

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION
TO FILE MOTION FOR SUMMARY JUDGMENT AND EXHIBITS UNDER SEAL
AND INCORPORATED MOTION TO STRIKE SEC'S UNTIMELY MOTION FOR
SUMMARY JUDGMENT WHEN IT IS FILED

Despite proposing to file a dispositive motion in a case of massive public interest under seal, Plaintiff, the Securities and Exchange Commission's ("SEC") has not met the high burden to overcome public access to Court records. Furthermore, the SEC used its tenuous Motion to Seal as an excuse for not filing its motion for summary judgment by the deadline. Therefore, Defendants, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta file this Response in Opposition to the SEC's Motion to File Summary Judgment and Exhibits Under Seal ("Motion to Seal"), and also request that this Court strike the SEC's motion for summary judgment when it is filed, and in support thereof, state as follows:

After the extended summary judgment motions deadline had passed, the SEC first raised the issue with Defense counsel and the Court that the motion for summary judgment should be filed under seal. However, the Motion does not even come close to overcoming the strong presumption of public access to Court records. In fact, the motion requests to seal a dispositive motion in this case that has a massive public interest solely on the grounds that "[t]he Motion includes portions that describe Confidential documents and some of the exhibits are Confidential documents." (DE# 806). While Defendants do not oppose the filing of exhibits under seal that contain confidential information too voluminous to redact, there is no basis to seal an entire dispositive motion on the grounds that a portion of the motion refers to "[t]he Motion includes portions that describe Confidential documents and some of the exhibits are Confidential documents." Rather, it appears, the SEC is using this tenuous motion to file under seal to circumvent the deadline and get a free look at the Defendants' motion before filing its own. Therefore, the Motion to Seal should be denied on the merits and as moot, because the SEC's Motion for Summary Judgment should be stricken as untimely when it is ultimately filed.

MEMORANDUM OF LAW

I. APPLICABLE STANDARD

"The operations of the courts and the judicial conduct of judges are matters of utmost public concern,' and '[t]he common-law right of access to judicial proceedings, an essential component of our system of justice, is instrumental in securing the integrity of the process.'" *Romero v. Drummond Co.*, 480 F.3d 1234, 1245 (11th Cir. 2007) (quoting *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839, 98 S. Ct. 1535, 1541, 56 L. Ed. 2d 1 (1978); *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311 (11th Cir. 2001)). "Material filed in connection with any substantive pretrial motion, unrelated to discovery, is subject to the common law right of access." *Romero v. Drummond Co.*, 480 F.3d 1234,

1245 (11th Cir. 2007) (citing *Chi. Tribune*, 263 F.3d at 1312). “The common law right of access may be overcome by a showing of good cause, which requires ‘balanc[ing] the asserted right of access against the other party’s interest in keeping the information confidential.’” *Romero v. Drummond Co.*, 480 F.3d 1234, 1246 (11th Cir. 2007) (quoting *Chi. Tribune*, 263 F.3d at 1309).

A party seeking to seal a judicial record bears the burden of overcoming the strong presumption of public access. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). “In balancing the public interest in accessing court documents against a party’s interest in keeping the information confidential, courts consider, among other factors, whether allowing access would impair court functions or harm legitimate privacy interests, the degree of and likelihood of injury if made public, the reliability of the information, whether there will be an opportunity to respond to the information, whether the information concerns public officials or public concerns, and the availability of a less onerous alternative to sealing the documents.” *Romero*, 480 F.3d at 1246 (citations omitted). “Good cause is established by showing that disclosure will cause ‘a clearly defined and serious injury.’” *Sutton v. Clayton Hosp’y Grp, Inc.*, No. 6:14-cv-571-Orl-40TBS, 2015 U.S. Dist. LEXIS 61389, at *3-4 (M.D. Fla. May 11, 2015) (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)).

II. THE MOTION FOR SUMMARY JUDGMENT SHOULD NOT BE FILED UNDER SEAL BEAUSE IT IS A DISPOSITIVE MOTION IN A CASE WITH A MASSIVE PUBLIC INTEREST.

As stated above, a party seeking to seal a judicial record bears the burden of overcoming the strong presumption of public access by meeting the “compelling reasons” standard. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). The compelling reasons standard applies to all motions except those that are only “tangentially related to the merits of a case.” *Center for Auto Safety v. Chrysler Grp. LLC*, 809 F.3d 1092, 1101 (9th Cir. 2016). Since the SEC is attempting to file its summary judgment motion under seal, the proposed sealed motion is clearly not only tangentially related to the merits of the case. Rather, it is a dispositive motion. Moreover, this case is not just a normal civil litigation between two private parties, but a case with a massive public interest. It is a case brought by an agency of the federal government and Par has approximately 80 direct noteholders along with the investors of ABFP PPM Funds, all of whom have an interest in the outcome of this case, many of whom appear on Zoom at every hearing or status conference held by the Court.

The SEC has not even come close to approaching its burden as to why an entire motion, let alone a dispositive one, should be filed under seal in any case, let alone this case. With respect to the

exhibits, the SEC does not even claim that all of the exhibits are confidential and would potentially warrant being filed under seal, but rather states “*some of the exhibits* are Confidential documents.” Certainly, those exhibits that are not “Confidential documents” under the protective order should be filed on the public docket.¹

Furthermore, the fact that portions of the motion merely “described Confidential documents” is insufficient to warrant filing the entire motion under seal and may not warrant any redactions whatsoever. At most, portions of the motion that describe Confidential documents, *specifically referring* to the *Confidential information* therein, should be redacted, and the remainder of the motion should be filed on the public docket, with a full unredacted copy filed under seal. However, merely describing Confidential documents alone is insufficient to warrant redactions, let alone filing under seal.

