

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ARBUTUS BIOPHARMA CORPORATION )  
and GENEVANT SCIENCES GmbH, )  
 )  
Plaintiffs, )

v. )

C.A. No. 22-252 (MSG)

MODERNA, INC. and MODERNATX, INC. )  
 )  
Defendants. )

REDACTED - PUBLIC VERSION

Original filing date: June 20, 2024

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MODERNA, INC. and MODERNATX, INC., )  
 )  
Counterclaim-Plaintiffs, )

v. )

ARBUTUS BIOPHARMA CORPORATION )  
and GENEVANT SCIENCES GmbH, )  
 )  
Counterclaim-Defendants. )

**DEFENDANTS' BRIEF IN SUPPORT OF THEIR OMNIBUS MOTION TO SEAL**

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**TABLE OF CONTENTS**

**I. Introduction.....1**  
**II. Legal Standard.....1**  
**III. Argument.....2**  
**IV. Conclusion .....6**

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>In re Avandia Mktg., Sales Prac. &amp; Prod. Liab. Litig.</i> , 924 F.3d 662 (3d Cir. 2019).....	1, 2, 3
<i>Bank of Am. Nat’l Tr. &amp; Sav. Ass’n v. Hotel Rittenhouse Assocs.</i> , 800 F.2d 339 (3d Cir. 1986).....	2
<i>In re Cendant Corp.</i> , 260 F.3d 183 (3d Cir. 2001).....	1
<i>Guardant Health, Inc. v. Foundation Med., Inc.</i> , C.A. Nos. 17-1616-LPS-CJB, D.I. 447 (D. Del. Jun. 16, 2020).....	5
<i>Leucadia, Inc. v. Applied Extrusion Tech., Inc.</i> , 998 F.2d 157 (3d Cir. 1993).....	5
<i>Littlejohn v. Bic Corp.</i> , 851 F.2d 673 (3d Cir. 1988).....	2
<i>Miller v. Ind. Hosp.</i> , 16 F.3d 549 (3d Cir. 1994).....	2
<i>Mosaid Techs. Inc. v. LSI Corp.</i> , 878 F. Supp. 2d 503 (D. Del. 2012).....	2
<i>Nitto Denko Corp. v. Hutchinson Tech. Inc.</i> , No. CV 16-3595 (CCC/MF), 2017 WL 2782639 (D.N.J. Mar. 3, 2017) .....	4
<i>Nixon v. Warner Commc’ns, Inc.</i> , 435 U.S. 589 (1978).....	5
<i>Pansy v. Borough of Stroudsburg</i> , 23 F.3d 772 (3d Cir. 1994).....	2, 5

## **I. INTRODUCTION**

Pursuant to the Protective Order (D.I. 91) as modified by the Court’s November 14, 2023 Order (D.I. 155), Defendants Moderna, Inc. and ModernaTX, Inc. (“Moderna”) respectfully move this Court to seal Moderna’s sensitive and confidential information and to grant leave to file a partially redacted version of Plaintiffs’ June 6, 2024 Letter to Judge Goldberg Regarding Discovery Disputes and Exhibits 2-3 and 5-15 thereto (D.I. 331); and Moderna’s Opposition to Plaintiffs’ Motion to Compel (D.I. 345) and Exhibits B and C thereto (collectively, “Moderna’s Confidential Materials”). As explained in more detail below, the portions marked for redaction contain Moderna’s sensitive and confidential information.

In support of this motion, Moderna attaches as Exhibit A the Declaration of Chantal Friebertshäeuser, Senior Vice President, Commercial, Europe, Middle East and Canada at Moderna Switzerland GmbH, who is knowledgeable about Moderna’s confidential information that Moderna seeks to seal and are familiar with its sensitivity. Moderna’s Confidential Materials contain Moderna’s confidential and highly confidential information, and the Court should maintain that material under seal to prevent serious and real harm to Moderna. Release of Moderna’s confidential information to the public and Moderna’s competitors would create a clearly defined and serious injury to Moderna, as discussed in detail below.

