IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

SMARTSKY NETWORKS, LLC, Plaintiff, v. WIRELESS SYSTEMS SOLUTIONS, LLC, a Delaware limited liability company; DAG WIRELESS LTD, an Israeli company; DAG WIRELESS USA, LLC, a North Carolina limited liability company; LASLO GROSS, a North Carolina resident; SUSAN GROSS, a North Carolina resident; DAVID D. GROSS, a resident of Israel, Defendants.	)	1:20-cv-000834

MEMORANDUM ORDER

On February 7, 2022, the court granted the motion of Plaintiff SmartSky Networks, LLC ("SmartSky") to confirm the arbitration award in its favor and entered final judgment and a permanent injunction against Defendants. (Docs. 194, 195.) Thereafter, all Defendants filed a notice of appeal of this court's final judgment, and Defendants Wireless Systems Solutions, LLC ("Wireless Systems") and David Gross filed for bankruptcy protection.

The parties now present several motions to this court. The motions were precipitated by SmartSky's motion for contempt for violation of the permanent injunction. (Doc. 199.) Defendants move to stay any contempt proceeding (Doc. 216) and to seal a

declaration filed by Defendant Laslo Gross (Doc. 207), portions of subsequent declarations (Doc. 215), and Defendants' reply in support of their motion to stay (Doc. 225). SmartSky seeks leave to file a surreply in opposition to Defendants' motion to stay. (Doc. 227.)

Subsequently, Defendants filed the report of an examiner appointed by the Bankruptcy Court for the Eastern District of North Carolina (Doc. 233) who investigated some of SmartSky's claims which, while raised in its motions before this court, are also at issue in the bankruptcy, as well as a motion to seal the same (Doc. 234). SmartSky responded to that filing (Doc. 235), then moved to seal its response and objections to the examiner's report (Doc. 236). SmartSky also requests a status conference. (Doc. 222.) The motions are fully briefed and ready for resolution.

For the reasons set forth below, Defendants' motion to stay (Doc. 216) will be denied in part. SmartSky's motion for contempt for violation of the permanent injunction (Doc. 199) will be granted to the extent that SmartSky will be permitted to serve limited discovery directed to determine whether Defendants are in violation of the court's injunction. SmartSky's motion for leave to file a surreply (Doc. 227) and request for a status conference (Doc. 222) will be denied as moot. Because limited discovery will be permitted, the motions to seal (Docs. 207, 215, 225, 234, 236) will be granted.

I. BACKGROUND

The facts of this case are extensively set forth in this court's prior order granting SmartSky's motion to confirm the final arbitration award. (Doc. 194.) In short, SmartSky develops air-to-ground wireless communications networks. (Doc. 5 at ¶¶ 9, 23.) Defendant Wireless Systems, controlled by Defendants Susan and Laslo Gross, focuses on developing cellular capabilities and producing components for use in wireless transmissions. (Id. at ¶¶ 10, 30-31; Doc. 145 at 1-2.) Among other agreements, Wireless Systems entered into a Teaming Agreement with SmartSky to develop and build proprietary components for use in SmartSky's communications network. (Doc. 5 at ¶¶ 34-38, 44; Doc. 104 at 3.) Susan and Laslo Gross, along with their son David Gross, then established Defendant DAG Wireless, Ltd. ("DAG Wireless"), which develops technology for wireless communications. (Doc. 5 at ¶¶ 39-42.) DAG Wireless assisted Wireless Systems in the development of components for SmartSky's network. But after relations soured between SmartSky and Defendants, SmartSky filed this lawsuit against Defendants DAG Wireless, DAG Wireless, USA, and David Gross (collectively "the DAG Defendants") and Wireless Systems, alleging ongoing breaches of the intellectual property and confidentiality provisions of the Teaming Agreement as well as misappropriation of trade secrets. (Docs. 1, 5.) In March 11, 2021, this court stayed the proceedings pending arbitration. (Doc. 149.)

