

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

CENTRIPETAL NETWORKS, INC.,)	
)	
Plaintiff,)	No. 2:18-cv-00094-HCM-LRL
)	
v.)	
)	
CISCO SYSTEMS, INC.,)	
)	
Defendant.)	
)	
)	
)	

**JOINT MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO CLOSE
COURTROOM TO PROHIBIT PUBLIC ACCESS TO PORTIONS OF THE AUDIO-
STREAM OR VIDEO OF THE TRIAL PROCEEDINGS HEREIN AND TO SEAL
PORTIONS OF THE TRIAL RECORD**

I. INTRODUCTION

Plaintiff, Centripetal Networks, Inc. (“Centripetal”) and Defendant, Cisco Systems, Inc., (“Cisco”) (collectively “the Parties”) submit this joint motion in support of closing the courtroom and excluding the public and individuals to whom disclosure of certain information designated as Highly Confidential – Attorneys’ Eyes Only or Highly Confidential Source Code – Attorneys’ Eyes Only is not permitted under the Protective Order entered herein [ECF No. 194] during presentation of certain evidence during trial of this matter.¹ The Court entered the Protective Order to protect against the public disclosure of the Parties’ highly confidential information that can negatively impact its business and competitive standing. In accordance with Local Rule 5 of

¹ By joining this Motion, Cisco does not waive, and expressly reserves, its objections to the conduct of the trial in this matter by videoconference as set forth in its Motion Opposing Trial Entirely by Videoconference [ECF No. 387] and the Memorandum in Support of that Motion.

the Rules of the United States District Court, Eastern District of Virginia, the Parties have maintained the practice of moving this Court for leave to file under seal those filings that contain highly confidential information, such as the confidential terms of the license agreement between Centripetal and Keysight Technologies, Inc. (“Keysight”) and Ixia (“Ixia”) (the “Keysight Binding Term Sheet”) and confidential customer sales information, as well as Cisco’s highly confidential sales information and source code designated under the Protective Order. The protections have allowed the Parties to freely and privately share information amongst themselves during the discovery process but cannot provide the same level of confidential treatment of information during trial. Because what has previously been sealed will be discussed at trial, the Parties, jointly, move this Court to close the Courtroom and exclude those individuals to whom disclosure of information designated as Highly Confidential – Attorneys’ Eyes Only or Highly Confidential Source Code – Attorneys’ Eyes Only is not permitted under the Protective Order from at least those portions of trial that cover confidential customer sales information, licensing information such as the Keysight Binding Term Sheet, and Cisco’s source code². The Parties files this brief in support of their Motion.

² Each party maintains the right to object to the introduction of evidence as appropriate at trial, outside of sealing reasons. Testimony and evidence relating to the confidential subject matter will likely be the subject of multiple fact witnesses and expert witnesses. If counsel intends to introduce evidence regarding confidential information, it will make an oral request to the Court prior to the introduction of such evidence, that the courtroom be closed as requested in the Parties’ Motion and that any audio-stream or video of the trial be limited to individuals to whom disclosure of information designated as Highly Confidential – Attorneys’ Eyes Only or Highly Confidential Source Code – Attorneys’ Eyes Only, as appropriate, is permitted under the Protective Order. At the conclusion of the discussion of the confidential information, counsel will advise the Court that it may lift the aforesaid restrictions. To avoid disruption to the proceedings, the parties agree to make every reasonable effort to consolidate discussion of confidential information to minimize the need to seal the courtroom and prohibit access to any audio-stream or video of the trial.

The strong public interest in protecting the confidentiality of the Parties' sensitive commercial information and preventing the harm that will arise from its disclosure far outweighs the right of public access to the portion of the trial in which these details are discussed.

II. ARGUMENT

A. THIS COURT SHOULD RESTRICT PUBLIC ACCESS TO THE TRIAL WHEN DISCLOSURE OF CONFIDENTIAL BUSINESS AND TECHNICAL INFORMATION COULD HARM A PARTY'S COMPETITIVE STANDING.