For example, if the SEC is describing a merchant’s application for funding and the application is confidential because it contains the merchant’s EIN, banking information, and personal contact information, but the motion for summary judgment only describes the application to the extent it was submitted on a certain date and the name of the company that submitted it, that would not warrant even redacting the motion, let alone filing the motion under seal. On the other hand, if the motion described the average daily balance of the merchant’s bank accounts that is shown on the exhibits, that would likely need to be redacted. However, this is not what the SEC is asking this Court to do. The SEC is asking this Court to seal an entire motion for summary judgment, which necessarily requires putting forth facts and arguments that support the allegations of the publicly filed Amended Complaint. There is simply no justification for filing the motion under seal especially given the strong presumption of public access to judicial records. The SEC has clearly not overcome this strong presumption. Thus, the Motion to Seal should be denied.

III. THE MOTION TO FILE UNDER SEAL SHOULD BE DENIED AS MOOT SINCE THE MOTION FOR SUMMARY JUDGMENT IS UNTIMELY AND SHOULD BE STRICKEN IF IT IS ULTIMATELY FILED.

The Motion to Seal should also be denied as moot since the Motion for Summary Judgment should be stricken as untimely when it is filed. After the extended summary judgment motions deadline had passed, the SEC first raised the issue with Defense counsel and the Court that the motion for summary judgment should be filed under seal. Notably, the motions deadline was extended for

¹ Defendants take no position on whether proposed exhibits that are designated Confidential should be filed under seal, and if this motion were to be granted, Defendants would seek to unseal any documents that they believe not be designated as Confidential, if there are any.

ten days because two members of the defense counsel team suffered deaths in their families in the weeks leading up to the deadline. Defendants agreed as a matter of fairness that the deadlines for all parties should be extended so that they would not be getting an extra ten days to prepare their motion while the SEC had to file its motion by the original deadline and give the Defendants ten days to review it and craft their motion having the advantage of a sneak peek of the SEC's motion. This provided an unexpected ten-day extension to the SEC for a motion that should have been near completion when the extension was granted that was not encumbered with the burdens of out-of-state travel and family obligations like it was for two members of the defense team.

Nevertheless, the SEC did not file its motion for summary judgment by the extended deadline. In fact, it did not even raise the issue about the need to file under seal with counsel for the Defendants, and simply filed its Motion to Seal after the dispositive motion deadline.² A motion to file under seal does not toll a deadline. In fact, the Southern District of Florida Local Rules specifically contemplate what a party should do when, as the SEC claims here, it was ready to file its motion, but the Court had not granted a motion to seal. The local rules state: "If, prior to the issuance of a ruling on the motion to file under seal, the moving party elects or is required to publicly file a pleading, motion, memorandum, or other document that attaches or reveals the content of the proposed sealed material, then the moving party must redact from the public filing all content that is the subject of the motion to file under seal." S.D. Fla. L.R. 5.4(b)(1). Thus, the SEC should have filed its motion for summary judgment, redacting all content that actually reveals the content of the Confidential information.³ Thus, there is no excuse for the SEC not filing the motion for summary judgment by the deadline on the basis that the Motion to Seal, also filed after the deadline, was pending.

Putting aside that the SEC did not file a redacted motion for summary judgment as required by S.D. Fla. L.R. 5.4(b)(1), the SEC did not even provide a service copy of the motion to the parties by the deadline. There is no dispute that all parties and their counsel are entitled to receive full unredacted copies of all Confidential information. Had the SEC truly been finished with the motion in advance of the deadline and realized it could not file it at the 11th hour, it should have at least served a copy of the completed motion on all parties to preserve the fairness and attempt to meet the deadline. It did not do so. In fact, the SEC reached out to confer with the Defendants about the Motion to Seal

² The SEC's failure to confer before filing its Motion to Seal alone provides grounds to deny the motion and impose sanctions. S.D.F.L. L.R. 7.1(a)(3).

³ Of course, the Defense would not have opposed the later filing of exhibits that were entirely confidential and could not have been sufficiently redacted.

at noon on October 5, 2021. Counsel for Mr. LaForte immediately responded stating: “We’re having a bit of trouble understanding why the entire motion needs to be filed under seal. Could you please send us a service copy of the motion so we can review it and make an informed decision?” Over an hour later, the SEC responded stating that it had spoken with the Receiver and was going to file a modified version of the motion for summary judgment. Thus, the SEC is using its tenuous Motion to Seal as an unauthorized extra extension of time to continue to edit its motion for summary judgment. The SEC’s explanation is simply not credible, and it should be held to filing the motion by the deadline. The SEC should not be rewarded by its last-minute request especially since it failed to comply with S.D. Fla. L.R. 5.4(b)(1), has not provided a service copy of the completed motion to all Parties, and the Defendants have already filed their motion for summary judgment.

CONCLUSION

WHEREFORE, the Defendant, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta respectfully request that this Court Deny the Motion to Seal, strike any motion for summary judgment filed by the SEC, and for such other and further relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed on the Court’s CM/ECF system which will serve a copy on all counsel of record via notices of electronic filing.

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