## **II. LEGAL STANDARD**

Third Circuit common law presumes a public right of access to judicial records; however, it also protects business and financial information when access would cause economic harm, including competitive harm. *In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019). “Although the common law right to public access is a recognized and venerated principle, courts have also recognized the accompanying principle that the right is not absolute.” *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001) (citations and quotations

omitted); *see also Littlejohn v. Bic Corp.*, 851 F.2d 673, 678 (3d Cir. 1988) (“Despite the presumption, courts may deny access to judicial records, for example, where they are sources of business information that might harm a litigant’s competitive standing.”).

This presumption is overcome where a movant shows “that the interest in secrecy outweighs the presumption.” *In re Avandia Mktg.*, 924 F.3d at 672 (quoting *Bank of Am. Nat’l Tr. & Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344 (3d Cir. 1986)). This showing may be made by demonstrating that disclosure will work a clearly defined and serious injury to the movant and that the material is the kind of information that courts will protect. *See In re Avandia Mktg.*, 924 F.3d at 672 (citing *Miller v. Ind. Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994)). The Court will apply a “good cause” standard justifying sealing or redacting judicial records, requiring a “balancing process, in which courts weigh the harm of disclosing information against the importance of disclosure to the public.” *Mosaid Techs. Inc. v. LSI Corp.*, 878 F. Supp. 2d 503, 507-08 (D. Del. 2012) (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994)).

### III. ARGUMENT

Good cause exists here to seal or partially seal Moderna’s Confidential Materials because these documents contain Moderna’s confidential and highly confidential technical and business information. Specifically, as described briefly below, and further explained in the Declaration of Chantal Friebertshäeuser, the portions Moderna seeks to redact contain Moderna’s confidential information, including highly confidential and sensitive information regarding the composition of Moderna’s COVID-19 Vaccine and Moderna’s sensitive material contained in confidential foreign customer contracts. Ex. A, ¶ 5. Disclosure of such information would cause real and serious competitive harm to Moderna and the information does not need to be disclosed to the

public to understand the filings at issue. Further, Moderna seeks only to partially seal Moderna's Confidential Materials.

Although the public's presumptive common law right of access to judicial records attaches to materials filed in connection with a pretrial motion of a non-discovery nature, this right is "not absolute" and may be overcome by a showing that the material sought to be sealed "is the kind of information that courts will protect and will work a clearly defined and serious injury to the party seeking closure." *In re Avandia Mktg.*, 924 F.3d 662, 673 (3d Cir. 2019) (citation omitted). Here, the material Moderna seeks to redact from is the type of limited information of the kind that courts in the Third Circuit have recognized as protectable, namely highly sensitive and confidential business and technical information regarding the composition of Moderna's COVID-19 Vaccine and Moderna's sensitive material contained in confidential foreign customer contracts.

The harms caused by revealing Moderna's confidential information are discussed below, and further in the attached declarations of Chantal Friebertshäeuser (Exhibit A), Senior Vice President, Commercial, Europe, Middle East and Canada at Moderna Switzerland GmbH, who is familiar with this information and its sensitivity. As Ms. Friebertshäeuser explains, there is significant competition between established vaccine suppliers, including suppliers with mRNA-based vaccines, like Moderna, and any information about one of these competitors, even seemingly minor information, may prove competitively advantageous. Ex. A, ¶ 6.

