

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

THE NATIONAL BANK OF)
BLACKSBURG,)
)
Plaintiff,)
)
v.) Civil Action No. 7:18-cv-00310
)
EVEREST NATIONAL INSURANCE)
COMPANY,)
)
Defendant.)

MOTION TO SEAL

COMES NOW The National Bank of Blacksburg (“Plaintiff” or “National Bank”), by and through counsel and in accordance with Rule 9 of the Local Rules, moves this Court for an order permitting it to file certain documents under seal in this matter, and in support thereof states as follows:

BACKGROUND

National Bank seeks an order granting it permission to file certain documents pertaining to its Complaint under seal in order to protect highly sensitive and confidential information concerning its customers, banking and computer systems, and security protocols. National Bank’s Complaint seeks declaratory judgment and breach of contract damages for the improper denial of insurance coverage by Everest National Insurance Company (“Defendant” or “Everest”) under the parties’ Financial Institution Bond (the “Bond”) related to breaches of National Bank’s computer systems that occurred in 2016 and 2017. The prosecution of its Complaint will require National Bank to disclose highly sensitive and confidential information including, but not limited to, customers’ names, customers’ bank account numbers, forensic

reports containing confidential details of National Bank's banking and computer systems, as well as detailed information on how an unauthorized party or parties (i.e. hackers or "Intruders") were able to access National Bank's computer systems and breach its security protocols. If not sealed, public disclosure of this information will harm National Bank, its customers and potentially other financial institutions similarly situated.

STANDARD

A common law right to access documents extends to judicial records and documents. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). Under common law, there is a presumption of access to such records. *Id.* However, this presumption may be overcome if countervailing interests heavily outweigh the public interests in accessing the same. *Id.* Where a right of access is derived from the First Amendment, documents may be sealed only if there is a compelling government interest and the denial is narrowly tailored to serve that interest. *Va. Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004). Documents filed in connection with criminal plea and sentencing hearings as well as civil summary judgment motions are afforded the more rigorous First Amendment standard. *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). For other judicial records and documents, the less stringent common law standard should apply.

Before sealing documents, a Court must first determine if the source of the public's right to access the documents is derived from common law or the First Amendment. *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988). The documents National Bank seeks to seal in the prosecution of this civil matter currently do not pertain to summary judgment or an effective trial on these matters. Therefore, at this point, the common law standard should apply. National Bank recognizes that it may be necessary for it to request permission to file documents

under seal for summary judgment or trial which may later require review under the more rigorous First Amendment standard.

ARGUMENT

In accordance with Rule 9 of the Local Rules of this Court, a party seeking to file documents under seal must provide: 1) a non-confidential description of the material sought to be sealed; 2) a statement as to why sealing is necessary and why no alternatives to filing under seal exist; and 3) a statement as to the period of time the party seeks to have the materials maintained under seal.

I. Description of Documents

This suit involves a dispute over insurance coverage and breach of contract for National Bank, a financial institution who suffered unauthorized intrusions and hacking into its computer systems in 2016 and 2017 which resulted in the manipulation of its files, accounts and records; and unauthorized withdrawals from customer accounts. (Denardo Decl., ¶ 2, June 27, 2018.)¹ The documents National Bank seeks to file under seal at this time are: 1) detailed proofs of loss with statements of claim (“Proofs of Loss”) with exhibits provided to Everest; 2) forensic reports; and 3) Everest’s denial of coverage letter (“Coverage Determination”).²

The Proofs of Loss include detailed explanations of how unauthorized Intruders were able to gain access to National Bank’s computer systems, install malware, alter account balances, monitor network communications, conduct keystroke tracking and otherwise manipulate National Bank’s computer systems and security protocols to allow the Intruders to facilitate fraudulent withdrawals from customer accounts. (Denardo Decl., ¶ 4).

¹ A true and correct copy of the First Declaration of F. Brad Denardo dated June 27, 2018 is attached hereto as Exhibit A. All citations to the Denardo Decl. refer to Exhibit A.

² A true and correct copy of the Second Declaration of F. Brad Denardo certifying the authenticity of the documents National Bank seeks to file under seal is attached hereto as Exhibit B.

The forensic reports sought to be sealed contain further detailed information regarding the unauthorized intrusions, including detailed analysis of the compromised computer systems, including IP addresses, network addresses, and file descriptions; how National Bank's banking systems and security protocols operate; how the Intruders gained access to and manipulated National Bank's banking and computer systems and security protocols; and recommendations on what additional security protocols National Bank should implement to prevent similar unauthorized intrusions in the future. (Denardo Decl., ¶ 5).

Everest's Coverage Determination summarizes the Proofs of Loss and forensic reports and summarizes how the unauthorized intrusions were executed through National Bank's computer systems, including reference to detailed information from the forensic reports and Proofs of Loss.

II. Sealing is Necessary

The documents sought to be sealed contain highly sensitive and confidential information that if made available to the public will subject National Bank and its customers to exposure of confidential and proprietary business information not generally available to the public. (Denardo Decl., ¶ 6). Public disclosure of this information will harm National Bank, its customers and potentially other similarly situated financial institutions and their customers as it will reveal, in detail, the manner and methods in which the unauthorized Intruders accessed National Bank's computer systems, entered or changed electronic data and computer programs on National Bank's computer systems, altered or eliminated security protocols, and eventually made unauthorized withdrawals from customer accounts. (Denardo Decl., ¶ 3).

These documents further serve as the source of business information that will harm National Bank's competitive standing. (Denardo Decl., ¶ 6.) The documents, if made public, will

subject National Bank to scrutiny unrelated to Everest's coverage of National Bank's claims, which is the sole subject of this suit. Further, public disclosure will expose National Bank's business and security practices to the public, potentially including other hackers, and essentially provide them with a "how to" guide on fraudulently accessing banking computer systems and executing the unauthorized withdrawal of customer funds.

Additionally, there is an ongoing criminal investigation into the security breaches which are the subject of the Complaint. Public disclosure of the information contained in the documents sought to be filed under seal may interfere with the ongoing criminal investigation. (Denardo Decl., ¶ 7).

Redacting these documents is not practical or feasible as the confidential and sensitive information necessary to be protected constitutes the substance of these documents. The non-confidential information contained in these documents which could remain unredacted would be piecemeal at best and be without context and clarity if standing alone. Redaction would deprive the Court of specific information necessary to evaluate National Bank's claims. No legitimate public interest will be served through the public disclosure of these documents and accordingly, National Bank seeks approval to file the same under seal.

III. Time Period to be Sealed

Because of the sensitive nature of the documents and the risks associated with public disclosure, National Bank requests that these documents be placed under seal permanently, or in the alternative, be sealed until the conclusion of the pending litigation at which time it will request permission to strike these documents from the record. The harm associated with disclosure of these documents will not become moot at any foreseeable time, but rather is continuing in nature.

IV. Filing Under Seal is Appropriate

When determining whether granting a motion to seal is appropriate, a court must provide public notice of the request allowing interested parties a reasonable opportunity to object, consider less drastic alternatives to sealing the documents, and provide specific reasons and factual findings which support its decision to seal the documents and for rejecting alternative. *Ashcroft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000).

Public notice of this motion is given by docketing it for a reasonable time period in advance of a determination on this issue. *In re Knight Publ'g Co.*, 743 F.2d 231, 235 (4th Cir. 1984). Accordingly, National Bank requests that the Court provide public notice by posting notice of this Motion on the public docket board for an appropriate period of time. Additionally, as discussed above, less drastic measures are not feasible and will not suffice to protect the highly sensitive and confidential information contained in the documents while allowing the Court to evaluate National Bank's claims. Finally, the Court's obligation to set forth specific reasons and factual findings supporting its decision to seal the documents, should it so find, is satisfied by the proposed Order accompanying this Motion to Seal in accordance with Rule 9 of the Local Rules.

WHEREFORE, National Bank respectfully requests that this Court enter an Order, the proposed form of which is attached hereto as Exhibit C, granting it permission to file the documents tendered herewith under seal permanently, or in the alternative, for the duration of this pending litigation at which time it may seek to have the documents struck from the record. Public disclosure of the information contained therein would further no legitimate public interest and National Bank's interest in protecting public disclosure of the information heavily outweighs any competing public interests for its disclosure.

Respectfully submitted,

THE NATIONAL BANK OF BLACKSBURG

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