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; and DAVID D. GROSS, a resident of Israel, Defendants.	)	1:20CV834

MEMORANDUM ORDER

On September 29, 2022, the court considered the motion of Plaintiff SmartSky Networks, LLC ("SmartSky") for contempt for violation of the permanent injunction, seeking relief from DAG Wireless Ltd., DAG Wireless USA, LLC, Laslo Gross, and Susan Gross.[1] (Doc. 199.) The court granted the motion in so far as it permitted SmartSky to conduct limited discovery; however, the court deferred ruling on the motion for contempt pending determination of "the full extent of any violations of the permanent injunction, if any." (Doc. 238 at 21.) SmartSky now

[1] SmartSky was simultaneously pursuing the same motion against Wireless Systems Solutions ("Wireless Systems") and David D. Gross in Bankruptcy Court, where both were in the midst of bankruptcy proceedings. (Doc. 199 at 2.)

moves to stay contempt proceedings (Doc. 245) and to seal certain filings (Doc. 247). For the reasons set forth below, the motion to stay contempt proceedings (Doc. 245) will be denied, and the motion for contempt in violation of the permanent injunction (Doc. 199) will be denied without prejudice. The motion to seal (Doc. 247) will be granted.

I. BACKGROUND

The facts of the case have been fully stated in this court's previous orders and need not be repeated here. (See Docs. 194, 238.) Certain facts, most pertinent here, are outlined below along with relevant procedural background.

SmartSky contracted with Wireless Systems to develop and build proprietary components for use in SmartSky's air-to-ground ("ATG") communications network. (Doc. 5 ¶¶ 1-2; Doc. 104 at 3.) In September 2020, SmartSky filed this lawsuit alleging breaches of the intellectual property and confidentiality provisions of their agreement as well as misappropriation of trade secrets. (Doc. 1, 5.) In May 2021, the parties engaged in arbitration (Doc. 166 at 6), and the third-party arbitration tribunal issued a final award in October 2021, denying in part and granting in part SmartSky's claims (id. at 7). On February 7, 2022, the court confirmed the final award determined by the tribunal, permanently enjoining all Defendants from certain conduct. (Doc. 194.)

On March 21, 2022, SmartSky moved to hold Defendants DAG

Wireless LTD, DAG Wireless USA, LLC, Laslo Gross, and Susan Gross in contempt for violation of the permanent injunction and moved for expedited discovery. (Doc. 199.) Wireless Systems Solutions, LLC ("Wireless Systems") and David D. Gross were excepted from the motion, having filed Chapter 11 and Chapter 7 bankruptcy proceedings, respectively. (Id. at 2.) SmartSky represented that it was pursuing relief as to those two Defendants in bankruptcy court. (Id.) In support of its motion for contempt, SmartSky provided a declaration by third party Stephen Newell, alleging that Defendant Laslo Gross had approached Newell about acquiring antennas for an ATG system on a particular broadband wavelength (Doc. 200-1 ¶¶ 3-6), the same wavelength used only by SmartSky (Doc. 200 at 17). On September 29, 2022, the court found SmartSky had failed to establish that Defendants violated the injunction (Doc. 238 at 19) but nevertheless permitted SmartSky to conduct "expedited discovery to determine whether a contempt proceeding is even warranted"[2] (id. at 25). The court further ordered that "[a]fter conducting such discovery, SmartSky may seek to supplement its filings, if appropriate." (Id. at 26.)

On February 28, 2023, SmartSky filed the present motion to stay contempt proceedings (Doc. 245) along with a "status report

[2] The court's grant of discovery as to the two Defendants in bankruptcy proceedings was dependent on whether the bankruptcy court lifted its stay for that purpose. (Doc. 238 at 26.)

on bankruptcy cases and contempt discovery" (Doc. 249). SmartSky likewise filed the present motion to seal. (Doc. 247.)

On March 21, 2023, Defendant Wireless Systems, through Richard D. Sparkman (its Chapter 7 trustee and successor-in-interest), filed a response in support of motion to stay contempt proceedings. (Doc. 250.) The same day, all other Defendants (hereafter, "Defendants") responded, opposing SmartSky's motion to stay (Doc. 251), to which SmartSky replied on April 4 (Doc. 252). The motions are fully briefed and ready for decision.