As Ms. Friebertshäeuser further explains, Moderna has always taken extensive measures to maintain the confidentiality of its highly sensitive business and technical information, including by implementing procedures that restrict access to sensitive information even within Moderna. Ex. A, ¶ 4. Employees have confidentiality obligations as part of their employment

and are provided guidance regarding how to treat sensitive information. *Id.* Specifically, confidential Moderna information is not to be disclosed outside of Moderna except under confidentiality agreement and when necessary. *Id.* Documents containing such information may be marked as confidential or otherwise indicate they contain restricted or sensitive information. *Id.* Internal to Moderna, employee access to commercially sensitive and trade secret information is often restricted on a need-to-know basis, as determined by a person's group or role on a project. *Id.* Moderna has been extremely concerned about the protection of its confidential information during this litigation and has been very careful to always protect this information. *Id.*

As Ms. Friebertshäeuser further explains, with respect to the information contained in Moderna's contracts with foreign third parties, Moderna owes a duty of confidentiality to these third parties which would require notice to each third party prior to public disclosure. *Id.* at ¶ 7. These third parties include primarily foreign governments. *Id.* Publicly revealing terms of the contracts with third parties could cause harm to Moderna's relationship with these third parties and give unfair advantage to competitors. *Id.*

Moderna has always taken extensive measures to maintain the confidentiality of its highly sensitive business and technical information. Ex. A, ¶ 4. Moderna has been extremely concerned about the protection of its confidential information during this litigation and has been very careful to always protect this information. *Id.* Moreover, this information is of the type that courts have recognized as protectable. *See, e.g., Nitto Denko Corp. v. Hutchinson Tech. Inc.*, No. CV 16-3595 (CCC/MF), 2017 WL 2782639, at \*2 (D.N.J. Mar. 3, 2017) (granting motion to seal "confidential technical information" where such information "was not intended to be seen by competitors . . . for review and potential use against the parties" and parties were in



“highly competitive [] industry”); *Guardant Health, Inc. v. Foundation Med., Inc.*, C.A. Nos. 17-1616-LPS-CJB, D.I. 447 (D. Del. Jun. 16, 2020) (granting motion to redact confidential information concerning defendant’s confidential information).

Disclosure of Moderna’s confidential information regarding the composition of Moderna’s COVID-19 Vaccine and Moderna’s sensitive material contained in confidential foreign customer contracts would “work a clearly defined and serious injury” to Moderna, as such disclosure would provide Moderna’s competitors, customers, and potential licensors or licensees with otherwise confidential information regarding Moderna’s products and strategies, as well as a competitive advantage in both the vaccine supplier market and in negotiations with Moderna. *See Pansy*, 23 F.3d at 786. Moreover, because this “case involves private litigants” and their confidential information, there is “little legitimate public interest” in the proposed redactions. *Id.* at 788. Under such circumstances, Moderna’s interest in maintaining the confidentiality of the proposed redacted information outweighs any countervailing public interest. *See id.* (“[I]f a case involves private litigants, and concerns matters of little legitimate public interest, that should be a factor weighing in favor of granting or maintaining an order of confidentiality.”); *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 166 (3d Cir. 1993) (“Documents containing trade secrets or other confidential business information may be protected from disclosure” and explaining that the court has “framed the inquiry as whether the need for secrecy outweighs the presumption of access that normally attaches to such documents”); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978) (“[C]ourts have refused to permit their files to serve as ... sources of business information that might harm a litigant’s competitive standing.”).

As explained above, Moderna's Confidential Materials contain technical details regarding the composition of Moderna's COVID-19 Vaccine and Moderna's sensitive material contained in confidential foreign customer contracts. Moderna's proposed redactions remove the specific confidential material at issue, leaving the remainder unredacted. These proposed redactions are narrow such that the public's ability to understand these filings is not impaired any less than necessary to prevent the release of Moderna's most sensitive information to its competitors, preventing clear competitive harm. Moderna's proposed redactions are narrow in scope and refer only to Moderna's confidential, highly sensitive business or technical information to prevent the serious harm to Moderna which would be caused by its public release as outlined in Ms. Friebertshäeuser's declaration.

#### **IV. CONCLUSION**

For the foregoing reasons, Moderna respectfully requests the Court grant Moderna's Motion to Seal with respect to Moderna's confidential and highly confidential information.

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 20, 2024, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

I further certify that I caused copies of the foregoing document to be served on June 20, 2024, upon the following in the manner indicated:

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