Between May 10 and May 21, 2021, the parties participated in in-person arbitration in Charlotte, North Carolina, presenting over ten days of evidence that included 348 exhibits and thirteen witnesses, including four experts. (Doc. 166 at 6; Doc. 166-1 at ¶¶ 77-79.) On October 1, 2021, the tribunal issued its Final Award denying in part and granting in part SmartSky's claims. (Doc. 166-1 at ¶ 347.) SmartSky moved this court to confirm the Final Award and enter final judgment pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 9. (Doc. 166.) This court granted that motion on February 7, 2022, and confirmed the Final Award and entered judgment against the Defendants.

On March 7,2022, Defendants filed notice of appeal. (Doc. 196.) On March 9 and 10, respectively, Defendants Wireless Systems and David Gross filed for bankruptcy protection in the United States Bankruptcy Court for the Eastern District of North Carolina. See In re Wireless Systems Solutions LLC, No. 22-00513-5-JNC (Bankr. E.D.N.C. 2022); In re David Dov Gross, No. 22-00517-5-JNC (Bankr. E.D.N.C. 2022).

On March 21, 2022, SmartSky filed the present motion in this court for contempt, alleging that Defendants were violating the permanent injunction by continuing to appropriate SmartSky technology and package it as their own. (Doc. 199.) SmartSky also requested expedited limited discovery. (Id.) In sum, SmartSky moves to serve expedited discovery on Laslo and Susan

Gross and on the DAG entities, which includes up to ten document requests, five interrogatories, and a four-hour deposition. The proposed interrogatories and document requests were filed with SmartSky's memorandum. (Doc. 200-3, 200-4.) SmartSky also conditionally requests to serve such discovery requests on Wireless Systems and David Gross "if relief from the bankruptcy stay is obtained." (Doc. 199 at 4.)

Defendants moved to stay the case and consideration of SmartSky's motion for contempt (Doc. 216) in favor of the Bankruptcy Court's appointment of an examiner to investigate SmartSky's allegations and because, Defendants argue, intervening United States Supreme Court precedent casts doubt on this court's jurisdiction to confirm an arbitration award under 9 U.S.C. § 9. (Doc. 217.) SmartSky has responded in opposition. (Doc. 220.)

On August 11, Defendants submitted the examiner's final report (Doc. 233-1), along with a motion to seal (Doc. 234). Plaintiffs responded in opposition (Doc. 237-1), and also filed a motion to seal (Doc. 236).

II. ANALYSIS

A. Motion to Stay

The parties dispute the proper legal test for Defendants' motion to stay. SmartSky argues that the court should analyze the issue pursuant to the factors set forth in Hilton v. Braunskill, 481 U.S. 770, 776 (1987), which addresses the issuance of a stay

pending appeal under Federal Rule of Civil Procedure 62(d). (Doc. 220 at 5.) Defendants contend that their request for stay is based on Federal Rule of Civil Procedure 62.1, which provides that where the court lacks the authority to grant a timely motion for relief because of a pending appeal, it may defer consideration of the motion, deny the motion, or state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue. (Doc. 223 at 1.)

Rule 62(d) addresses stays of proceedings to enforce a judgment pending appeal. Specifically, Rule 62(d) provides that "the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Rule 62(d) addresses the posting or waiver of a supersedeas bond for a stay as a matter of right. S.E. Booksellers Ass'n v. McMaster, 233 F.R.D. 456, 457-58 (D.S.C. 2006). Defendants' argument, however, is not that the court should stay the case pending resolution of their appeal, but rather that the court lacks subject matter jurisdiction to confirm and enforce the permanent injunction. (Doc. 216 at ¶ 11.) Defendants contend that pursuant Rule 62.1 "[t]he most logical alternative is to stay [SmartSky's] motion for contempt" pending resolution of the jurisdictional question before the Fourth Circuit. (Doc. 223 at 2-3.)

The court entered judgment on February 7, 2022, granting

SmartSky's motion to confirm the Arbitration Award pursuant to 9 U.S.C. § 9. (Doc. 195.) Following final judgment in this case, the United States Supreme Court issued its decision in Badgerow v. Walters on March 31, 2022. 142 S. Ct. 1310 (2022). The Supreme Court addressed the jurisdictional differences between 9 U.S.C. § 4, which allows courts to "look through" a petition to compel arbitration to the underlying dispute and base the court's subject matter jurisdiction on the underlying controversy, and sections 9 (confirmation of an arbitration award) and 10 (vacation of an award). Id. at 1314. In holding that the same "look through" jurisdiction does not apply to § 9, the Supreme Court stated that "a court may look only to the application [to affirm an arbitration award] actually submitted to it in assessing its jurisdiction" pursuant to § 9. Id.

