

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 9:20-cv-81205-RAR
Referred to Magistrate Judge Reinhart

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP,
INC. d/b/a PAR FUNDING, et al.,

Defendants.

**NON-PARTIES, ECKERT SEAMANS CHERIN & MELLOTT, LLC
AND JOHN W. PAUCIULO, RESPONSE TO
PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S
MOTION FOR LEAVE TO FILE DEPOSITION TRANSCRIPTS**

Non-Parties, Eckert Seamans Cherin & Mellott, LLC (“Eckert Seamans”) and John W. Pauciulo (“Mr. Pauciulo”) (together, the “Deponents”), file this Response to Plaintiff Securities and Exchange Commission’s (“SEC”) Expedited Motion for Leave to File Deposition Transcripts, etc. (ECF No. 544) and respectfully submit the Motion should be denied for the reasons set forth below.

The SEC’s Motion requesting this Court permit it to bypass the procedures set out in the Court’s Protective Order (ECF No. 487) should be denied. It appears that the SEC desires to avoid the provisions of the Court’s Protective Order as to nonparty Deponents because those provisions are time-consuming.

RELEVANT BACKGROUND

The SEC Subpoenas And Discussions Leading To The Depositions At Issue.

On March 5, 2021, the SEC served the Deponents with subpoenas to appear and testify at depositions in the Enforcement Action. The Deponents are an attorney (John Pauciulo) and a law firm (Eckert Seamans). Thus, the Deponents have important obligations to assure that they are protecting the confidentiality interests of their clients, as well as the attorney-client privilege, which can be waived only by their clients and former clients, and the attorney work-product privilege.

The depositions were set for April 9th and April 14th, and Mr. Pauciulo was scheduled to appear at both - in his individual capacity and as the corporate representative for Eckert Seamans. In compliance with the Federal Rules of Civil Procedure, the Deponents asserted objections to the non-party subpoenas and provided a detailed and lengthy privilege log pertaining to documents withheld on the basis of attorney-client privilege and work product. The Deponents also produced 3,821 non-privileged documents (a total of 13,510 pages) in response to the SEC subpoenas.

Counsel for the Deponents attempted to confer with counsel for the SEC regarding their objections and the privilege issues in efforts to resolve those issues prior to and between the scheduled depositions. Deponents' counsel urged SEC counsel to permit the Court to address the numerous pending privilege-related issues before requiring Deponents to appear for their depositions in an effort to eliminate the need to have to re-do depositions after Court rulings on the issues, but the SEC refused to proceed in that manner. Instead, the depositions proceeded as scheduled with the Deponents asserting all applicable privileges and seeking protection under the Court's Protective Order.

Counsel For Deponents' Non-Party Former Clients Requests To Attend The Depositions.

On March 22, 2021, Clifford Haines, an attorney representing non-party former clients of the Deponents and investors of the defendants, wrote to counsel for Deponents to advise that his clients had not waived the attorney-client privilege and instructed that no privileged documents or communications with his clients should be released. (See March 22, 2021 letter attached hereto as **“Exhibit 1”**). Mr. Haines later requested permission to attend the depositions of the Deponents for the purpose of assuring his clients’ privileges were protected. Counsel for the Deponents responded to Mr. Haines that he should confer with counsel for the SEC as they had set the depositions.

On April 9, 2021, Mr. Haines appeared at Mr. Paucilio’s deposition, which was held virtually, and the SEC did not alert anyone that there was any cause for concern regarding compliance with the Court’s Protective Order. Nor did the SEC ask, on the record, if there was any objection to or concern with Mr. Haines’ attendance. Deponents’ counsel incorrectly assumed Mr. Haines had been informed by the SEC, a party to the action in which the Protective Order had been entered, of the Protective Order and had agreed to abide by its terms. Given that Mr. Haines had already identified himself as an attorney for former clients and investors of the defendants, Mr. Haines was not simply a “member of the public.” And, in light of the fact that Mr. Haines was the only person in attendance other than Parties and counsel for Parties bound by the Protective Order in the SEC Enforcement Action and Mr. Pauciulo and his counsel, it is altogether unclear to whom the SEC now refers in arguing that “members of the public” attended the deposition. Mr. Pauciulo and his counsel were certainly not informed that “members of the public” were in attendance.

