IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

INVISTA NORTH AMERICA S.À.R.L., and AURIGA POLYMERS INC.,	)	
Plaintiffs	)	
v.	)	Civil Action No. 11-1007-SLR-CJB
M&G USA CORPORATION and M&G POLYMERS USA, LLC,	)	
Defendants.	)	

MEMORANDUM ORDER

I. BACKGROUND

Pending before the Court is a dispute between the parties regarding redactions to certain sealed documents filed in connection with a Motion to Compel (D.I. 179) ("the Motion"), all of which have been filed under seal (i.e., D.I. 180, 184-186, 199-202, 205-207, 218, 223, 227 (hereinafter, "the Motion to Compel Documents")). The dispute will also relate to, *inter alia*, the Court's recent Memorandum Order regarding the Motion. (D.I. 422) With the Motion, Defendants M&G USA Corporation and M&G Polymers USA, LLC (collectively, "M&G"), sought to compel production of [redacted] prepared for Plaintiff INVISTA North America S.a.r.l. ("INVISTA") and protected by the attorney-client privilege and work product doctrine. (*Id.*)

Generally, pursuant to this Court's procedures, a party must electronically file a redacted version of a sealed document within seven days of the date on which the sealed document was filed. (*See* Filing Sealed Civil Documents in CM/ECF, dated October 2012, available on the District Court's website, located at http://www.ded.uscourts.gov) Here, however, because the

parties have been unable to agree on the scope of redactions to the Motion to Compel Documents, the Court has entered several Stipulations to stay the time for the parties to file redacted versions of these documents until the Court rules on the dispute. (D.I. 196, 214, 226, 238) Pursuant to the Court's February 13, 2013 Oral Order, the parties summarized the nature of their dispute in a joint letter. (D.I. 218)

INVISTA proposes extensive redactions to the Motion to Compel Documents, while M&G proposes more limited redactions. The Court will address the parties' respective proposals below.

II. DISCUSSION

A. Legal Standard

It is well-settled that the public has a common law right of access to judicial proceedings and records. *See Littlejohn v. BIC Corp.*, 851 F.2d 673, 677–78 (3d Cir. 1988) (noting that the public's right to such access is "beyond dispute") (internal quotation marks and citation omitted); *accord United States v. Martin*, 746 F.2d 964, 968 (3d Cir. 1984). The public's right of access extends beyond the ability to attend court proceedings, and includes the right to inspect and copy public records, including judicial records (i.e., those documents filed with the court, or documents otherwise incorporated into a court's adjudicatory proceedings). *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001). The United States Court of Appeals for the Third Circuit has explained that this common law right of access, which carries with it a "strong presumption" in favor of public access to judicial records, applies to pretrial motions of a nondiscovery nature and the material filed therewith. *In re Cendant Corp.*, 260 F.3d at 192; *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 165 (3d Cir. 1993). While the presumption of public

access does not apply to discovery motions and supporting documents filed with such motions, *Leucadia, Inc.*, 998 F.2d at 165, it does apply to judicial opinions regarding discovery motions, *see Newman v. Gen. Motors Corp.*, Civil Action No. 02-135 (KSH), 2008 WL 5451019, at *6 (D.N.J. Dec. 31, 2008).

A party seeking to seal court documents from public access must demonstrate "good cause" for protecting such material from disclosure. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994). To establish good cause, the moving party bears the burden of showing that "disclosure will work a clearly defined and serious injury." *Id.* (internal quotation marks and citations omitted). "The injury must be shown with specificity. . . . Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing." *Id.* (internal quotation marks and citations omitted); *see also Joint Stock Soc'y v. UDV N. Am., Inc.*, 104 F. Supp. 2d 390, 395 (D. Del. 2000) (noting that the "good cause standard" requires an "exacting type of analysis"). The party seeking to seal documents must demonstrate good cause to do so, regardless of whether the documents at issue are of the type that implicate the strong presumption in favor of public access. *United States v. Wecht*, 484 F.3d 194, 212 & n.22 (3d Cir. 2007).

Assessing whether good cause exists to seal portions of a judicial record generally involves a balancing process, in which courts weigh the harm of disclosing information against the importance of disclosure to the public. *See Pansy*, 23 F.3d at 787. To that end, in *Pansy*, the Third Circuit outlined a series of factors that may be considered in evaluating whether "good cause" exists: (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose; (3) whether disclosure will cause

embarrassment to a party; (4) whether the information to be disclosed is important to public health and safety; (5) whether sharing the information among litigants will promote fairness and efficiency; (6) whether the party benefitting from the order is a public entity or official; and (7) whether the case involves issues important to the public. *Id.* at 787–91. These factors are neither mandatory nor exhaustive. *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995).

B. Applying the "Good Cause" Standard to the Parties' Disputes

The Court focuses on the areas of dispute between the parties regarding the proposed redactions, which appear to relate to two distinct issues that will be addressed in turn.