The United States Supreme Court has recognized that the right of the public to access judicial proceedings is "not absolute." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978); *see also, Woven Electronics Corp. v. The Advance Group, Inc.*, Nos. 89-1580, 89-1588, 1991 U.S. App. LEXIS 6004 at *17-19 (4th Cir. April 15, 1991) ("It is also uncontested, however, that this right of access is not unlimited."); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 432 (5th Cir. 1981) ("The common law right of access certainly antedates the Constitution's free press guarantee, but it does not rise to that level of importance or merit the same degree of protection"); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 664 (8th Cir. 1983) (holding that a private party's property interests in its trade secrets sufficed to override the media's First Amendment right of access).

In the face of this common law presumption, the United States Court of Appeals for the Fourth Circuit has acknowledged the legitimacy of limiting public access to court proceedings and records in order to protect certain proprietary information. *Woven Electronics*, 1991 U.S. App. LEXIS 6004 (unpublished and per curiam) (finding that an order closing the courtroom during times when trade secrets were exposed would have been proper); *see also, Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000); *In re The Knight Publ'g Co.*, 743 F.2d 231, 234 (4th Cir. 1984); *Boone v. City of Suffolk*, 79 F. Supp. 2d 603, 606-10 (E.D. Va. 1999); *Level 3 Commc'ns, LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572, 581 (E.D. Va. 2009). Indeed,

while materials introduced in civil cases typically are open to the public, there are recognized exceptions to this common law right of access. See, e.g., *Ashcraft*, 218 F.3d at 302; *In re The Knight Publ'g Co.*, 743 F.2d at 234; *Boone*, 79 F. Supp. 2d at 606-10. One recognized limited exception occurs when a party seeks to protect commercially sensitive information from public disclosure, or where access to information could provide a source of business information that might harm a litigant's competitive standing. *Nixon*, 435 U.S. at 598.

In *Woven Electronics*, the Fourth Circuit stated that the decision to prohibit access to evidence presented at trial is vested in the sound discretion of the trial court; as such, a court should seek “an appropriate balance between the public's right of access to judicial records and proceedings and the parties' legitimate interest in the protection of sensitive proprietary information.” 1991 U.S. App. LEXIS 6004, at *18-19. The court explained that such balance can often be accomplished by closing portions of the trial and sealing the “portions [of the record] necessary to prevent the disclosure of trade secrets.” *Id.* at *19. Ultimately, the *Woven* court recommended following the Eighth Circuit's approach from *In re Iowa* and instructed the district court to review the record and “seal only those portions necessary to prevent the disclosure of trade secrets.” *Woven*, 1991 U.S. App. LEXIS 6004, at *19 (citing *In re Iowa*, 724 F.2d at 663-64). Although the Fourth Circuit did “not announc[e] a blanket rule that the presence of trade secrets will in every case and at all events justify the closure of a hearing or trial,” it acknowledged that such action by the district court would be appropriate in certain circumstances.” *Level 3 Comm.*, 611 F. Supp. 2d at 582 (quoting *Woven*, 1991 U.S. App. LEXIS 6004, at *6).

Similarly, in *Microsoft Corp.*, the United States District Court for the District of Columbia granted a motion to “close the courtroom for a limited period of time,” since

discussion “regarding a Joint Marketing Agreement (‘JMA’)” would likely “elicit...confidential business information.” 2002 U.S. Dist. LEXIS 8603, at *4. The court further noted that “any release, via testimony or display of the JMA, would result in ‘clearly defined and very serious injury’ to [the party’s] business interest.” *Id.* at *7-8 (quoting *United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C. 1981)). This closure of the courtroom was “narrowly tailored to include only the specific information which, if released, would be detrimental to [the party’s] business interest.” *Id.* (citing *Press-Enterprise*, 464 U.S. at 510).

Because the common law provides only a presumption of public access, public access is just one of the interests to be weighed in considering closure. *See Belo*, 654 F. 2d at 434; *Van Waeyeberghe*, 900 F.2d at 848 n. 4 (“[W]e have refused to assign a particular weight to the right.”). Where, as here, only private commercial interests—as opposed to questions of public policy—are involved, the interest in public access is diminished. *See In re Iowa*, 724 F.2d at 664 (“Where only private commercial interests or damage are involved, we think the law justifies the steps taken by the District Court to [prevent public disclosure]”). The Fourth Circuit instructed that “[i]n these sensitive situations courts must proceed cautiously and with due regard to the unique facts involved in each case.” *Woven Electronics*, 1991 U.S. App. LEXIS 6004 at *19.

