth Amended Complaint—which includes, for example, the identity of investors, bid strategies, business plans, analyses of investment opportunities, and other proprietary material—could seriously harm the competitive position of defendants and the companies that they took private. There is no good reason to depart from the Court's earlier ruling denying a request for similar relief as a consequence.

The Times tries to justify its request by pointing to a supposed common law and First Amendment "presumption of public access" to such materials. (*See* New York Times Mem. of Law In Support of Mot. and To Unseal [Dkt. 673] at 1 ("Mot.").) Plaintiffs' cases do not support this proposition, and any such presumption is rebuttable—which this Court recognized when it refused to modify the parties' protective order last year. (*See* 3/1/2011 Order [Dkt. 438].) Indeed, courts routinely recognize that the "presumption of public access" is not absolute and

steps aside when there are compelling reasons to keep information private—such as the need to preserve trade secrets and competitively-sensitive business information. Those confidentiality concerns are paramount and outweigh the Times' purported interest in "public access."

Nor should the Court countenance the Times' argument that the complaint should be disclosed because the case "involves Bain Capital Partners, a firm that is. . . associate[ed] with Mitt Romney." (Mot. at 8.) This case has nothing to do with Mitt Romney or the presidential election. As the Times itself has reported, Governor Romney left Bain Capital in 1999.[1] Plaintiffs' allegations, by contrast, concern deals that did not close until years later—at earliest in 2004, in the case of Bain Capital—by which time Mr. Romney was governor of Massachusetts. It should come as no surprise that there is not a single mention of Governor Romney in the complaint or the documents it cites. The election should not serve as an excuse to allow the press to get at confidential documents and upend competitive sensitivities. If anything, it only heightens defendants' concerns about the disclosure of the highly confidential materials here, which are likely to be washed into the spin of the campaign news cycle instead of being the subject of a proper legal discussion about the lack of merit of plaintiffs' case.

Even if the public does have an interest in accessing the Fifth Amended Complaint, that interest can be properly accommodated by providing the Times with a version that redacts defendants' most sensitive and confidential information. The Times did not meet and confer with defendants about this motion, as required under Local Rules. But, if it had, it would know that defendants plan to provide plaintiffs with a redacted version of the complaint in due course—as with the Fourth Amended Complaint—that releases all but the confidential, competitively sensitive information in that document.

[1] *See, e.g.*, Michael D. Shear & Richard A. Oppel Jr., *Obama and Romney Trade Shots, a Few Possibly Accurate, on Outsourcing*, NEW YORK TIMES (July 10, 2012), *available at* http://www.nytimes.com/2012/07/11/us/politics/obama-and-romney-trade-shots-a-few-possibly-accurate-on-outsourcing.html.

This makes it impossible for the Times to claim that "an appropriate balancing of 'the competing interests that are at stake'" favors unsealing the complaint "in its entirety." (Mot. at 1 (citing *Siedle v. Putnam Invs., Inc.*, 147 F.3d 7, 10 (1st Cir. 1998).) A redacted version of the complaint would provide the Times with notice of plaintiffs' claims and thus "allow the public [to] serve its essential function of monitoring" this Court's handling of this case. (Mot. at 5.) At the same time, it would preserve defendants' interests in maintaining the confidentiality of their proprietary information and trade secrets, including business practices, valuation methodologies, and bid strategies that have been refined over several decades at tremendous cost in time and money. The very cases that the Times cites admit that this Court has "considerable leeway" in deciding whether to seal documents and pleadings. *Siedle*, 147 F.3d at 10. The Court should use that discretion to deny the Times' motion here.

BACKGROUND

Defendants in this litigation are almost all private equity firms that, among other things, manage investment funds that purchase companies and businesses through leveraged buyouts. Defendants then operate these companies with the goal of adding value through management and capital structure changes and ultimately reselling the improved companies. In so doing, defendants compete with each other (and other funds and corporations not parties to this case) for investment opportunities, financing, and capital from limited partners. And the companies that defendants own often compete with each other and other companies in their respective markets. For example, Phillips NXP and Freescale—both subjects of the Fifth Amended Complaint—each operate in the semiconductor space, and Texas Genco and TXU are both independent power producers.

Given the competitive nature of defendants' relationships and the information sought by plaintiffs, the parties agreed to and the Court entered a protective order limiting the disclosure of

certain types of proprietary business information. That order establishes specific procedures for designating and protecting two tiers of information. (*See* 1/15/2009 Stipulated Protective Order [Dkt. 170].) "Confidential" materials, which include "research, personal, or commercial information [that] is not in the public domain," may be provided to litigants, counsel, and the Court, but may not be publicly disclosed. (*Id.* ¶ 1(c).) "Highly Confidential" materials, which include information subject to third-party confidentiality agreements or that the "person producing believes in good faith contains information that is competitively or otherwise highly sensitive," may not be shared even among litigants beyond counsel. (*Id.* ¶¶ ¶ 1(d), 3(c).) The protective order requires protected materials to be filed under seal. (*Id*. ¶ 5).

Defendants have sat for close to 50 depositions and produced over eleven million pages of documents in reliance on the protective order. Much of the information produced contains commercial research, valuation methodologies, business plans, investment targets, investor lists, and auction strategies. These materials include proprietary, highly sensitive businesses practices that have been refined over several decades, and that are central to how defendants value and acquire companies—the very heart of their business. They also include information regarding the business practices of the portfolio companies that defendants operate. Consequently, disclosure of this information would allow interested parties to appropriate unfairly defendants' business practices, and to compete unfairly with them in future deals.

Plaintiffs asked the Court to modify the protective order in February 2011 so that they could "disclos[e] to the public any filings with the Court including the Fourth Amended Class Action Complaint." (*See* Pls.' Mem. In Supp. Of Mot. To Modify the Protective Order [Dkt. 414] at 4.) The Court denied that motion. (*See* 3/1/2011 Order [Dkt. 438].) The Times' current motion is in all material respects the same as plaintiffs' February 2011 motion. The Times asks

this Court to allow it "to intervene and to unseal the Fifth Amended Complaint and its associated exhibits" (Mot. at 1), though there are no such "exhibits."

ARGUMENT

I. THE DOCUMENTS AND PLEADINGS AT ISSUE HERE ARE NOT SUBJECT TO A "PRESUMPTIVE RIGHT OF ACCESS."

It is beyond dispute in this Circuit that there is no presumption of public access to discovery materials. *See Anderson v. Cryovac, Inc*., 805 F.2d 1, 13 (1st Cir. 1986) (holding that the presumption of public access "does not encompass discovery materials"). The Times attempts to circumvent this established rule by arguing that the discovery it seeks here is contained in a judicial document—the Fifth Amended Complaint—and the "exhibits" submitted with it. (*See* Mot. at 1-2.) But the fact that discovery materials are referenced in the Fifth Amended Complaint does not make those materials "judicial documents."

A. There Is No Presumptive Right Of Access To Confidential Business Documents Produced As Part Of The Discovery Process.

As an initial matter, the Times requests that this Court unseal "each of the exhibits referenced" in the Fifth Amended Complaint. (Mot. at 2.) This request should be denied for the straightforward reason that there were no exhibits to the complaint. But to the extent the Times is actually requesting discovery materials that plaintiffs have referenced or quoted in the complaint, that request should also be denied. The law is clear that discovery materials are not judicial documents subject to either a common-law or First-Amendment presumption of public access. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984). Thus, in *Anderson v. Cryovac, Inc*., a case on which the Times relies, the First Circuit held that there was no right of access, presumptive or otherwise, to documents submitted as part of a discovery motion. 805 F.2d at 13. "There is no tradition of public access to discovery," it held, "and requiring a trial

court to scrutinize carefully public claims of access would be incongruous with the goals of the discovery process." *Id*.

The general rule that there is no presumptive right of access to discovery in private lawsuits applies with added force where—as here—discovery was provided voluntarily in reliance on a protective order. *See, e.g.*, *SEC v. TheStreet.com*, 273 F.3d 222, 230 (2d Cir. 2001) ("It is [] presumptively unfair for courts to modify protective orders which assure confidentiality and upon which the parties have reasonably relied."); *Tavoulareas v. Washington Post Co.*, 111 F.R.D. 653, 658-59 (D.D.C. 1986). Had the protective order here not been in place, or were it so flimsy as to fold upon intervention of the Times, defendants might not have produced or would have redacted many of the millions of pages of documents produced in this case, which could have burdened this Court with "years of adjudication of the confidentiality of individual documents." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 529 F. Supp. 866, 879 n.18 (E.D. Pa. 1981). Indeed, managing complex cases like this one would be impossible if intervenors could easily circumvent protective orders and gain access to confidential materials. *See Cryovac*, 805 F.2d at 12 ("[A] public right of access would unduly complicate the process. It would require the court to make extensive evidentiary findings whenever a request for access was made, and this could in turn lead to lengthy and expensive interlocutory appeals….").