In reaching this conclusion, the Supreme Court resolved a circuit split. Some circuits, including the Fourth Circuit, had held that the "look through" approach applied to applications to confirm, vacate, or modify an arbitral award, and jurisdiction to confirm an arbitral award could be based on the underlying substantive issues involved in the dispute. McCormick v. America Online, Inc., 909 F.3d 677 (4th Cir. 2018); Quezada v. Bechtel OG & C Construction Services, Inc., 946 F.3d 837, 843 (5th Cir. 2020); Doscher v. Sea Port Group Securities, LLC, 832 F.3d 372, 381-88 (2d Cir. 2016). Other circuits had held the opposite. See Goldman

v. Citigroup Global Markets Inc., 834 F.3d 242, 252-55 (3d Cir. 2016) (holding the "look through" approach does not apply to applications under §§ 9 or 10); Magruder v. Fidelity Brokerage Services, 818 F.3d 285, 287-89 (7th Cir. 2016) (same).

1. Scope of Badgerow

Although no party raised the issue previously, Defendants now argue that this court lacked subject matter jurisdiction to confirm the arbitration award because Badgerow implicitly overruled the existing Fourth Circuit precedent applying the "look through" approach to determining subject matter jurisdiction. (Doc. 217 at 6.) Defendants present the same argument in their appeal pending before the Fourth Circuit. (Doc. 216 at ¶ 11.) SmartSky has responded in opposition and notes that "[t]he Court in Badgerow did not otherwise address whether a district court retains jurisdiction to confirm an arbitration award in a case that was filed based on federal question jurisdiction." (Doc. 220 at 7.)

In short, the parties disagree on whether Badgerow overrules Fourth Circuit precedent and deprives the court of jurisdiction to enforce the arbitration award. This court unquestionably had federal question jurisdiction over the initial action, as SmartSky asserted federal claims arising under the federal Defend Trade Secrets Act and Lanham Act. (Doc. 1 ¶¶ 167-179; Doc. 86 ¶¶ 17-27.) Defendants do not dispute that point but challenge the court's jurisdiction over post-award motions to vacate or confirm

the arbitration award, arguing that "[w]hether the underlying claim was initially brought in federal court is irrelevant because jurisdiction over the underlying claim does not confer jurisdiction over the application under Section 9." (Doc. 217 at 10.)

At this stage of the litigation, Defendants' argument is not persuasive to stay the proceedings. Badgerow was decided in the context of a suit brought to confirm or set aside an arbitration award where no federal court had ordered the arbitration in the first instance. There, petitioner Denise Badgerow initiated an arbitration action pursuant to her employment contract, claiming violations of state and federal law. Badgerow, 142 S. Ct. at 1314. After the arbitrator denied her claim, she filed a state court action to vacate the arbitral decision. Id. The respondent, Greg Walters, removed the action to federal court and applied to confirm the award. Id. Badgerow moved to remand the case, arguing that the federal court lacked jurisdiction under sections 9 and 10 of the FAA. The district court concluded it had subject matter jurisdiction because it could "look through" to the underlying substantive dispute that was founded in part on federal law. Id. at 1315.

The circumstances in Badgerow are plainly different from those present here. SmartSky's underlying claims were initially filed in federal court based, at least in part, on federal question

jurisdiction. (Doc. 1.) The case was stayed while the parties engaged in arbitration. (Doc. 149.) A final arbitration award was rendered over a year later, and SmartSky moved this court to confirm the award (Doc. 166 at 1), while Defendants moved to vacate it (Docs. 167, 170). Unlike in Badgerow, where the action was brought to federal court only to vacate the arbitral decision, this action originated in federal court and has been pending since. "There appears to be no dispute that when a court with subject-matter jurisdiction orders arbitration and then stays the suit pending resolution of the arbitral proceedings, that court retains jurisdiction to confirm or set aside the arbitral award." Dodson International Parts, Inc. v. Williams International Co. LLC, 12 F.4th 1212, 1227 (10th Cir. 2021) (collecting cases). Indeed, the Supreme Court has suggested that such situations are distinguishable from the facts of Badgerow, noting that "where the court has authority under the [Federal Arbitration Act] . . . to make an order for arbitration, the court also has authority to confirm the award or to set it aside for irregularity, fraud, ultra vires, or other defect." Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 275–76 (1932). Even the dissent in Badgerow notes that "[i]t may be possible to eliminate some [jurisdictional questions] by using a federal-question lawsuit or Section 4 motion as a jurisdictional anchor." Badgerow, 142 S. Ct. at 1325-26. For instance, the dissent continues, "[i]f a party to an arbitration

agreement files a lawsuit in federal court but then is ordered to resolve the claims in arbitration, the federal court may stay the suit and possibly retain jurisdiction over related FAA matters." Id. It would be a strange interpretation of the FAA that a federal court, which has subject matter jurisdiction over claims that it subsequently refers to arbitration, is deprived of its jurisdiction to confirm or vacate the arbitration award.

Thus, this case does not appear to be within the scope of Badgerow, and Defendants' post-judgment subject matter jurisdiction challenge over the arbitration award is doubtful.[1]

2. Rule 62.1

Furthermore, Rule 62.1 does not divest the court of jurisdiction to consider this subject matter jurisdiction question. Under Rule 62.1, "[i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Civ. P. 62.1(a). By its very terms, Rule 62.1 "only applies when a 'timely motion' (typically a Rule 60(b) motion) has been made for relief that the court lacks jurisdiction to grant, because

[1] In any event, the Fourth Circuit is poised to resolve the jurisdictional question on appeal.

of the pendency of an appeal." Medgraph, Inc. v. Medtronic, Inc., 310 F.R.D. 208, 210-11 (W.D. N.Y. 2015). Thus, "[a]bsent an underlying, predicate motion, there is no basis for relief under Rule 62.1." Id. (citing Advisory Committee Notes to Rule 62.1 ("This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal.")); see Kravitz v. United States Dep't of Commerce, 382 F. Supp. 3d 393 (D. Md. 2019) (granting "Motion for an Indicative Ruling under Rule 62.1(a)" after concluding that plaintiffs raised substantial issues under a Rule 60(b) motion.)

Defendants argue that Rule 62.1 applies to Plaintiff's motion for contempt and deprives the court of authority to rule on the motion. (See Doc. 217 at 12; Doc. 223 at 1.) This is incorrect. "Federal Rule of Civil Procedure 62.1 is intended to be used in conjunction with a separate motion seeking relief, such as a Rule 60(b) motion to vacate a judgment that is pending on appeal." Gorrell v. Haynes, No. CV211-213, 2013 WL 174561, at *1 n. 1 (S.D. Ga. Jan. 16, 2013); see 2009 Advisory Committee Notes to Rule 62.1 ("Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal."). Here, the Defendants have not filed a motion for relief from the injunction or judgment, and

they do not contend that the injunction is currently inapplicable to their actions. (See Doc. 223 at 7 (encouraging the court to "hold an evidentiary hearing to evaluate SmartSky's [violation] claims" rather than dismiss the contempt allegations outright because the injunction is unenforceable)). Procedurally, there is no basis for a free-standing Rule 62.1 motion. As such, the motion to stay "is subject to denial on that ground alone." Medgraph, 310 F.R.D. at 210 (collecting cases). In other words, Defendants are free to make the same jurisdictional arguments regarding Badgerow on appeal, but such arguments do not automatically divest this court of the authority to enforce its judgments. See Fed. R. App. P. 8(a)(1)(A) ("A party must ordinarily move first in the district court for . . . a stay of the judgment or order of a district court pending appeal."). However, despite this procedural defect, the court will consider whether the injunction should be stayed pending appeal.

