

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

ANDREA ROSSI, et al.,)	
)	
Plaintiffs,)	
v.)	No. 16-cv-21199-CMA (JJO)
)	
THOMAS DARDEN, et al.,)	
)	
Defendants.)	
_____)	

DEFENDANTS’ MOTION TO FILE UNDER SEAL

Pursuant to Local Rule 5.4(b), and paragraph 15 of the Agreed Protective Order [D.E. 56], Defendants Thomas Darden, John T. Vaughn, Cherokee Investment Partners, LLC, Industrial Heat, LLC, and IPH International, B.V. (collectively, “Defendants”) respectfully move the Court to file under seal Exhibits 22, 30 (in part), 31, 32 and 33 of Defendants’ Statement of Material Facts in Support of Motion for Summary Judgment (“SOMF”), as well as references to the contents of those Exhibits in the Motion for Summary Judgment. In support, Defendants state as follows:

MEMORANDUM OF LAW

I. Standard on a Motion for Leave to File Under Seal

Local Rule 5.4(b) provides that a party seeking to file under seal must (1) set forth the factual and legal basis for departing from the policy that Court filings be public; and (2) describe the proposed sealed filing with sufficient particularity without revealing the confidential information. Although the general policy in the Southern District of Florida is that court filings are matters of public record, a court may seal documents in connection with a substantive pretrial motion where the moving party shows that the balance tips in favor of its interest in keeping the

information confidential and against the public's common law right of access. *Procaps S.A. v. Patheon, Inc.*, No. 12-24356-CIV, 2013 WL 5928586, at *3 (S.D. Fla. Nov. 1, 2013); *Romero v. Drummond Co.*, 480 F.3d 1234, 1245-46 (11th Cir. 2007). "When balancing the public's common-law right to access judicial records against a party's interest in keeping the information confidential, courts consider, among other factors, whether allowing access would impair court functions or harm legitimate privacy interests, the degree of and likelihood of injury if made public, the reliability of the information, whether there will be an opportunity to respond to the information, whether the information concerns public officials or public concerns, and the availability of a less onerous alternative to sealing the documents." *Sec. Networks, LLC. v. Vision Sec., LLC*, 14-80453-CIV, 2014 WL 12538975, at *1 (S.D. Fla. Apr. 8, 2014) (internal citations omitted).

II. Description of Documents to be Filed Under Seal and Factual Basis for Sealing¹

Here Defendants seeks to file the following documents under seal:

1. Exhibit 22 to the SOMF, a copy of handwritten notes by Craig Cassarino of AmpEnergco, Inc. ("AEG"), a party to the License Agreement between Andrea Rossi ("Rossi), Leonardo Corporation ("Leonardo") and Industrial Heat ("Industrial Heat"). AEG is not a party to this litigation but has designated these notes as confidential pursuant to the Agreed Protective Order. Moreover, the notes do contain confidential business and proprietary information that non-party AEG has requested remain out of the public view.
2. Page IH-000131929 of Exhibit 30 to the SOMF, a detailed financial ledger reflecting payments made from Industrial Heat to Rossi and AEG. This ledger contains confidential financial information of Industrial Heat, Rossi and AEG as to payments between these parties and non-party AEG. The document was designated Confidential pursuant to the Agreed Protective Order by Industrial Heat.

¹ To the extent such materials are sealed by the Court, the portions of Defendants' Motion for Summary Judgment addressing those materials should also be sealed so as not to disclose indirectly the substance of the sealed materials. Defendants will publicly file a redacted Motion for Summary Judgment for this purpose.

3. Exhibit 31 to the SOMF, IRS Form 1120 for the year 2012 filed by Plaintiff Leonardo Corporation. This tax return contains sensitive and confidential financial information of Leonardo Corporation, and was designated Confidential pursuant to the Agreed Protective Order by Leonardo Corporation.
4. Exhibit 32 to the SOMF, IRS Form 1120X for the year 2013 filed by Plaintiff Leonardo Corporation of Florida. This tax return contains sensitive and confidential financial information of Leonardo Corporation, and was designated Confidential pursuant to the Agreed Protective Order by Leonardo Corporation.
5. Exhibit 33 to the SOMF, IRS Form 1040NR for the year 2013 filed by Plaintiff Andrea Rossi. This tax return contains sensitive and confidential financial information of Rossi, and was designated Confidential pursuant to the Agreed Protective Order by Rossi.