B. The Documents Referenced In Plaintiffs' Fifth Amended Complaint Are Not "Judicial Documents" Entitled To Any Right Of Access.

The Times cannot circumvent the black-letter rule that discovery materials are not "judicial documents" simply because plaintiffs have quoted and cited those materials in the complaint. The purpose of a complaint, after all, is to concisely set forth the nature a claim and its general basis, *not* to outline in detail the results of discovery. *See* Fed. R. Civ. P. 8(a)(2) (directing that complaints contain "a short and plain statement" of the claim). Here, however,

the Fifth Amended Complaint's use of discovery materials goes far beyond providing notice of plaintiffs' claims. The latest complaint is 216 pages long, includes 643 footnotes, and cites testimony from over twenty depositions and hundreds of documents—all of which were designated "Confidential" or "Highly Confidential." The Court never reached much of that material in ruling on defendants' latest motion to dismiss portions of the Fifth Amended Complaint, and the documents cited in the complaint are not now, and were never, part of the record before the Court in the first place.

Indeed, courts commonly limit access to protected materials, even if they are referenced in a complaint or motion. In *Siedle v. Putnam Investments, Inc.*, for example, the First Circuit reversed a district court order unsealing a complaint that "in Putnam's view, needlessly divulge[d] information obtained in the course of the parties' attorney-client relationship." 147 F.3d 7, 8 (1st Cir. 1998). In so doing, the Court explained that the public's right of access is not "unfettered": when a party "objects to an unsealing order, a court must carefully balance the competing interests that are at stake in the particular case." *Id.* at 10. There is no material difference between that case and this one: defendants here have an interest in the confidentiality of their business secrets just as the defendant in *Siedle* had an interest in the confidentiality of privileged communications. That those communications were placed by plaintiffs in the complaint did not make them "judicial documents" subject to a right of access, *see id.*, and the same is true here. *See also M.P. v. Schwartz*, 853 F. Supp. 164,168-69 (D. Md. 1994) (finding "no need, at least at present, to make the attachments to the Complaint available").

Finally, the documents that plaintiffs reference but do not attach to the latest complaint cannot be considered "judicial documents" for an additional reason. They were never actually incorporated into the complaint or filed with the Court. They have never been found admissible,

let alone relevant. *See EEOC v. Dial Corp.*, 2000 WL 33912746, at *1 (N.D. Ill. Nov. 29, 2000) ("The public has no interest in gaining access to information that has failed to pass the threshold tests of relevance and admissibility.") They are discovery documents, pure and simple, and they are not subject to a public right of access as a consequence.

II. EVEN IF THERE WERE A "PRESUMPTIVE RIGHT OF ACCESS," THE TIMES' INTEREST IN THE MATERIALS AT ISSUE IS OUTWEIGHED BY DEFENDANTS' CONFIDENTIALITY INTERESTS.

Even if the Court found that the pleadings and documents at issue here are subject to a presumptive common law or the First Amendment right of access, that right can be rebutted by countervailing considerations, like defendants' confidentiality concerns here. The Times' own cases admit not only this, *see, e.g.*, *Siedle*, 147 F.3d at 10, but also make clear that this Court has "considerable leeway" in deciding whether documents should remain under seal, *id*. As the Supreme Court has stated, "the right to inspect and copy judicial records is not absolute" and may not extend to, among other things, "sources of business information that might harm a litigant's competitive standing." *Nixon v. Warner Comm'ns, Inc.*, 435 U.S. 589, 598 (1978); *see also Zenith Radio Corp.*, 529 F. Supp. at 890 ("[I]t is clear that a court may … restrict[] disclosure of discovery materials to protect a party from being put at a competitive disadvantage."). Defendants' interest in keeping their proprietary and business-sensitive documents out of the hands of competitors outweighs any supposed public right of access to such material, especially since both parties' interests can be accommodated with the publication of a redacted complaint. *See Zenith Radio Corp.*, 529 F. Supp. at 905.

A. Defendants Would Suffer Severe And Irreparable Competitive Injury If The Fifth Amended Complaint Were Unsealed In Its Entirety.

The Fifth Amended Complaint was filed after the parties completed close to 50 depositions and produced millions of pages of documents. This information includes documents

and testimony regarding highly proprietary business practices that were developed and refined at great expense by defendants. The disclosure of such information would give competitors unearned insight into the defendants' strategies and methodologies in attracting investors and valuing and acquiring companies—the core business in which defendants are engaged.