II. ANALYSIS

A. Motion to Stay Contempt Proceedings

SmartSky moves to stay the contempt proceedings it initiated on the grounds that "the immediacy of potential harm to SmartSky . . . [is] no longer present" given that Wireless Systems' Chapter 11 bankruptcy proceedings have been converted into Chapter 7 liquidation proceedings, and thus Wireless Systems is "no longer pursuing customers or engaging in any further business[.]" (Doc. 245 at 2.) However, SmartSky does not withdraw its motion for contempt proceedings, alleging that Defendants have not provided "any substantive responsive information or documents" in response to discovery requests and have instead "stonewalled" SmartSky's attempts to "discover violations of the Court's injunction[.]" (Id. at 2-3; see also Doc. 249 at 19-20 (detailing some of Defendants' objections to discovery requests).) Despite these

contentions, SmartSky makes no request of the court related to discovery disputes, preferring to "defer additional discovery costs on its Contempt Motion pending further developments in the [Wireless Systems] and David Gross bankruptcy cases, or until evidence develops to suggest or confirm that Laslo, Susan and/or David Gross are continuing to develop, produce, market or sell wireless communications products" in a manner that violates the injunction. (Doc. 249 at 21.) SmartSky maintains that Wireless Systems' bankruptcy proceedings were converted from Chapter 11 to Chapter 7 proceedings as a result of "serious dishonest[y] or misrepresentations to the Court" by multiple Defendants (Doc. 245 at 2) and that Defendants have a "well-established pattern of dishonest and deceptive conduct" such that they will likely "continue to . . . disregard . . . the Injunction" (Doc. 249 at 22). SmartSky requests that it be allowed to provide the court with a status report in six months and, if necessary, to file a motion to reopen the proceedings before then "based on discovery of information suggesting a risk that Defendants are or may be violating the Injunction." (Doc. 245 at 3.)

In response, Defendants argue the court should dismiss the contempt proceedings due to SmartSky's lack of evidence that Defendants or Wireless Systems have violated the permanent injunction. (Doc. 251 at 1-2.) In response to SmartSky's allegations of misconduct, Defendants contend that "there were

good grounds for the objections and responses" to SmartSky's discovery requests. (Id. at 19.) Defendants likewise assert that "Laslo Gross and Susan Gross . . . and [Wireless Systems] did not provide false testimony to the Bankruptcy Court[,]" nor was the conversion of Wireless Systems' bankruptcy case from Chapter 11 to Chapter 7 a result of "alleged false testimony and misrepresentations to the Bankruptcy Court[.]" (Id. at 17-18.) Defendants argue that SmartSky has "fail[ed] to put forth credible and admissible evidence that Defendants have violated the Permanent Injunction" (id. at 15-16), so the contempt motion should be dismissed altogether (id. at 19-20).

"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 in original) (quoting Colonial Williamsburg Found. v. Kittinger Co., 792 F. Supp. 1397, 1405-06 (E.D. Va. 1992), aff'd, 38 F.3d 133 (4th Cir. 1994)). In its September 29, 2022 order, the court determined that SmartSky had not offered sufficient evidence that Defendants were in violation of the injunction. (Doc. 238 at 19.) Now, nine months after the

court granted SmartSky's motion for discovery, SmartSky has not presented any new evidence. While SmartSky alleges ongoing "stonewall[ing]" of discovery efforts (Doc. 249 at 19) and generally "dishonest and deceptive conduct" (Doc. 245 at 3), it does not allege that Defendants have violated or are currently violating the permanent injunction. Nor does SmartSky move to enlist the court's assistance in proceeding with its discovery efforts. The court need no longer defer ruling on the motion for contempt while awaiting the "discovery of information suggesting a risk that Defendants are or may be violating the Injunction." (See id.) It is not the practice of this court to keep motions open indefinitely, especially in the absence of a forecast of any further evidence. If and when SmartSky obtains such evidence, it may renew its motion for contempt and for further discovery. Thus, the court will deny the motion to stay contempt proceedings and will deny the motion for contempt in violation of the permanent injunction without prejudice.