There are strong interests in favor of a narrowly tailored order protecting both Parties’ confidential commercial information from disclosure in this action. “[T]here can be no doubt that society in general is interested in the protection of trade secrets and other valuable commercial information. That interest is recognized, for example, in Rule 26(c)(7), in our copyright, trademark, and patent statutes, and in the common law of business torts.” *Zenith Radio*, 529 F. Supp. 866 at 905 (E.D. Pa. 1981). Protecting confidential information such as trade secrets and other valuable, sensitive commercial information, such as Centripetal’s highly

confidential information about certain customers, sales, the Keysight license, and Cisco's source code, is important since "[t]heir only value consists in their being kept private. If they are disclosed or revealed, they are destroyed." *In re Iowa*, 724 F.2d at 662.

Accordingly, courts frequently limit the public's access to courtroom proceedings when the disclosure of confidential commercial information could "harm a litigant's competitive standing." *See Woven Electronics*, 1991 U.S. App. LEXIS 6004 at *17; *Nixon*, 435 U.S. at 598. *See also Standard & Poor's Corp., Inc. v. Commodity Exchange, Inc.*, 541 F. Supp. 1273, 1277 (S.D.N.Y. 1982) ("[T]he right to attend judicial proceedings should, in appropriate circumstances, give way to the right to protect one's trade secrets"); *Zenith Radio*, 529 F. Supp. at 901 ("Judicial proceedings and records may be closed in part or in full to the public in order to protect private interests, including proprietary interest in trade secrets and other commercial information").

B. THE DISCLOSURE OF THE PARTIES' CONFIDENTIAL LICENSING, COMMERCIAL AND TECHNICAL INFORMATION AT ISSUE IN THIS CASE COULD HARM THEIR BUSINESSES AND COMPETITIVE STANDING.

The Parties respectfully request that the Court close the courtroom and excluding the public and individuals to whom disclosure of information designated as Highly Confidential – Attorneys' Eyes Only or Highly Confidential Source Code – Attorneys' Eyes Only is not permitted under the Protective Order during the presentation of evidence relating to confidential information (e.g. related to Centripetal's license agreement and certain confidential customer and sales information, Cisco's confidential sales information and Cisco's confidential source code) because public dissemination of such sensitive and confidential information could harm the business and competitive standing of each Party.

1. The Disclosure of the Confidential Licensing and Sales Information Could Harm Centripetal's Business and Competitive Standing

Centripetal requests the Court seal the Courtroom and exclude the public and individuals to whom disclosure of information designated as Highly Confidential – Attorneys' Eyes Only is not permitted under the Protective Order during presentations concerning the confidential information related to its license with Keysight or customer sales information that is subject to confidentiality agreements.³ Pursuant to a clause in the Keysight Binding Term Sheet, Centripetal and Keysight agreed to maintain the terms of the license confidential outside of what was required to be disclosed pursuant to SEC regulations. Centripetal also has agreements with certain customers to maintain certain sales information as confidential.

Public dissemination of the confidential terms of the Keysight Binding Term Sheet and customer sales information during the trial would cause significant harm to the business and competitive position of Centripetal, as it could give competitors or potential licensors insight into Centripetal's business to obtain an unfair business or competitive advantage. *See, e.g., Flexible Benefits Council*, 2008 WL 4924711 (E.D. Va. 2008) (holding that Plaintiff's interest in preserving the confidentiality of financial data normally unavailable to the public outweighs the public's interest to access); *see also Microsoft Corp.*, 2002 U.S. Dist. LEXIS 8603, at *4 (closing the courtroom and sealing the record inquiry into the confidential terms of Defendant's business agreement); *Apple Inc. v. Samsung Elecs. Co.*, No. 11-cv-1846, Dkt. No. 1649 at 16 (N.D. Cal. Aug. 9, 2012) (granting sealing of license agreements as the agreements themselves contain "a whole host of terms" that would be unnecessary to make public and could result in "significant competitive harm" if disclosed); *Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 15-cv-3295-BLF, Dkt.

³ Cisco does not oppose Centripetal's motion to seal information relating to its license with Keysight but maintains its objections to this subject matter for the reasons set forth in Cisco's Motion in Limine No. 1.