Not surprisingly, much of this information made its way into plaintiffs' Fifth Amended Complaint. That document cites testimony from over twenty depositions and literally hundreds of discovery documents—*all of which* were designated "Confidential" or "Highly Confidential" under the protective order. Just by way of example, the complaint includes documents and testimony regarding:

- The identity of investors in defendant funds. (*See, e.g.,* 5AC ¶¶ 101, 394 (citing BC-E00545381-96).)

- Valuations of acquisition companies and methods, and internal rates of return on investments. (*See, e.g.*, 5AC ¶¶ 327 (citing BX-0658897-99, BX-0653720-65), 362 (citing GSPIA00093788-871), 240 (citing BX-1525170-372).)

- Defendants' business, investment, and bidding strategies. (*See, e.g.*, 5AC ¶¶ 87 (citing Friedman Dep. Ex. 657, Pontarelli Dep. Ex. 214); 139 (citing TCG0236361), 161 (citing BX-0001537-65), 173 (citing Connaughton Dep. at 140:3-141:5), 182 (citing BC-E01074946, BC-E00574136, BC-E01073554), 195 (citing SLTM-DAHL-E-0057989-8006, SLTM-DHAL-E-0067438-42), 211 (citing APOLLO011850-83), 237 (citing BX-1753535-65), 238 (citing BX-1557466-67), 281 (citing TCG1040802), 290 (citing GSPE00385219-20, THL DAHL 00283871-72), 424 (citing APOLLO131378-95), 434 (citing BC-E00674169-70), 463 (citing BC-E00112808-21), 529 & n. 602 (citing TCG0208676).)

- Potential investment opportunities. (*See, e.g.*, 5AC ¶¶ 196 (citing Roux Dep. Ex. 906, SLTM-DAHL-E-0067420-22), 267 (citing TCG1040729-30, TCG1056078-80), 296 (citing BC-E00533514), 307 (citing BX-0812809-13), 363 & n.410 (citing Connaughton Dep. at 185:25-186:25), 394 (citing BC-E 00545381-96), 546 (citing BC-E01003697).)

- Details regarding negotiations with targets. (*See, e.g.*, 5AC ¶¶ 343 (citing JPM_00160808), 477 (citing TPG-E-0001199316-17).)

- The investment breakdown of particular defendant funds by portfolio company (*See, e.g.*, 5AC ¶ 268 at n. 277.)

These materials are critical to defendants' competitive position—in identifying and attracting fund investors, executing leveraged buyouts, and in running portfolio companies. The disclosure of such information to the public—and to competitors—would be prejudicial to defendants' businesses. It would give a sufficiently sophisticated and motivated person (or other private equity firms, dozens of which are not defendants in this case) an unfair business advantage by allowing them to copy critical aspects of defendants' business, which defendants have spent significant time and money developing and refining, or more effectively compete with them in other ways. Disclosure of the competitive assessments used in operating defendants' companies could also harm those portfolio companies in their respective industries.

Courts routinely and consistently protect documents of this nature from public disclosures in light of these concerns. *See, e.g.*, *Blanchard & Co. v. Barrick Gold Corp.*, 2004 WL 737485, at *10 (E.D. La. Apr. 5, 2004) ("[A]mple precedent exists for limiting disclosure of highly sensitive, confidential or proprietary information….") (citation omitted); *The Bank of New York & JCPL Leasing Corp., v. Meriden Biao Bank Tanzania Ltd.*, 171 F.R.D. 135, 144 (S.D.N.Y. 1997) (noting the "broad spectrum of internal corporate documents that courts regularly hold to be confidential, business information"); *In re NASDAQ Market-Makers Antitrust Litig.*, 164 F.R.D. 346, 355 (S.D.N.Y. 1996) ("The courts have long recognized the protection of trade secrets as an important interest underlying confidentiality."); *Zenith Radio Corp.*, 529 F. Supp. at 890 ("[I]t is clear that a court may issue a protective order restricting disclosure of discovery materials to protect a party from being put at a competitive disadvantage"). And courts have protected each of the aforementioned types of material from disclosure.[2]

[2] *See, e.g.*, *GTE Prods. Corp. v. Gee*, 112 F.R.D. 169, 170-72 (D. Mass. 1986) (granting a protective order to protect a company's list of customers and the prices they were charged); *In re Northstar Energy, Inc.*, 315 B.R. 425,

The Times advances only one response to this obvious point. "The mere fact that one party or another designated documents or testimony 'confidential' under the protective order," it claims, is insufficient to overcome the right of public access because such designation "is not binding on the Court" and only proves that a party "'believes in good faith' that the discovery material constitutes 'commercial information.'" (Mot. at 7.) This misses the point. That the designation is "not binding on the Court" does nothing to prove that the designation is wrong, and the Court is not required to rule on such designations in order to resolve this motion. In *Siedle*, for example, the First Circuit kept a complaint under seal because it contained information allegedly protected by the attorney-client privilege, even though the propriety of that privilege claim had not been litigated. *See* 147 F.3d at 12.