Deponents' Counsel Correctly Invoked The Protective Order Procedures.

On April 9, 2021, Mr. Pauciulo was deposed in his individual capacity for more than seven hours. Not surprisingly, Mr. Pauciulo's counsel asserted numerous objections on privilege and work-product grounds given that Mr. Pauciulo is not able to waive privileges owned by his clients and former clients. At the conclusion of the April 9 deposition, pursuant to the express terms of the Protective Order, Mr. Pauciulo's counsel indicated that she was invoking the Protective Order and designating the transcript confidential pending a determination of which specific portions of the transcript require confidential treatment. (*See* excerpt of April 9, 2021 Deposition Transcript attached hereto as "**Exhibit 2.**"). Mr. Pauciulo also reserved the right to read the transcript. *Id.*

With regard to testimony given in depositions, the Protective Order sets forth the following procedures for designating such testimony as confidential:

Designation as Confidential requires "that the Designating Party ***identify the Disclosure or Discovery Material on the record, before the close of the deposition,*** ... and specify the level of protection being asserted. When it is impractical to identify separately each portion of testimony that is entitled to protection and it appears that substantial portions of the testimony may qualify for protection, ***the Designating Party may invoke on the record (before the deposition... is concluded) a right to have up to 21 days after receipt of a certified transcript to identify the specific portions of the testimony as to which protection is sought and to specify the level of protection being asserted.*** Only those portions of the testimony that are appropriately designated for protection within the 21 days shall be covered by the provisions of this Protective Order. Alternatively, a Designating Party may specify, at the deposition or up to 21 days afterwards if that period is properly invoked, that the entire transcript shall be treated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL."

Protective Order at § 5.4(b). After a Designating Party invokes the Protective Order regarding a deposition transcript or portions thereof, Section 6 of the Protective Order provides the mechanism by which to challenge the application of confidentiality designations.

The SEC Has Not Followed The Protective Order's Process For Challenging Designations.

The procedures for challenging confidentiality designations require additional time, including seven days from the date of a challenge to specify the bases for confidentiality designations and an additional seven days for the parties to attempt to resolve challenges. Section 6 is designed to encourage the resolution of challenges to confidentiality designations without court intervention and, instead, through conferral. The challenge procedures do not even begin until after the designating party has had up to twenty-one days after receipt of a certified transcript to make designations.¹ Suffice it to say, the process for designating testimony as confidential and then challenging such designation is time-consuming.

The Protective Order Also Protects Against Inadvertent Disclosures.

Importantly, the Protective Order also addresses the unauthorized disclosure of protected materials (§10) and the inadvertent production of privileged or otherwise protected material (§11). As indicated above, the Deponents were not aware that “members of the public” attended the depositions nor that the one attorney of whom they were aware had not been required to agree to be bound by the Protective Order. As such, to the extent Mr. Haines did hear confidential information while attending the depositions, such disclosures were inadvertent and unauthorized. Pursuant to Section 10 of the Protective Order, once the SEC realized they had permitted the disclosure of confidential information contrary to the Protective Order, the SEC was required to “immediately” inform Mr. Haines of the terms of the Protective Order and request that he execute the Acknowledgement and Agreement to be Bound pursuant to the Protective Order.²

¹ Notably, the SEC is seeking to file transcripts in the public record although those transcripts are not yet even certified because the Deponents have reserved their right to read the transcripts.

² Deponents’ counsel asked Mr. Haines to refrain from disclosing any information learned at the depositions until the confidentiality issues are resolved by the Court.

Thus, to the extent the SEC maintains that “members of the public” attended the depositions without Deponents’ knowledge or that, as is clear, it inadvertently failed to notify Mr. Haines of the Protective Order or to require his agreement to be bound, the disclosure of confidential information during the depositions was inadvertent and measures should be taken to correct those inadvertent disclosures consistent with the Protective Order.

Contrary to the SEC’s request, inadvertent disclosure of confidential information does not warrant tossing aside the protections of the Protective Order altogether so that the SEC can simply ignore its procedures. The analysis of waiver of privilege protections after inadvertent disclosure of privileged documents is instructive and dictates that protections are not waived where a disclosure is inadvertent. *See, e.g. Thermoset Corp. v. Bldg. Materials Corp. of Am.*, Case No. 14-60268-CIV-Cohn, 2015 U.S. Dist. LEXIS 45924, at *22-23 (S.D. Fla. Apr. 8, 2015) (analyzing application of Rule 502(b) regarding waiver of attorney-client privilege and work product doctrine after inadvertent disclosure in discovery). Under the circumstances presented here, nonparty Deponents did not waive the protection of the Protective Order by “agreeing” to allow members of the public to attend the deposition, but, instead, any failure to protect the confidentiality of the information disclosed in the depositions was inadvertent.

Mr. Pauciulo Did Not Prematurely Leave The 30(b)(6) Deposition.

While not relevant to the determination of the SEC’s Motion, the SEC suggests that Mr. Pauciulo walked out of a deposition prematurely. *See* Motion at p.4. The suggestion is misleading and to the extent it has any bearing on this Court’s consideration of the Motion (which it should not), warrants only a brief response.

Mr. Pauciulo sat for more than seven hours for his first deposition on April 9 (from 10:15 a.m. to 7:07 p.m. including breaks). He then returned on April 14 for his deposition as the 30(b)(6)

representative. That deposition began at 10:10 a.m. During the April 14 deposition, SEC counsel informed all present that she had to deal with a family emergency. Without hesitation, everyone agreed to accommodate her and to wait for her to inform them if she would be able to continue that same day. At 4:15 p.m., SEC counsel sent an email indicating that she would be ready to resume the deposition at 4:25 p.m. and would conclude at 5:30 p.m. (See April 14, 2021 email communication attached hereto as “**Exhibit 3.**”) The deposition resumed at 4:25, and at 5:45 Deponents’ counsel advised SEC counsel that Mr. Pauciulo would agree to stay until 6:00 but then would need to leave and could arrange to return to finish the full seven hours of testimony, pointing out that they had accommodated SEC counsel by taking the break during the day and remaining past the 5:30 cut-off time she had provided. However, at approximately 5:50 p.m., SEC counsel began playing a 40-minute video exhibit, at which point Deponents’ counsel informed SEC counsel Mr. Pauciulo needed to leave at 6:00 and would return another day to finish the remaining testimony which had not been completed due to SEC counsel’s family emergency. (See April 14 deposition transcript excerpt attached hereto as “**Exhibit 4.**”). SEC counsel’s attempt to describe the circumstances as though Mr. Pauciulo had acted in any way inappropriately or anything less than courteous is a misrepresentation of facts.

SEC Counsel Has Not Yet Conferred Regarding Its Anticipated Privilege-Related Motion.

The SEC asserts that the Motion is necessitated by its need to file a motion to compel responses to deposition questions withheld on the basis of privilege objections. It is worthy of note that SEC counsel has not yet reached out to Deponents’ counsel to confer regarding the substance of its privilege motion. It is near impossible to determine whether there is a need to refer to confidential portions of the transcript to address the privilege issues. Again, if Counsel for the SEC provides those areas of contention, it may be possible to narrow or resolve those issues.

CONCLUSION

For the reasons set forth above, Deponents respectfully submit that the SEC's Motion should be denied. The SEC's attempt to circumvent the application of the Protective Order and its procedures should fail. The Protective Order applies, and the SEC should follow its procedures, including correcting any inadvertent disclosures of confidential information. This is particularly so because Deponents have agreed to expedite their compliance with the Protective Order regarding designation of confidential portions of deposition transcripts, and Deponents submit that a review of those portions designated as confidential can be made in camera for resolution should those portions affect the SEC's ability to use the transcripts in support of any forthcoming motions addressing privilege-related assertions.