3. Hilton factors

Courts consider four factors when determining whether to issue a stay pending appeal:[2] "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a

[2] Defendants' motion does not specifically address the four factors set forth in Hilton. Nevertheless, the court concludes that Defendants could not satisfy their "heavy burden" to obtain the "extraordinary relief" of a stay of this court's order.

stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Hilton v. Braunskill, 481 U.S. 770, 776 (1987)); accord Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970).[3] "A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appeal." Nken v. Holder, 556 U.S. 418, 427 (2009) (citation omitted). "The granting of a stay pending appeal is an extraordinary remedy." Does 1-5 v. Cooper, No. 1:13CV711, 2016 WL 10587195, at *1 (M.D.N.C. Mar. 2, 2016) (citation omitted).

The first factor, whether the moving party is likely to prevail on the merits, weighs against the issuance of a stay. With respect to this factor, "it is not enough that the chance of success on the merits be better than negligible . . . more than a mere possibility of relief is required." Nken, 556 U.S. at 434 (citation omitted). Here, for the reasons discussed above, Plaintiffs have not demonstrated that the Fourth Circuit is likely to reverse this court's finding that it possesses subject matter jurisdiction over the arbitration award in this case.

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[3] While the precise standard in the Fourth Circuit for issuing a stay pending appeal is not completely clear, see Does 1-5 v. Cooper, No. 1:13CV711, 2016 WL 10587195, at *1-2 (M.D.N.C. Mar. 2, 2016), the court assumes without deciding that Defendants must meet all four factors, though the result would be the same if the court applied a balancing test.

The next factor, whether the moving party will suffer irreparable injury if the stay is denied, also weighs against the issuance of a stay. "[S]imply showing some possibility of irreparable injury fails to satisfy the second factor." Nken, 556 U.S. at 434-35 (internal citation omitted). Defendants do not contend that the arbitrator's decision is inapplicable to their actions. Rather, they only challenge this court's ability to enforce the award. As such, there is no indication that the Defendants will suffer irreparable injury from the enforcement of an injunctive order preventing something they have no right to do. Additionally, Defendants' argument that a stay will prevent duplicative discovery and save the parties and court resources in light of the bankruptcy examiner's investigation is unpersuasive. (Doc. 217 at 2-4.) While valuable, the examiner's investigation is limited in scope to the debtor Defendants and will not determine if the other Defendants are in violation of the court's injunction.

The third factor, whether other parties will be substantially harmed by the stay, weighs against issuing a stay. Leaving Plaintiff without redress until the appeal is decided risks the evidence of past violations becoming stale and opens the door for Defendants to violate the injunction and misuse SmartSky's technology in the future. Finally, as to the last factor, the public interest lies in protecting SmartSky's intellectual property rights. See, e.g., Variable Annuity Life Insurance Co.

v. Coreth, 535 F. Supp. 3d 488, 519 (E.D. Va. 2021) ("[T]here is no doubt that it is in the public interest to protect trade secrets." (citation omitted)).

In sum, Defendants have failed to demonstrate success under the four required for granting a stay pending appeal. Thus, Defendants' motion to stay is denied, and Plaintiff's motion for leave to file a surreply will be denied as moot.

B. Motion for Contempt

SmartSky argues that Defendants should be held in civil and criminal contempt and that sanctions should be imposed for violating the court's injunction. (Doc. 200 at 18-23.) SmartSky specifically requests daily fines in the amount of $2,500 until Defendants demonstrate they are complying with the injunction, punitive sanctions including imprisonment, attorneys' fees, and expedited discovery. (Doc. 199 at 4.) In support of these requests, SmartSky argues that the court has inherent power to sanction parties for failing to comply with its orders, and that it has made a sufficient showing that Defendants should be found in contempt. (Doc. 200 at 24.) In response, Defendants contend that SmartSky's evidence fails to demonstrate that sanctions are appropriate and that they are in violation of the injunction. (Doc. 203 at 4-11.) In support, Defendants have filed a declaration by Defendant Laslo Gross which discusses Defendants' technology and argues that SmartSky has no evidence that Wireless

Systems is using SmartSky intellectual property in its products.[4] (Doc. 205.)

"[C]ourts have inherent power to enforce compliance with their lawful orders through civil contempt." Shillitani v. United States, 384 U.S. 364, 370 (1966). "A court may impose sanctions for civil contempt 'to coerce obedience to a court order or to compensate the complainant for losses sustained as a result of the contumacy.'" Cromer v. Kraft Foods North America, 390 F.3d 812, 821 (4th Cir. 2004) (quoting In re General Motors Corp., 61 F.3d 256, 258 (4th Cir. 1995)).

"To establish civil contempt, each of the following elements must be shown by clear and convincing evidence: (1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) . . . that the decree was in the movant's 'favor'; (3) . . . that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations; and (4) . . . that [the] movant suffered harm as a result." Ashcraft v. Conoco, Inc., 218 F.3d 288, 301 (4th Cir. 2000) (omissions and alteration

[4] As SmartSky points out, the examiner found that Defendant Laslo Gross does not explicitly deny that Defendants are developing their air-to-ground communication technology in violation of the court's injunction. (See Doc. 210 at 3-4.) Instead, the examiner found, Laslo Gross contends only that "SmartSky has cited no evidence that [Wireless Systems] is using SmartSky IP in its products" or that Susan Gross, David Gross, or the DAG Defendants "are currently doing anything in violation of the injunction." (Id. at 4.)

in original) (quoting Colonial Williamsburg Foundation v. Kittinger Co., 792 F. Supp. 1397, 1405-06 (E.D. Va. 1992), aff'd, 38 F.3d 133 (4th Cir. 1994)). Once this showing is made, the burden shifts to the alleged contemnor to justify non-compliance. United States v. Rylander, 460 U.S. 752, 757 (1983). "Recognized defenses to civil contempt include: (1) a good-faith attempt to comply with the court's order; (2) substantial compliance; and (3) an inability to comply." U.S. Commodity Futures Trading Commission v. Capitalstreet Financial, LLC, 3:09cv387-RJC-DCK, 2010 WL 2131852, at *2 (W.D.N.C. May 25, 2010) (citing Consolidated Coal Co. v. United Mine Workers of America, 683 F.2d 827, 832 (4th Cir. 1982)).

"The appropriate remedy for civil contempt is within the Court's broad discretion 'based on the nature of the harm and the probable effect of alternative sanctions.'" Cree, Inc. v. Bain, No. 1:15-CV-547, 2015 WL 12911462, at *3 (M.D.N.C. July 20, 2015) (quoting Colonial Williamsburg Foundation, 792 F. Supp. at 1407). The remedy in a civil contempt proceeding must be tailored to either coerce the contemnor into compliance with the court's order and/or compensate the complainant for losses caused by past non-compliance.[5] Id. (quoting Colonial Williamsburg Foundation, 792

[5] The Fourth Circuit has explained that

> [w]hen the nature of the relief and the purpose for which the contempt sanction is imposed is remedial and intended to

F. Supp. at 1407). "The Court may order incarceration pending compliance, and there may be financial consequences such as a fine and attorneys' fees." Id. The court need not hold an evidentiary hearing before granting a civil contempt motion. Id. However, if the alleged contemnor fails to appear for the hearing, the court may issue an order for his arrest to coerce an appearance or may rule on the motion in his absence, and — if the motion for contempt is granted and incarceration is ordered — issue an order for his arrest until or unless he complies with the order. Id.

SmartSky bases its motion for contempt on the declaration of Steve Newell, the Chief Commercial Officer of NXT Communications Corporation, who claims he had a conversation with Defendant Laslo Gross indicating that Defendants were in violation of the injunction by developing prohibited air-to-ground wireless communication technology. (Doc. 200 at 16-17 (citing Doc. 200-1).) This declaration, standing alone, is insufficient to establish by clear and convincing evidence that the Defendants are in violation of the injunction. See Ashcraft, 218 F.3d at 301.

However, in appropriate circumstances, a court has authority

> coerce the contemnor into compliance with court orders or to compensate the complainant for losses sustained, the contempt is civil; if, on the other hand, the relief seeks to vindicate the authority of the court by punishing the contemnor and deterring future litigants' misconduct, the contempt is criminal.

Buffington v. Baltimore County, Md., 913 F.2d 113, 133 (4th Cir. 1990).

to order discovery where additional facts bearing on a decision are needed. See, e.g., Better Gov't Bureau v. McGraw (In re Allen), 106 F.3d 582, 590 (4th Cir. 1997) (reopening discovery where the existence of a highly relevant memorandum that defendants failed to identify or produce during discovery came to light). Here, SmartSky's expert, Dennis Roberson, explained that the products Wireless Systems is currently developing with over-the-counter technology will eventually require customized modifications, which necessarily will compel Defendants to use SmartSky's intellectual property, or derivatives thereof, in violation of the court's injunction. (Doc. 237-1 at 18-19.) While the Bankruptcy Court is engaged in somewhat parallel proceedings by granting discovery on a similar issue, that investigation is limited in scope to the two debtors. Additionally, the examiner's final report to the Bankruptcy Court was limited in scope and did not fully scrutinize what Defendants may be preparing to implement in the future, and how. (See id. at 11-12.) While the court need not endorse Roberson's opinions at this stage, they provide an adequate basis for SmartSky to believe that Defendants are planning to "misuse the proprietary information and intellectual property . . .they learned from and developed on behalf of SmartSky, or derivatives thereof, to develop an ATG system to compete against SmartSky in the aviation market in willful and contemptuous violation of the Permanent Injunction." (Doc. 200 at

4.)

Thus, the court will defer ruling on SmartSky's motion to initiate contempt proceedings against Defendants and, based on SmartSky's allegations and the evidence before the court, SmartSky will be granted leave to take additional limited discovery in order to determine the full extent of any violations of the permanent injunction, if any. See BASF Agro B.V. v. Makhteshim Agan of North America, Inc., No. 1:10-cv-276, 2014 WL 12651122 (M.D.N.C. Jan. 13, 2014) (granting limited discovery during contempt proceedings). Though there is not a uniform standard for granting expedited discovery, some courts employ a "reasonableness or good cause [standard], taking into account the totality of the circumstances." Dimension Data North America, Inc. v. NetStar-1, Inc., 226 F.R.D. 528, 531 (E.D. N.C. 2005). The court finds there is good cause to grant expedited discovery now before the passage of time prevents evidence from being discovered. Moreover, by being granted the expedited, limited discovery outlined in SmartSky's Exhibits 3 and 4 (Docs. 200-3, 200-4) at this stage, SmartSky can determine whether evidence exists supporting contempt proceedings. Should such evidence exist, SmartSky will be free to supplement its motion for an order to show cause why Defendants should not be held in contempt.[6]

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[6] Because the court is granting discovery on SmartSky's motion for

C. Motion to Seal

The parties have filed several related motions to seal. When a party makes a request to seal judicial records, a district court "must comply with certain substantive and procedural requirements." Virginia Department of State Police v. Washington Post, 386 F.3d 567, 576 (4th Cir. 2004). Procedurally, the court must (1) give the public notice and a reasonable opportunity to challenge the request to seal; (2) "consider less drastic alternatives to sealing"; and (3) if it decides to seal, make specific findings and state the reasons for its decision to seal over the alternatives. Id. "As to the substance, the district court first must determine the source of the right of access with respect to each document, because only then can it accurately weigh the competing interests at stake." Id. (citation omitted). "While the common law presumption in favor of access attaches to all judicial records and documents, the First Amendment guarantee of access has been extended only to particular judicial records and documents." Stone v. University of Maryland Medical System Corp., 855 F.2d 178, 180 (4th Cir. 1988) (citations omitted).

"If both experience and logic indicate that a judicial record has in the past, and should in the future, be afforded public access, a qualified First Amendment right of public access attaches

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contempt, SmartSky's request for a status conference to discuss the contempt motion (Doc. 222) is denied as moot.

to it." Courthouse News Service v. Schaefer, 2 F.4th 318, 326 (4th Cir. 2021). Generally, the public interest in disclosure heightens as the underlying motions are directed more to the merits and as the case proceeds toward trial. See Washington Post, 386 F.3d at 578-79 (observing that the public has a First Amendment right of access to materials submitted in connection with a summary judgment motion in a civil action (citing Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988))).

"The burden to overcome a First Amendment right of access rests on the party seeking to restrict access, and that party must present specific reasons in support of its position." Id. at 575; see Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 15 (1986) ("The First Amendment right of access cannot be overcome by [a] conclusory assertion."). The public's right of access "may be abrogated only in unusual circumstances." Stone, 855 F.2d at 182. Evaluating whether these "unusual circumstances" exist in a particular case is a fact-based inquiry conducted in light of the "specific facts and circumstances" of the case at issue. See Washington Post, 386 F.3d at 579.