429-30 (E.D. Tex. 2004) (granting a protective order to protect a company's list of investors because "investor procurement functions are crucial to its business plan" and disclosure would "severely jeopardize[]" investor procurement and "expose the heart and soul of the commercial operations"); *Standard Inv. Chartered, Inc. v. National Ass'n of Sec. Dealers, Inc.*, 2008 WL 199537, at *13 (S.D.N.Y. Jan. 22, 2008) (granting a protective order concerning documents that "contain information that, if disclosed, would reveal the organization's business and negotiation strategies"); *Asch/Grossbardt, Inc. v. Asher Jewelry Co.,* 2003 WL 660833, at * 2 (S.D.N.Y. Feb. 28, 2003) (barring "disclosure of customer lists" to "direct competitors" because such disclosure "could potentially result in economic harm to the disclosing party"); *Sullivan Mktg., Inc. v. Valassis Commc'ns, Inc.*, 1994 WL 177795, at *1 (S.D.N.Y. May 5, 1994) (granting a protective order to protect "contracts, proposals, negotiations or arrangements" with customers, "current or future strategic and marketing plans or proposals or financial projections," and "proprietary market research or analysis"); *Vesta Corset Co. v. Carmen Found., Inc.*, 1999 WL 13257, at *2 (S.D.N.Y. Jan. 13, 1999) (granting protective order for documents regarding "pricing, profits, costs, overhead, manufacturing specifications, customer lists, price structure, and dealings with a common customer").

B. The Times' Alleged Interest in Preserving "Public Access" Is Insufficiently Particularized To Outweigh Defendants' Interests In Confidentiality.

The Times claims that the public has an interest in accessing the confidential information in the Fifth Amended Complaint for two reasons: because it involves "Bain Capital Partners, a firm that is the subject of intense scrutiny because of its close association with Mitt Romney," and because the "sealing of the Fifth Amended Complaint has deprived the public of a meaningful ability to monitor the Court's actions in this case." (Mot. at 8.) Neither, however, is sufficient reason to risk disclosing defendants' proprietary information to competitors.

As an initial matter, Mitt Romney and the presidential election are completely irrelevant to this litigation. Governor Romney is not a party to this litigation and is not mentioned in the Fifth Amended Complaint or a single document that it cites. In fact, plaintiffs' allegations concern transactions that occurred between 2003 and 2007 (*See* 5AC ¶ 76)—well after Mr. Romney had left Bain Capital and was elected Governor of Massachusetts. (*See* State of Massachusetts, *Governors of Massachusetts* (last accessed Aug. 17, 2012), *available at* http://www.mass.gov/portal/government-taxes/laws/interactive-state-house/historical/governors-of-massachusetts/.) He accordingly could not have been involved in the deals at issue here, as the Times has itself repeatedly recognized.[3] There is nothing that "amplifies the public interest in the evidence in this case." (Mot. at 8.)

Moreover, although various cases have recognized a generalized interest in monitoring courts (*see id.*), the Times' interest is insufficiently particularized here. *See Anderson v.*

[3] The Times has published articles noting that Romney gave up day-to-day control of Bain Capital in 1999—four years before the allegations in question here—and formally transferred his shares to other Bain Capital partners in 2001. *See, e.g.*, Richard A. Oppel Jr., *Ex-Factory Worker Links Losses to Bain*, NEW YORK TIMES (Aug. 7, 2012), *available at* http://www.nytimes.com/2012/08/08/us/politics/ex-factory-worker-links-losses-to-bain.html (noting that Romney "formally transferred his shares of Bain's management corporation to the other Bain partners" in August 2001); Michael D. Shear & Richard A. Oppel Jr., *Obama and Romney Trade Shots, a Few Possibly Accurate, on Outsourcing*, *supra* ("In fact, there is compelling evidence to suggest that Mr. Romney had largely left day-to-day control of Bain Capital to his partners after 1999, when the activity at issue took place.").

Hartford Life & Accident Ins. Co., 2010 WL 1418398, at *2 (S.D. Ind. Apr. 6, 2010) (denying motion to unseal in part because plaintiff advanced only a "generalized argument that members of the public should know this information"); *Heller v. Shaw Indus., Inc.*, 1997 WL 786542, at *6 (E.D. Pa. Nov. 20, 1997) (granting request for protective order because "[p]laintiffs have presented … *no specific reasons* whatsoever as to why this information should be made available to the public") (emphasis in original and emphasis added). The Times' sweeping allegations that the public interest necessitates unsealing the complaint and its exhibits could be made in any case and with respect to any motion. The Times does nothing to demonstrate that the public has a right to see the information in question here. *See Seattle Times Co.*, 467 U.S. at 31 (even if the public has an interest in access, "[i]t does not necessarily follow … that a litigant has an unrestrained right to disseminate information that has been obtained through pretrial discovery").

Finally, as the Times would have learned if it had met and conferred with defendants before filing this motion, defendants are willing to accommodate any interest that the public might have in monitoring this case by providing a redacted version of the complaint. Defendants have always intended to provide plaintiffs with a redacted Fifth Amended Complaint and will do so in due course. This is a common and accepted method of accommodating both public rights of access and private interests in confidentiality. *See, e.g.*, *Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Secs. Dealers, Inc.*, 2008 WL 199537, at *16 (S.D.N.Y. Jan. 22, 2008) ("[W]holesale publication of motion papers is not required if the papers quote from or contain references to confidential information…. [R]edaction is often a practical, narrowly tailored strategy for balancing the interest in public access and the interest of one or both parties in the confidentiality of sensitive information."). And it will ensure that defendants' proprietary and competitively-sensitive information is not used against them.

C. The Times' Motion Should Still Be Denied Even If There Were a First Amendment Right Of Access In This Circuit.

Finally, the Times' cursory invocation of a right of access based in the First Amendment does nothing to move the ball forward. To start, the Times admits in a footnote that "*[t]he First Circuit has not yet decided whether the First Amendment right of access applies to civil proceedings, as it does to criminal matters.*" (Mot. at 9 n.3 (emphasis added).) This is not the case to answer that question, as the Times presents no arguments whatsoever that this Court *should* recognize a First-Amendment-based right in civil trials and instead simply notes that other Circuits have done so. (*See id.* at 9.) But more importantly, whether there is a First Amendment right to attend civil proceedings is irrelevant here.

First, the Times would not have any interest in the materials here even under the "experience" and "logic" test. That test derives from the Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980), in which the Court found that the public had a qualified First-Amendment right to attend *criminal* trials. Under the "experience" prong of that test, a court considers "whether the place and process have historically been open to the press and general public." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). Under the "logic" prong, a court considers "whether public access plays a significant positive role in the functioning of the particular process in question." *Id*. Here, however, the Supreme Court has already held that neither "experience" nor "logic" supports a right of access to discovery materials. *See Seattle Times Co.,* 467 U.S. at 32 ("A litigant has no First Amendment right of access to information made available only for purposes of trying his suit," and, as a result, "continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations."); *Cryovac*, 805 F.2d at 13 ("History and logic lead us to conclude that there is no presumptive first amendment public

right of access to documents submitted to a court in connection with discovery motions."). And as already discussed, the fact that the materials at issue were referenced in the complaint does not change this outcome.

Second, even if there were a First-Amendment right for the public to view the documents and pleadings at issue here, that right would be overcome by defendants' countervailing interests in preserving the confidentiality of their proprietary business information. *See, e.g.*, *Zenith Radio Corp*., 529 F. Supp. at 890. Indeed, the Times' own cases admit that "an interest in safeguarding a trade secret may overcome a presumption of openness" based on the First Amendment. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1073 (3d Cir. 1984); *see also Press-Enterprise*, 478 U.S. at 9 (right is "qualified" and "not absolute"). As discussed above, the outcome of that balancing clearly favors keeping the court-ordered seal intact.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court deny the Times' motion to intervene and unseal the Fifth Amended Complaint. Defendants will provide a redacted version of the Fifth Amended Complaint that releases all but the confidential and competitively-sensitive information quoted from discovery materials in that pleading.

Dated: Boston, Massachusetts
August 27, 2012

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CERTIFICATE OF SERVICE

I, Kevin M. McGinty, hereby certify that on August 27, 2012, a true and correct copy of the foregoing document was served upon the attorney of record for each party by transmission through the Court's electronic case filing system.

/s/ Kevin M. McGinty___
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