

No. 03-13-00753-CV

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3RD COURT OF APPEALS
AUSTIN, TEXAS

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JEFFREY D. KYLE

SUSAN COMBS, IN HER OFFICIAL CAPACITY AS TEXAS
COMPTROLLER, AND GREG ABBOTT, IN HIS OFFICIAL
CAPACITY AS TEXAS ATTORNEY GENERAL

Appellants

v.

TEXAS SMALL TOBACCO COALITION AND
GLOBAL TOBACCO, INC.

Appellees

APPELLEES' MOTION REQUESTING TO FILE DOCUMENTS UNDER SEAL

Craig T. Enoch
Melissa A. Lorber
Amy Leila Saberian
Shelby O'Brien
ENOCH KEVER PLLC
600 Congress Avenue, Suite 2800
Austin, Texas 78701
(512) 615-1200 / (512) 615-1198 fax

Attorneys for Appellees

Appellees Texas Small Tobacco Coalition and Global Tobacco, Inc. (collectively, the “Coalition”) file this Motion Requesting to File Documents Under Seal. On November 15, 2013, the trial court granted summary judgment declaring that House Bill 3536, which imposes a tax on cigarettes manufactured by small tobacco companies, but not on cigarettes manufactured by their Big Tobacco competitors, is unconstitutional. The trial court also granted an injunction prohibiting the State from collecting the unconstitutional tax. The State immediately filed a notice of appeal and asserted that despite the injunction and the tax having been declared unconstitutional, the Coalition members must still continue paying the tax each month during the State’s appeal.

The Coalition members are contemporaneously filing with this Court a Motion for Review of Supersedeas Order, which includes as part of its appendix redacted affidavits supporting the Coalition members’ inability to pay the unconstitutional, discriminatory tax during the State’s appeal.¹ The unredacted versions of these affidavits contain the Coalition members’ sales data, which they consider to be extremely

¹ See Motion For Review of Supersedeas Order, Appendix B (A-D).

confidential proprietary financial information, both among the members of the Coalition themselves and with respect to the general public. Further, the Coalition members believe that disclosing this confidential financial information will harm them competitively. As such, the affidavits are redacted to remove this sales data.

Texas courts invoke the protection of trade secret law to protect a company's confidential material when the company makes an effort to keep such material away from its competitors. *Gonzales v. Zamora*, 791 S.W.2d 258, 265 (Tex. App.—Corpus Christi 1990, no writ) (citing *Furr's Inc. v. United Specialty Advertising Co.*, 385 S.W.2d 456, 459 (Tex. Civ. App.—El Paso 1964, writ ref'd n.r.e.), cert. denied, 382 U.S. 824 (1964)). A trade secret may consist of any formula, pattern, device, or compilation of information that is used in one's business, and which gives a person an opportunity to obtain an advantage over competitors who do not know or use it. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). Texas courts analyze the following six factors to determine if information constitutes a trade secret under Texas law:

- 1) The extent to which the information is known outside of the company's business;

- 2) The extent to which it is known by employees and others involved in the company's business;
- 3) The extent of measures taken by the company to guard the secrecy of the information;
- 4) The value of the information to the company and to its competitors;
- 5) The amount of effort or money expended by the company in developing the information; and
- 6) The ease or difficulty with which the information could be properly acquired or duplicated by others.

In re Bass, 113 S.W.3d 735, 739-40 (Tex. 2003). A party need not satisfy all six factors to establish a trade secret, and other circumstances may also be relevant to the analysis. *Id.* at 740. Texas courts have repeatedly described product sales and pricing information as entitled to trade secret protection. *See, e.g., Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, 859 (Tex. App.—Fort Worth 2003, no pet.); *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 22 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd).

Here, the unredacted affidavits contain the Coalition members' confidential sales data for 2013. No other tobacco company is required to disclose its specific sales data, nor can the State independently verify a tobacco company's sales data. Indeed, the comptroller does not even keep tax data for individual Big Tobacco manufacturers that would

allow for a determination of their sales data. Potential competitors are unable to obtain information about the Coalition members' sales data through public means. The Coalition maintains the information as confidential and does not allow publication or distribution of the information, even to other Coalition members. *See T-N-T Motorsports, Inc.*, 965 S.W.2d at 22 (observing that “when an effort is made to keep material important to a particular business from competitors, trade secret protection is warranted”). The Coalition members are willing to produce this information directly to the State and to this Court. But any requirement for the members to make public their confidential sales information will erect the very impediment to access to the courts they seek to avoid by filing their Motion for Review of Supersedeas Order in the first place.

Accordingly, to the extent the Court believes it needs to review the unredacted affidavits, the Coalition requests that the Court allow them to file the unredacted affidavits under seal.

PRAYER

The Texas Small Tobacco Coalition and Global Tobacco, Inc. pray that the Court grant this Motion Requesting to File Documents under

Seal and allow the Coalition members to file the unredacted affidavits under seal. Movants further pray for such other relief to which they may be entitled.

Respectfully submitted,

ENOCH KEVER PLLC
600 Congress Avenue
Suite 2800
Austin, Texas 78701
Phone: (512) 615-1200
Fax: (512) 615-1198

By: /s/ Craig T. Enoch

Craig T. Enoch SBN 00000026
Melissa A. Lorber SBN 24032969
Amy Leila Saberian SBN 24041842
Shelby O'Brien SBN 24037203

ATTORNEYS FOR APPELLEES
TEXAS SMALL TOBACCO
COALITION and GLOBAL
TOBACCO, INC.

CERTIFICATE OF CONFERENCE

As evidenced by my signature below, counsel for Appellees has conferred with counsel for Appellants. Appellants have indicated that they take no position on this Motion.

/s/ Craig Enoch

Craig T. Enoch

CERTIFICATE OF SERVICE

The undersigned certifies that the forgoing document has been served on the following counsel of record via electronic service on February 18, 2014:

ERIKA M. KANE
ARTHUR C. D'ANDREA
Office of the Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548
(512) 320-0067 Fax
erika.kane@texasattorneygeneral.gov
arthur.dandrea@texasattorneygeneral.gov

/s/ Craig Enoch

Craig T. Enoch