First, while both parties have proposed to redact [redacted] itself in its entirety, M&G has not proposed redactions to references to the contents of [redacted] that appear throughout the Motion to Compel Documents. (*See* D.I. 218, ex. INVISTA-A & MG-A) It is undisputed that [redacted] is protected by the attorney-client privilege and work product doctrine, and the Court has rejected M&G's argument that the crime-fraud exception has eviscerated these protections or that INVISTA has otherwise waived them. (D.I. 422) The Court agrees with INVISTA that, in addition to [redacted] itself, "all references to the facts of [redacted], or references that infer or suggest those facts" may be properly redacted. (D.I. 218 at 1); *see Cuadra v. Univision Commc'ns, Inc.*, Civil Action No. 09-4946 (JLL), 2012 WL 1150833, at *11-12 (D.N.J. Apr. 4, 2012) (retaining under seal segments of court filing that set forth attorney-client communications); *Dombrowski v. Bell Atl. Corp.*, 128 F. Supp. 2d 216, 219 (E.D. Pa. 2000) (same). Indeed, it has been recognized that "[t]he extremely important public and private purposes served by preserving the confidentiality of such communications would be undermined if one party could unilaterally trumpet such information in a pleading available for public

inspection[.]" *Dombrowski*, 128 F. Supp. 2d at 219.

Second, INVISTA proposes to redact any other reference (including basic legal argument and the parties' case law citations) to M&G's allegations that [redacted] should be produced because its contents implicate the crime-fraud exception to the attorney-client privilege and work product doctrine. (D.I. 218 at 1-2 & ex. INVISTA-A) INVISTA specifically points to two of the factors set out by the Third Circuit in *Pansy*—whether disclosure will violate any privacy interests or whether it will cause embarrassment to a party—arguing that they weigh heavily in favor of its proposed redactions, as disclosure of these claims would cause embarrassment to, and violate the privacy interests of, INVISTA and its in-house counsel. (*Id.* at 2) INVISTA states that these redactions are particularly appropriate here, as M&G's allegations as to the Motion were "completely unsubstantiated" and disclosure of M&G's claims would "violate the purpose of the Protective Order" and "serve no public benefit." (*Id.*)

A party's interest in privacy prevails where it would "prevent the infliction of unnecessary or serious pain on parties who the court reasonably finds are entitled to such protection." *Pansy*, 23 F.3d at 787. As to whether preventing embarrassment can be a factor satisfying the "good cause" standard, the Third Circuit has held that "'an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious.'" *Id.* (quoting *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986)). Because embarrassment is generally "'thought of as a nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground.'" *Id.* (quoting *Cipollone*, 785 F.2d at 1121); *see also Wilcock v. Equidev Capital L.L.C.*, No.

99CIV.10781LTSDFE, 2001 WL 913957, at *1 (S.D.N.Y. Aug. 14, 2001) (noting that "[g]enerally, protective orders are not available . . . to protect businesses from . . . embarrassment"). To succeed on such a claim, the "business will have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position." *Cipollone*, 785 F.2d at 1121.

The Court agrees with M&G that INVISTA has failed to meet its burden of showing with specificity that disclosure of the fact of M&G's crime-fraud allegations would cause significant harm to it as a corporate entity. Rather, INVISTA has merely set forth broad allegations of harm, without providing "specific examples or articulated reasoning" of the harm to it (economic or otherwise) that might result if its proposed redactions in this area are not accepted. (D.I. 218 at 2); *Cipollone*, 785 F.2d at 1121; *see also Meds. Co. v. Teva Parenteral Meds., Inc.*, C.A. No. 09-750-ER, 2011 WL 3290291, at *9-10 (D. Del. June 30, 2011) (rejecting the plaintiff's argument that the defendant's allegations regarding inequitable conduct and unclean hands would cause company embarrassment and harm to its reputation and therefore should be redacted, because the plaintiff's "conclusory arguments—which are not supported by affidavit or concrete examples—fall far short" of establishing good cause); *Allied Corp. v. Jim Walter Corp.*, Civ. A. Nos. 86-3086, 95-5530, 1996 WL 346980, at *1, *3 (E.D. Pa. June 17, 1996) (rejecting the plaintiff's motion to seal the defendant's allegations of wrongful conduct by plaintiff and noting that the "Third Circuit has never held that a corporation can be embarrassed to such an extent that it is entitled to a sealing order over information that casts it or its officers in a bad light").[1]

[1] INVISTA cites to a single case, *Haber v. Evans*, 268 F. Supp. 2d 507 (E.D. Pa. 2003), in support of its argument that good cause to redact "mere allegations of wrongdoing" can be found based on privacy interests and resultant embarrassment. (D.I. 218 at 2) The facts of

In light of the specificity that the Third Circuit requires to demonstrate good cause to seal judicial records on these grounds, the Court denies INVISTA's request to seal any reference to M&G's allegations that the crime-fraud exception applied here.[2]

III. CONCLUSION

For the reasons set forth above, **by no later than August 7, 2013**, the parties shall file redacted versions of the Motion to Compel Documents that include (1) those redactions

