

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KNOWLEDGEAZ, INC.,)	
)	
Plaintiff,)	
)	
vs.)	1:05-cv-1019-DFH-TAB
)	
JIM WALTER RESOURCES, INC., et al.,)	
)	
Defendants.)	

ORDER ON MOTION FOR LEAVE TO FILE DOCUMENTS UNDER SEAL¹

I. Introduction.

This case presents a timely example of an unfortunately all-too-common practice: overreaching efforts to file documents under seal. As the Seventh Circuit Court of Appeals stated in *Citizens First National Bank of Princeton v. Cincinnati Insurance*, 178 F.3d 943, 945 (7th Cir. 1999), “The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it).” As illustrated below, this duty is taken seriously. Any request to seal any portion of the record will be closely scrutinized and must be rigorously justified.

II. Discussion.

At the outset of this case (and most others), the Court issued an order reminding counsel that, if they anticipated seeking a protective order, they should “carefully review” such cases as *Cincinnati Insurance* as well as *Baxter v. Abbott Laboratories*, 297 F.3d 544 (7th Cir. 2002), and

¹This entry is a matter of public record and will be made available on the Court’s web site because it provides guidance on a recurring and significant issue. However, this entry is not intended for commercial publication.

Union Oil Company of California v. Leavell, 220 F.3d 562 (7th Cir. 2000). [Docket No. 46.]

Despite this clear admonition, the parties filed an agreed motion for entry of a protective order that far exceeded the bounds of what could permissibly be placed under seal. [Docket No. 105.]

In denying this proposed protective order, the Court stated in relevant part that the motion provided “no meaningful description of the types of documents or information sought to be designated as ‘confidential.’” [Docket No. 109.] Instead, the proposed order contained boilerplate assertions of confidentiality that the Court flatly rejected as inadequate. [*Id.*] In doing so, however, the Court recognized that this type of case – essentially a messy business-related dispute between competitors – may be appropriate for a protective order. [*Id.*] To this end, the parties submitted a more narrowly tailored protective order to protect confidential pricing and related information involving clients and vendors. [Docket No. 111.] The Court approved this revised protective order. [Docket No. 132.]

Defendants Jim Walter Resources (“JWR”) and Guy Hensley filed a motion to dismiss asserting lack of personal jurisdiction. [Docket No. 47.] Plaintiff KnowledgeAZ, Inc.’s response to the motion to dismiss purports to rely upon numerous documents Defendants marked as “confidential” during discovery pursuant to the protective order. Seeking to avoid violating the protective order, Plaintiff filed a motion for leave to file these documents under seal. [Docket No. 129-1.]

In reviewing this motion, and the volume of documents for which secrecy was sought, the Court had serious concerns as to whether any of the documents could properly be placed under seal. Plaintiff’s motion certainly provided no argument or authority in support of placing these documents under seal. This is not altogether surprising. As is often the case, the party

seeking to file the documents under seal is merely seeking to comply with the terms of the protective order in dealing with discovery documents produced by the other side, and otherwise has no vested interest in keeping the documents confidential. Thus, on June 8 the Court held a hearing on the motion for leave to file documents under seal. The parties appeared at this hearing by counsel, and the Court received evidence and heard argument.

JWR – the party with the actual interest in keeping certain documents confidential – acknowledged during the hearing that some of the documents subject to the motion could not properly be placed under seal. This acknowledgment is perhaps charitably characterized as an understatement. The documents sought to be filed under seal include boilerplate contractual language, non-confidential notes, photographs, and letters to third-party vendors. The documents also include routine change orders and invoices that lack any pricing information or other potentially proprietary information. The documents sought to be filed under seal even include a fax cover page from counsel to JWR lacking any substantive or other confidential or privileged information whatsoever. Such documents could not, under any imaginable circumstances, be filed with the Court yet be shielded from the public eye.