III. Legal Basis for Sealing

“The Eleventh Circuit [has] ruled that a party’s privacy or proprietary interest in information sometimes overcomes the interest of the public in accessing the information.” *Id.* In particular, courts of the 11th Circuit have allowed documents containing sensitive financial information, such as tax returns, to be filed under seal, finding that the balance tips in favor of keeping such information confidential. *See, e.g. Henning v. Versaggi*, 6:15-CV-830-22DAB, 2015 WL 9582713, at *3 n. 5 (M.D. Fla. Dec. 2, 2015), *report and recommendation adopted*, 615CV830ORL22DAB, 2015 WL 9488954 (M.D. Fla. Dec. 30, 2015); *Pellegrino v. Koeckritz Dev. of Boca Raton, LLC*, 08-80164-CIV, 2009 WL 1437813, at *7 (S.D. Fla. May 15, 2009), *report and recommendation adopted*, 08-80164-CIV, 2009 WL 1798382 (S.D. Fla. June 24, 2009); *Guzman v. Consumer Law Group, P.A.*, 115 A.F.T.R.2d 2015-2248 (S.D. Ga. 2015); *See Local Access, LLC v. Peerless Network, Inc.*, 2015 WL 7351444, at *1 (M.D. Fla. Nov. 20, 2015) (“A party’s interest in the privacy of its financial records and the terms of confidential agreements oftentimes outweighs the public’s right of access”); *State Farm Mut. Auto. Ins. Co. v. Altamonte Springs Diagnostic Imaging, Inc.*, 2013 WL 1212818, at *2 (M.D. Fla. Mar. 25, 2013) (“[A] company’s interest in preserving the confidentiality of its financial records outweighs the

public right of access and establishes good cause.”); *Graphic Packaging Int’l, Inc., v. C.W. Zumbiel Co.*, 2010 WL 6790538, at *2 (M.D. Fla. Oct. 28, 2010) (“[A] company’s interest in the privacy of its financial records and the terms of confidential agreements . . . often outweigh the public right of access.”). Here, Exhibits 30, 31, 32 and 33 consisting of a financial ledger and Leonardo and Rossi’s tax returns contain sensitive corporate and personal financial information for which the public does not have any need. This includes financial information relating to payments to non-party AEG.

Additionally, documents which “contain sensitive technical drawings, designs, test data, [] non-public financial data that are important to [a company’s] business,” and trade secrets are the proper subject of a motion to file under seal. *Teledyne Instruments, Inc. v. Cairns*, 6:12-CV-854-ORL-28TB, 2013 WL 5874584, at *1 (M.D. Fla. Oct. 31, 2013); *Wi-LAN USA, Inc. v. Telefonaktiebolaget TM Ericsson & Ericsson Inc.*, 12-23569-CV, 2015 WL 12976849, at *3 (S.D. Fla. Apr. 17, 2015) (sealing documents referencing Ericsson’s RRM specification “which explains in minute detail the mechanics of Ericsson’s confidential and proprietary uplink bandwidth allocation algorithm.”). The same holds true for internal documents discussing business strategy and planning. *See, e.g., Cowan v. GE Capital Retail Bank*, 2015 WL 1324848, at *3 (N.D. Cal. Mar. 24, 2015) (granting sealing request as to documents containing “confidential strategies and policies and procedures”); *Apple, Inc. v. Samsung Elecs. Co.*, 2013 U.S. Dist. Lexis 38682, at *17-18 (N.D. Cal. Mar. 19, 2013) (granting sealing request as to documents containing “internal business strategy and planning”); *Arbinet-Thexchange, Inc. v. Mashinsky*, 2006 WL 2828469, at *2 (D.N.J. Sept. 28, 2006) (granting sealing request as to documents containing “competitive strategies and assessments of business opportunities”). Here, Exhibits 22 contains sensitive information relating to business strategy and planning. In

particular, the document contain confidential information relating to investors, investments, and payment structuring.

Applying the relevant legal standards, the Court should conclude that the harm that the parties or non-party AEG will sustain through disclosure of this confidential information outweighs any marginal public interest in disclosure. While sealing the above-requested documents will not impair court function, not sealing them will harm legitimate privacy interests and may cause injury. There is not a less onerous alternative to sealing the documents.

CONCLUSION

WHEREFORE, Defendants respectfully request that the Court maintain under seal the materials described above, as well as the portions of the Motion for Summary Judgment addressing the contents of those materials for the duration of the lawsuit.

LOCAL RULE 7.1 CERTIFICATION

Counsel for Defendants has conferred with the parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues raised herein, but have been unable to reach a resolution.

Dated: March 22, 2017

Respectfully submitted,

/s/ Christopher R. J. Pace

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 22, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel or parties of record.

/s/ Christopher R. J. Pace
Christopher R.J. Pace