Respectfully submitted,

DAMIAN & VALORI LLP | CULMO TRIAL
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Cherin & Mellot, LLC and John Pauciulo*
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Admitted Pro Hac Vice

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Catherine Recker

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(215) 972-6430 – main

Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic transmission via this Court's CM/ECF filing system on the 28th day of April, 2021, on all counsel or parties who have appeared in the above-styled action.

/s/Melanie E. Damian _____

Melanie E. Damian

EXHIBIT 1



HAINES & ASSOCIATES

CLIFFORD E. HAINES
DIRECT DIAL 215-246-2201
EMAIL CHAINES@HAINES-LAW.COM

March 22, 2021

Catherine M. Recker, Esquire
Welsh & Recker, PC
306 Walnut Street
Philadelphia, PA 19106

Jay Dubow, Esquire
Troutman Pepper
3000 Two Logan
18th and Arch Streets
Philadelphia, PA 19103

RE: Parker, et al. v. Eckert Semans, et al.

Dear Counsel:

While this office recognizes the impact of a legal malpractice case on the attorney-client privilege, we do not believe any waiver of the privilege extends to other parties. For that reason, as well as Constitutional privileges which may be available to my clients, we assert the privilege as to any entity or person seeking client records by subpoena or otherwise and insist that neither Eckert nor Mr. Pauciulo release any documents or communications between my clients and yours for any reason.

Very truly yours,

CLIFFORD E. HAINES

CEH/dao

EXHIBIT 2

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

SECURITIES AND EXCHANGE)	
COMMISSION,)	
)	
Plaintiff,)	Civil Action No.:
)	20-cv-81205-RAR
vs.)	
)	
COMPLETE BUSINESS SOLUTIONS)	
GROUP, INC. D/B/A PAR FUNDING)	
FULL SPECTRUM PROCESSING, INC.,)	
ABETTERFINANCIALPLAN.COM LLC)	
D/B/A A BETTER FINANCIAL PLAN,)	
ABFP MANAGEMENT COMPANY, LLC)	
F/K/A PILLAR LIFE SETTLEMENT)	
MANAGEMENT COMPANY, LLC, ABFP)	
INCOME FUND, LLC, ABFP INCOME)	
FUND 2, L.P., UNITED FIDELIS)	
GROUP CORP., FIDELIS FINANCIAL)	
PLANNING LLC, RETIREMENT)	
EVOLUTION GROUP, LLC, RETIREMENT)	
EVOLUTION INCOME FUND, LLC F/K/A)	
RE INCOME FUND, LLC, RE INCOME)	
FUND 2 LLC, LISA MCELHONE,)	
JOSEPH COLE BARLETA A/K/A JOE)	
COLE, JOSEPH W. LAFORTE A/K/A)	
JOE MACK A/K/A JOE MACKI A/K/A)	
JOE MCELHONE, PERRY S.)	
ABBONIZIO, DEAN J. VAGNOZZI,)	
MICHAEL C. FURMAN, and JOHN)	
GISSAS,)	
)	
Defendants, and)	
)	
L.M.E. 2017 FAMILY TRUST,)	
)	
Relief Defendant.)	
_____)	

VIDEOCONFERENCE DEPOSITION OF JOHN PAUCIULO

Friday April 9, 2021

Reported by:
Denise Sankary, RPR, RMR, CRR
Job No. 210409DSA

1 that you're claiming privilege.

2 MS. RECKER: I'm instructing him not to
3 answer.

4 MS. BERLIN: Are you instructing --

5 BY MS. BERLIN:

6 Q. So Mr. Pauciulo, is your answer that
7 you're asserting the attorney-client privilege?

8 A. Yes, it is.

9 Q. Okay. And that's with respect to
10 Mr. Vagnozzi?

11 A. Yes.

12 MS. BERLIN: Thank you so much. I have no
13 further questions, Mr. Pauciulo.

14 MS. RECKER: I would like to put on the
15 record that Mr. Pauciulo reserves the right to
16 read and sign the transcript, and that we
17 request that the deposition be designated
18 confidential pursuant to the protective order
19 entered on December 16, 2020 on Docket
20 Number 437.

21 MS. BERLIN: You will have to follow the
22 proper procedures for that, and the SEC would
23 dispute that this is a -- any sort of
24 confidential proceeding. We have third
25 parties, and we'll litigate that in court, but

-----Original Message-----

From: Berlin, Amie R. <BerlinA@sec.gov>

Sent: Wednesday, April 14, 2021 1:13 PM

To: Dubow, Jay A. <Jay.Dubow@Troutman.com>; Allison Leonard <aleonard@dvllp.com>; Catherine Recker <cmrecker@welshrecker.com>; Melanie Damian <mdamian@dvllp.com>; Brian Miller <brian.miller@akerman.com>; James R. Froccaro <jrfesq61@aol.com>; Jeffrey Cox <jlc@sallahlaw.com>; Jeffrey Marcus <jmarcus@mnrlawfirm.com>; Alejandro Soto <asoto@ffslawfirm.com>; Bettina Schein <bschein@bettinascheinlaw.com>; Alan Futerfas <asfuterfas@futerfaslaw.com>; Timothy Kolaya <tkolaya@sflaw.com>; Gaetan J. Alfano <GJA@pietragallo.com>

Cc: Jacqmein, Victoria <JacqmeinV@SEC.GOV>

Subject: Conferral Regarding Confidential Designation

EXTERNAL SENDER

I write concerning two designations of confidential material in the SEC v. CBSG case:

1. John Pauciulo's designation of his entire deposition transcript in this case as confidential; and 2. Eckert Seamans' designation of its entire 30(b) deposition transcript in this case as confidential.

The designations of these transcripts as confidential are improper. The transcripts and exhibits do not reflect or contain "confidential" material or information as reflected in the Court's Order (DE 437). Further, Mr. Pauciulo and Eckert Seamans agreed to third party individuals and counsel not representing any party to this case to observe the depositions, and such persons have observed the depositions.

Accordingly, the Commission challenges the confidentiality designations of both transcripts referenced above.

Thank you,
Amie Riggle Berlin
Senior Trial Counsel

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CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

SECURITIES AND EXCHANGE)
COMMISSION,)
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Plaintiff,) Case No. :
v.) 20-CV-81205-RAR
))
COMPLETE BUSINESS SOLUTIONS GROUP,)
INC. d/b/a PAR FUNDING, et al,)
))
Defendants, and)
))
L.M.E. 2017 FAMILY TRUST,)
))
Relief Defendants.)
_____)

****CONFIDENTIAL UNDER PROTECTIVE ORDER****

REMOTE 30(B)(6) DEPOSITION OF

ECKERT SEAMANS

THROUGH ITS DESIGNATED REPRESENTATIVE

JOHN PAUCIULO

Wednesday, April 14, 2021

Reported by:
BRIDGET LOMBARDOZZI,
CSR, RMR, CRR, CLR
Job No. 210414BLO

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

1 entire video and ask Mr. Pauciulo about
2 it, but since he's threatened he's walking
3 out in eight minutes, we're not going to
4 be able to even finish the video within
5 eight minutes. So if the Court permits us
6 to continue the deposition and to ask the
7 questions that we believe we're entitled
8 to ask and to show this video in full and
9 ask it, then we will do so when your
10 deposition is continued.

11 MR. DUBOW: Just so we're -- just
12 so we're clear, we will agree to come back
13 and continue up to the seven hours that
14 you are entitled for this deposition, just
15 not today. You had an unfortunate -- you
16 had to take a break today. He's been here
17 all day. It's been going on too long. So
18 at six o'clock, we're done. It's going to
19 be approximately five and a half hours,
20 and we can reschedule for another hour and
21 a half on another day.

22 MS. RIGGLE BERLIN: Okay. Thank
23 you. I did not understand that you were
24 agreeing to return.

25 MR. DUBOW: Yes.