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Haber, however, are distinguishable from the facts at hand. In *Haber*, the plaintiff, who accused the defendant, a former state trooper, of improper sexual misconduct, attached to her complaint numerous internal affairs department documents containing unrelated allegations of sexual misconduct against various other state troopers, for the purpose of supporting her claim that the Pennsylvania State Police routinely tolerated sexual misconduct. *Id.* at 509-510. The *Haber* Court found that good cause existed to "redact the names of any accused officer [in those documents] who was cleared of wrongdoing by virtue of a withdrawn complaint or a determination that the charges were unfounded or not sustained." *Id.* at 513. In reaching this conclusion, the court noted, *inter alia*, that such records did not always contain the ultimate dispositions, and that none of the troopers who were the subject of those documents were named parties to the case. *Id.* at 511-12 & n.8. Here, in contrast, INVISTA, a plaintiff in the instant action, has been able to steadfastly deny M&G's allegations on the record as to it and its employees. (D.I. 199); *see also Rose v. Rothrock*, Civil Action No. 08-3884, 2009 WL 1175614, at *7-9 (E.D. Pa. Apr. 29, 2009) (rejecting defendants' argument that the complaint contained allegations of racial discrimination harmful to their reputations and should therefore be sealed because, *inter alia*, the defendants would "have every opportunity to respond on the record to the allegations in the Complaint").

[2] The fact that the claims relate to not only a corporation, but to individuals who work there, (D.I. 240 at 32), does not alter the requirement that a specific articulation must be made of the harm that has or will be occasioned absent redaction. *Cf. Mitcham v. Pittsburgh Cardiovascular Inst.*, Civil Action No. 10-76 Erie, 2011 WL 5827533, at *1-3 (W.D. Pa. Nov. 18, 2011) (denying joint motion to place record under seal in discrimination case, where individual and corporate defendants made only broad allegations of the harm or embarrassment they would face were matter not kept under seal); *Rossi v. Schlarbaum*, Civil Action No. 07-3792, 2008 WL 222323, at *1-3 (E.D. Pa. Jan. 25, 2008) (denying individual defendants' request to seal the record in a case where plaintiff alleged defendants had falsely stated to plaintiff's associates that plaintiff had engaged in illicit and illegal activities, despite claims that allegations were "'highly personal'" and could be "'destructive'" to defendants' personal and public lives, where defendants' allegations of harm were broad); *see also Rose*, 2009 WL 1175614, at *8-9. Such a showing has not been made here.

previously agreed upon by the parties and that are not in dispute; and (2) redaction of [redacted] itself in its entirety; and (3) redactions of all references to the facts of [redacted], or references that infer or suggest those facts.

Additionally, the Court must issue publicly-available versions of two Memorandum Orders that it released under seal on June 25, 2013 and July 15, 2013, and this Memorandum Order, respectively. (D.I. 384, 422) Due to the strong presumption in favor of public access to judicial records, particularly court opinions that set out the reasoning behind judicial decision making, it is difficult for parties to argue for redaction of portions of such documents beyond reference to privileged communications and material akin to trade secrets. *Mosaid Techs. Inc. v. LSI Corp.*, 878 F. Supp. 2d 503, 507-13 (D. Del. 2012); *Newman*, 2008 WL 5451019, at *6; *Houston v. Trella*, Civil Action No. 04-1393 (JLL), 2006 WL 2772748, at *16 (D.N.J. Sept. 25, 2006). The parties have already submitted proposed redactions—which appear to be extensive—to the Court's June 25, 2013 Memorandum Order (which relates to a motion to compel the production of documents that Plaintiffs claimed were privileged). (D.I. 402) To the extent that the scope of these proposed redactions extends beyond (1) the content of privileged communications and (2) information amounting to clear trade secrets, the parties shall submit, **by no later than August 7, 2013,** a letter explaining why good cause exists to believe that disclosure of the additional portions of the Court's June 25, 2013 Memorandum Order would work a "clearly defined and serious injury" to the relevant party. *Pansy*, 23 F.3d at 786. The Court will subsequently issue a publicly-available version of its June 25, 2013 Memorandum Order. If the Court does not receive any letter from the parties **by August 7, 2013**, it will proceed with publicly issuing a version of its Memorandum Order that redacts only the content of

privileged communications and clear trade secret information therein.

Further, the parties shall submit a single, jointly proposed, redacted version of the Court's July 15, 2013 Memorandum Order (which relates to the motion to compel the production of [redacted] and this Memorandum Order, in accordance with the guidelines set out in this Order, **by no later than August 7, 2013**, for review by the Court. To the extent that the parties believe that certain material should be redacted that is not addressed by this Memorandum Order, they should submit a letter explaining why good cause exists to believe that disclosure of such additional portions of these Orders would work a "clearly defined and serious injury" to the relevant party. *Pansy*, 23 F.3d at 786. The Court will subsequently issue publicly-available versions of these Memorandum Orders.

Dated: July 30, 2013

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE