

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

IN RE: AFLIBERCEPT PATENT LITIGATION

MDL No.: 1:24-md-3103-TSK

**THIS DOCUMENT RELATES TO
CASE NO. 1:23-cv-00089-TSK**

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR LEAVE TO FILE UNDER SEAL**

Regeneron Pharmaceuticals, Inc. (“Regeneron”) seeks to file its Preliminary Injunction Bond (“Bond”). Because the Bond reflects projected sales data that Defendant considers confidential, Regeneron seeks permission to file the Bond under seal. In support of this request, and in compliance with the requirements of Local Rule of Civil Procedure 26.05(b)(2), Regeneron states as follows.

A. Sealing the Bond is necessary.

Patent infringement litigation, by its nature, involves trade secrets and other confidential information. The Bond contains commercially sensitive business information that Defendant considers confidential. Sealing this information is necessary because broadcasting a party’s commercially sensitive business information to the public creates an obvious risk of harm to that party’s competitive standing.

B. The seal should remain in place indefinitely.

Because the basis for sealing is that the Bond contains information that Defendant considers confidential, and that Defendant believes could harm its business if made public, the seal should remain in place indefinitely or until the parties agree otherwise.

C. Sealing the Bond is proper.

There are two sources of the public's right of access to court documents: the First Amendment and the common law. *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004). The common law "does not afford as much substantive protection to the interests of the press and the public as does the First Amendment." *Id.* Although the common law presumes access to all "judicial records and documents," a party can rebut the presumption by showing some significant interest that outweighs the presumption. *Id.* Unlike the common law, the First Amendment right of access extends only to particular documents. *Id.* Although the First Amendment right of access most often applies in criminal proceedings, the Fourth Circuit has held that it also applies to documents filed in connection with a summary judgment motion or at trial in a civil case. *Rushford v. New Yorker Mag., Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). Where the First Amendment applies, the denial of access must be necessitated by a compelling government interest and narrowly tailored to serve that interest. *Id.* But courts may substitute "higher value" for "government interest" in cases involving records filed by nongovernmental civil litigants, and trade secrets may constitute higher values that can overcome the First Amendment right of access. *Hosaflook v. Ocwen Loan Servicing, LLC*, 2020 WL 13179423, at *1 (N.D.W. Va. Jan. 9, 2020); *Morris v. Cumberland Cnty. Hosp. Sys., Inc.*, No. 5:12-CV-629-F, 2013 WL 6116861, at *2 (E.D.N.C. Nov. 13, 2013).

Even where the First Amendment right of access applies, courts in the Fourth Circuit have held that it is proper to seal a private company's confidential and proprietary business information because the information is not generally available to the public, does not bear on public matters, and could harm the company if published. *See Accreditation Comm'n for Health Care, Inc. v. NextLOGiK, Inc.*, No. 5:20-CV-46-M, 2020 WL 2543787, at *2 (E.D.N.C. May 19,

2020); *Jones v. Lowe's Companies, Inc.*, 402 F. Supp. 3d 266, 291 (W.D.N.C. 2019), *aff'd*, 845 F. App'x 205 (4th Cir. 2021); *Silicon Knights, Inc. v. Epic Games, Inc.*, No. 5:07-CV-275-D, 2011 WL 901958, at *1–2 (E.D.N.C. Mar. 15, 2011). Here, the Bond contains nonpublic information that Defendant considers confidential and proprietary and believes could harm its business if made public. Accordingly, the Court may properly seal the Bond.

Based on the foregoing, Regeneron respectfully requests leave to file the Bond under seal.

Date: July 26, 2024

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