No. 394 (N.D. Cal. Oct. 31, 2017) (granting motion to seal courtroom during discussion at trial of confidential licensing information); *Woven Electronics*, 1991 U.S. App. LEXIS 6004 at *19 (holding that “Such a partial sealing strikes an appropriate balance between the public's right of access to judicial records and proceedings and the parties' legitimate interest in the protection of sensitive proprietary information.”). Accordingly, Centripetal requests that the Court close the courtroom and exclude the public and individuals to whom disclosure of sales and licensing information designated as Highly Confidential – Attorneys’ Eyes Only is not permitted under the Protective Order, when any specific discussion of such confidential information is offered at trial, and that it seal all documents and portions of transcripts related to this evidence at trial, e.g. Plaintiff Exhibits 1125, 1510, 1512, 1513, 1515 and Defendant Exhibits 46, 52, 59-60, 117, 119-122, 1114-1116, 1119-1120, 1152-1154, 1270-1271, 1394-1395, 1411-1415.

2. The Disclosure of Cisco’s Confidential Sales Information and Confidential Source Code Could Cause Significant Commercial Harm to Cisco

Cisco requests the Court seal the Courtroom and exclude the public and individuals to whom disclosure of information designated as Highly Confidential– Attorneys’ Eyes Only is not permitted under the Protective Order during presentation of evidence or argument relating to its confidential sales information and exclude the public and individuals to whom disclosure of information designated as Highly Confidential Source Code – Attorneys’ Eyes Only is not permitted under the Protective Order during presentation of evidence or argument relating to its confidential source code. Cisco’s confidential sales information and confidential source code is proprietary trade secret information, which is maintained as confidential, and the disclosure of this information could cause Cisco significant commercial harm. Cisco’s interest in maintaining the secrecy of this information justifies precluding public access to this information during trial. *See e.g., Eden Hannon & Co. v. Sumitomo Trust & Banking Co.*, 914 F.2d 556, 562 (4th Cir.

1990) (confidential financial information entitled to trade secret protection); *Lifenet Health v. Lifecell Corp.*, Civil Action No. 2:13cv486, 2015 U.S. Dist. LEXIS 181315, at *4 (E.D. Va. Jan. 9, 2015); *ATI Indus. Automation, Inc. v. Applied Robotics, Inc.*, 801 F.Supp.2d 419, 425 (M.D.N.C. 2011) (private property interest in maintaining the secrecy of financial and sales information overcame the public's First Amendment right of access).

Disclosure of Cisco's confidential sales information or source code during trial would cause significant harm to Cisco's business and competitive position, as it could give competitors access to confidential information about Cisco's business practices and the operation of Cisco's proprietary software. Accordingly, Cisco requests that the Court close the courtroom and exclude the public and individuals to whom disclosure of information designated as Highly Confidential – Attorneys' Eyes Only is not permitted under the Protective Order when any discussion of Cisco's confidential sales information is offered at trial information and exclude the public and individuals to whom disclosure of information designated as Highly Confidential Source Code – Attorneys' Eyes Only is not permitted under the Protective Order when any discussion of Cisco's source code is offered at trial, and that it seal all exhibits and portions of transcripts related to this evidence at trial, including Plaintiff's Exs. 37-54, 1547-1583, 1628-1629, 1822-1846, 1849-1850 and Defendants Exs. 627, 653, 687, 690, 699, 700, 708-710, 712-715, 717-721, 723-728, 731-736, 738-749, 779, 805, 827-830, 954-955, 962, 973, 981, 992, 1431-1467, 1469-1471, 1473-1511, 1549, 1551-1552, 1559-1586, 1590-1637, 1641.

III. CONCLUSION

For the foregoing reasons, the Parties respectfully request that this Court order the courtroom closed and order that the public and individuals to whom disclosure of information designated as Highly Confidential – Attorneys' Eyes Only or Highly Confidential Source Code –

Attorneys' Eyes Only is not permitted under the Protective Order be excluded during the presentation of highly confidential information regarding customers sales information, licensing, and source code, and seal all exhibits and portions of transcripts discussing such sensitive information that are introduced during the trial.

Dated: April 30, 2020

Respectfully submitted,

/s/ Stephen E. Noona

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically send notification of electronic filing to all counsel of record.

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