"Under common law, there is a presumption of access accorded to judicial records." Rushford, 846 F.2d at 253. The party seeking to seal documents may overcome this presumption by identifying interests that heavily outweigh the public's interest in access. Id. The court may consider "whether the records are

sought for improper purposes, such as promoting public scandals or unfairly gaining a business advantage; whether release would enhance the public's understanding of an important historical event; and whether the public has already had access to the information contained in the records." In re Knight Publishing Co., 743 F.2d 231, 235 (4th Cir. 1984).

"One exception to the public's right of access is where such access to judicial records could provide a 'source[] of business information that might harm a litigant's competitive standing.'" Woven Electronics Corp. v. Advance Group, Inc., 930 F.2d 913 (4th Cir. 1991) (unpublished) (quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978)).[7] "[M]any courts have considered the trade secret status of testimony or materials submitted to a court a significant private interest to be weighed against the common law, or even the First Amendment, right of public access that would otherwise apply to them." Level 3 Communications, LLC v. Limelight Networks, Inc., 611 F. Supp. 2d 572, 581-82 (E.D. Va. 2009) (collecting cases); Woven Electronics Corp., 930 F.2d 913 (holding the district court erred in denying motion to close the courtroom to prevent disclosure of trade secrets at trial and remanding the case for determination as to what portions of the

[7] While the Fourth Circuit does not accord precedential value to its unpublished opinions, it has noted that "they are entitled only to the weight they generate by the persuasiveness of their reasoning." See Collins v. Pond Creek Mining Co., 468 F.3d 213, 219 (4th Cir. 2006) (citation omitted).

district court record must be sealed in order to prevent further disclosure); ATI Industrial Automation, Inc. v. Applied Robotics, Inc., 801 F. Supp. 2d 419, 427-28 (M.D.N.C. 2011) (finding the public had a First Amendment right of access to documents submitted in connection with motions to dismiss for lack of personal jurisdiction and improper venue, but holding that the sealing of eight exhibits was appropriate in order to protect trade secrets contained therein); Longman v. Food Lion, Inc., 186 F.R.D. 331, 335 (M.D.N.C. 1999) (noting documents could "be sealed even given the public access requirements because they contain Defendants' trade secrets, confidential business information, or information protected by attorney-client privilege").

Here, under either the First Amendment or common law standard, sealing is appropriate at this discovery stage of these proposed contempt proceedings. Presently, the court is only granting expedited discovery to determine whether a contempt proceeding is even warranted. Unlike later, merit-related stages of litigation, such as summary judgment, the public's interest at this discovery stage is not as strong. Further, the public's interest is outweighed by the need to protect trade secrets and proprietary business information. See Longman, 186 F.R.D. at 335. The motions have been pending for some time, and no opposition has been filed. Moreover, both parties request sealing, and neither party opposes the other's motion. Whether the public's interest might outweigh

the need to protect confidential and proprietary business interests might arise at a later stage of any contempt proceeding is a premature concern at this time. Thus, the court will grant both parties' motions to seal.

III. CONCLUSION

For the reasons stated, therefore,

IT IS ORDERED that SmartSky's motion for contempt for violation of the permanent injunction (Doc. 199) is GRANTED in part in that SmartSky will be permitted to conduct its limited discovery as outlined in Documents 200-3 and 200-4. SmartSky's ability to conduct such discovery of any Defendant who is in bankruptcy proceedings is dependent on whether the Bankruptcy Court has lifted the stay for that purpose. After conducting such discovery, SmartSky may seek to supplement its filings, if appropriate.

IT IS FURTHER ORDERED that Defendants' motion to stay (Doc. 216) is DENIED, SmartSky's motion for leave to file a surreply (Doc. 227) is DENIED as moot, and SmartSky's request for a status conference (Doc. 222) is DENIED as moot.

IT IS FURTHER ORDERED that the parties' respective motions to seal (Docs. 207, 215, 225, 234, 236) are GRANTED.

/s/ Thomas D. Schroeder
United States District Judge

September 26, 2022