B. Motion to Seal

SmartSky seeks to seal its "status report on bankruptcy cases and contempt discovery, and brief in support of motion to stay contempt proceedings[.]" (Doc. 249, redacted at Doc. 246.) No Defendant has responded in opposition.

When a party makes a request to seal judicial records, a district court "must comply with certain substantive and

procedural requirements." Va. Dep't of State Police v. Wash. Post, 386 F.3d 567, 576 (4th Cir. 2004) (citing Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988)). 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 '[o]nly then can it accurately weigh the competing interests at stake.'" Id. (alteration in original) (quoting Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178, 181 (4th Cir. 1988)). "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, 855 F.2d at 180 (internal quotations and citations omitted).

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 Wash. 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, 846 F.2d at 253)). "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-Enter. Co. v. Super. Ct. of Cal. for Riverside Cty., 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 Wash. 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 (citing Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978)). The party seeking to seal documents may overcome this presumption by identifying interests that heavily outweigh the public's interest in access. Id. The factors to be weighed in the common-law balancing test include the following: "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 Publ'g Co., 743 F.2d 231, 235 (4th Cir. 1984) (citing Warner Commc'ns, 435 U.S. at 597-608).

"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 Elecs. Corp. v. Advance Grp., Inc., 930 F.2d 913, at *6 (4th Cir. 1991) (unpublished table decision) (quoting Warner Commc'ns, 435 U.S. at 598).[3] "[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 Commc'ns, LLC v. Limelight Networks, Inc., 611 F. Supp. 2d 572, 581–82 (E.D. Va. 2009) (collecting cases); Woven Elecs. Corp., 930 F.2d, at *6-7 (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 district court record must be sealed in order to prevent further disclosure); ATI Indus. 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

[3] 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." Collins v. Pond Creek Mining Co., 468 F.3d 213, 219 (4th Cir. 2006) (citation omitted).

secrets contained therein).

SmartSky argues the court should seal portions of its status report and brief because they contain "confidential information and evidence from [Wireless Systems'] bankruptcy case[.]" (Doc. 248 at 3.) SmartSky represents that much of the information it seeks to redact arose from testimony at a hearing in the bankruptcy proceedings, which hearing and transcript have been sealed and are subject to a protective order. (Id. at 3-4.) Redactions arising from other hearings in the bankruptcy case "address[] the same types of topics and information" as the sealed hearing. (Id. at 4.)

Under either the First Amendment or common law standard, sealing is appropriate. As a threshold matter, SmartSky's motion meets the preliminary procedural requirements. The motion to seal was filed on February 28, 2023, and has been available for public viewing since that time. (See Doc. 247.) No third party has objected to the motion, and Defendants have not expressed any objections. Further, the public's interest is outweighed by the need to protect trade secrets and proprietary business information, see Longman v. Food Lion, Inc., 186 F.R.D. 331, 335 (M.D.N.C. 1999), and there appears to be no less drastic measure available. The court will not second guess the bankruptcy court's determination that certain of its proceedings should remain confidential. Thus, the court will grant SmartSky's motion to

seal the specified portions of its "status report on bankruptcy cases and contempt discovery, and brief in support of motion to stay contempt proceedings" (Doc. 249) as redacted at Doc. 246; Exhibits A (Doc. 249-1) and D (Doc. 249-2) will likewise be sealed.

III. CONCLUSION

For the reasons stated,

IT IS THEREFORE ORDERED that SmartSky's motion to stay contempt proceedings (Doc. 245) is DENIED;

IT IS FURTHER ORDERED that SmartSky's motion for contempt for violation of the permanent injunction (Doc. 199) is DENIED WITHOUT PREJUDICE;

IT IS FURTHER ORDERED that SmartSky's motion to seal (Doc. 247) is GRANTED.

/s/ Thomas D. Schroeder
United States District Judge

July 18, 2023