On the other hand, some of these documents also contain pricing and cost information. Rick Sergent, general manager of purchasing and materials control for JWR, testified at the June 8 hearing by way of affidavit that JWR maintains confidential pricing/cost information. Sergent testified that JWR negotiates prices with its vendors and/or suppliers pursuant to which JWR receives special pricing that is not offered to other customers of the vendors/suppliers. Sergent further testified that this information is shared only with certain JWR employees, and that disclosure of this information to JWR's competitors, customers, and/or prospective customers

“would negatively impact JWR’s negotiating power in the marketplace and would reveal details about JWR’s internal cost/pricing structure to JWR’s competitors.” [Sergent Aff. ¶ 8.] Pricing information may constitute a protectable trade secret. *Star Scientific v. Carter*, 204 F.R.D. 410, 414 (S.D. Ind. 2001). Like the plaintiffs in *Star Scientific*, JWR has taken steps to maintain the secrecy of this information. As a result, like the plaintiffs in *Star Scientific*, JWR has established good cause for maintaining this confidential pricing/cost information under seal.

This does not mean that parties should routinely expect to file pricing and cost information under seal. Seventh Circuit precedent holds otherwise. *See, e.g., Union Oil Company of California*, 220 F.3d at 567 (“Many a litigant would prefer that the subject of the case – how much it agreed to pay for the construction of a pipeline, how many tons of coal its plant uses per day, and so on – 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.”). In the case at bar, however, the Court held a hearing on the motion to seal and heard evidence that established the confidential nature of the pricing/cost information, as well as the harm that would result if this information were made public. The hearing also demonstrated that most of the documents and information could not properly be filed under seal, and thus the hearing permitted the Court to closely scrutinize the motion to seal and ensure that counsel could rigorously justify the limited relief granted.

As a result, the pricing/cost information in the at-issue documents may be filed under seal. However, the Plaintiff’s motion to file documents under seal is otherwise denied. Moreover, the documents containing the pricing/cost information cannot be entirely sealed. Simply because a document contains confidential pricing information does not permit a party to

file the entire document under seal. Rather, the proper solution is to redact those portions of the documents that contain confidential pricing information. *Citizens First National Bank of Princeton*, 178 F.3d at 945. That is what JWR² must do in this case.

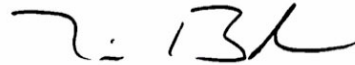
The only remaining question is how to effectuate this result. Plaintiff filed the foregoing documents with the Court under seal with a contemporaneous motion seeking to have them remain under seal. By way of this order, the Court has ruled that good cause has been established only to keep confidential pricing/cost information under seal, and that the proper way to file this information is by redacting only this pricing information from the public filings. Accordingly, Plaintiff's motion to file documents under seal [Docket No. 129-1] is granted in part and denied in part. The motion is granted to the extent that JWR may file confidential pricing/cost information under seal by redacting only this information from future filings, including its reply in support of its motion to dismiss for lack of jurisdiction. The motion is otherwise denied. Moreover, the documents that Plaintiff sought to file under seal (Docket Nos. 126-28, consisting of Exs. P and T to Plaintiff's opposition to the motion to dismiss) shall be stricken, for they cannot be permitted to remain sealed in the public file (nor can they simply be unsealed, for to do so would reveal the confidential pricing/cost information that may properly be kept under seal). JWR is given leave to refile these documents with the confidential pricing/cost information redacted within five days from the date of this order. Any such redacted documents shall be accompanied by an unredacted copy filed under seal.

²This is JWR's task, not the Plaintiff's, because as previously noted it is JWR that has the vested interest in keeping the pricing/cost information sealed.

III. Conclusion.

The Seventh Circuit Court of Appeals recently stated, “What happens in the federal courts is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based upon public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.” *Hicklin Engineering v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006). Counsel who would prefer to ignore this directive – and hope that the district courts will look the other way as well – will find little judicial solace.

Dated: 06/28/2006



Tim A. Baker
United States Magistrate Judge
Southern District of Indiana

Copies to: