UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA, *ex rel.* JON H. OBERG, Plaintiff, v. NELNET, INC., *et al.* Defendants.	Civil Action No. 1:07-cv-960-CMH-JFA

MOVANT CAMOIN'S SUPPLEMENTAL RESPONSE TO OPPOSITION TO MOTION REQUESTING COPIES OF EXHIBITS FILED UNDER SEAL

Pursuant to this Court's order of May 16, 2023 (Doc. 1003), movant Michael J. Camoin, through undersigned counsel, submits this supplemental response to the opposition (Doc. 1001) filed by Nelnet, Inc., Nelnet Education Loan Funding, Inc., Brazos Higher Education Authority, and Brazos Higher Education Service Corporation (collectively, Nelnet and Brazos) to Mr. Camoin's pro se request (Docs. 997 & 1000) for documents filed under seal in this matter (hereinafter, the Sealed Documents).[1]

The Sealed Documents were filed by relator Jon H. Oberg on July 12, 2010 (Docs. 411–414) in connection with the filing of summary judgment motions in this qui tam action under the False Claims Act against multiple defendants engaged in the business of providing and servicing

[1] Mr. Camoin seeks the unsealing of the redacted information in Doc. 408, as well as the unsealing of the following documents: Docs. 411 (Exs. 51–52, 54–55, 58–69, 72–77, 80–87), 412 (Exs. 88–107, 114–18, 122–26, 130–31, 134, 137–38, 142, 144, 149–55, 158–62), 413 (Exs. 167–75, 179–82, 184–200), 414 (attachment I, Part 2). *See* Doc. 997; Letter from Michael Camoin (Apr. 15, 2023). The April 15, 2023, letter from Mr. Camoin was mailed to the Court, but it has not appeared on the electronic docket; accordingly, it is attached hereto as Exhibit 1.

student loans. The documents relate to Oberg's claim that the defendants, including but not limited to Nelnet and Brazos, fraudulently manipulated their loan portfolios to obtain increased federal subsidies. *See* Third Amended Complaint (Doc. 228). Mr. Camoin seeks access to these documents because he believes them to be "historically significant" and relevant to the ongoing debate about federal student-loan policies. *See* Doc. 1000.

Plaintiff and Defendants Arkansas Student Loan Authority, Educations Loans, Inc., Kentucky Higher Education Student Loan Corp., Panhandle Plains Higher Education Authority, Panhandle-Plains Management and Servicing Corp., Pennsylvania Higher Education Assistance Agency, SLM Corporation, Southwest Student Services Corporation, Student Loan Finance Corporation, and Vermont Student Assistance Corp. have not filed an opposition to his request. All Sealed Documents consisting of material produced by or concerning those parties should be promptly unsealed.

Nelnet and Brazos, however, oppose his request but have made no attempt to satisfy their burden of proving that permanent sealing of the Sealed Documents is justified. And in the absence of such a showing, the First Amendment and the common law grant Mr. Camoin the right to access those materials. Accordingly, this Court should grant his request and unseal the Sealed Documents in their entirety.

ARGUMENT

I. The Sealed Documents should be released in light of the public's First Amendment and common-law rights to access.

A. "It is well settled that the public and press have a qualified right of access to judicial documents and records filed in civil and criminal proceedings." *Company Doe v. Public Citizen*, 749 F.3d 246, 265 (4th Cir. 2014). "Public access serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of

the judicial system, including a better perception of fairness." *Id*. at 266 (quoting *Littlejohn v. Bic Corp*., 851 F.2d 673, 682 (3d Cir. 1988)). That right of access springs from two sources: "the First Amendment and the common-law tradition that court proceedings are presumptively open to public scrutiny." *Id.* at 265 (citing *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004) (*VDSP*)). "[T]he First Amendment secures a right of access 'only to particular judicial records and documents,' and, when it applies, access may be restricted only if closure is 'necessitated by a compelling government interest' and the denial of access is 'narrowly tailored to serve that interest.'" *Id*. at 266 (citations omitted) (quoting). "The common-law presumptive right of access extends to all judicial documents and records, and the presumption can be rebutted only by showing that 'countervailing interests heavily outweigh the public interests in access.'" *Id.* at 265–66 (quoting *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)).

"[W]hether arising under the First Amendment or the common law," the "right of public access … 'may be abrogated only in unusual circumstances.'" *Id.* at 266 (quoting *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 182 (4th Cir. 1988)). Thus, "[t]he burden to overcome a First Amendment right of access rests on the party seeking to restrict access, and that party must present specific reasons in support of its position." *VDSP*, 386 F.3d at 575. Likewise, "[t]he party seeking to overcome the [common-law] presumption bears the burden of showing some significant interest that outweighs the presumption." *Rushford*, 846 F.2d at 253. "Some of the factors to be weighed in the common law balancing test 'include whether the records are sought for improper purposes, such as promoting public scandals or unfairly gaining a business advantage; whether release would enhance the public's understanding of an important historical event; and whether the public has already had access to the information contained in the records.'" *VDSP*, 386 F.3d at 575 (quoting *In re Knight Publ'g Co*., 743 F.2d 231, 235 (4th Cir. 1984)).

Local Civil Rule 5 implements these principles. That rule requires that a motion to maintain a document under seal would have to include, among other things, "why sealing is necessary," the "appropriate evidentiary support for the sealing request," "an analysis of the appropriate standard to be applied for that specific filing, and a description of how that standard has been satisfied." The local rule further provides that "[i]f the Court determines that the appropriate standards for filing material under seal have not been satisfied, it may order that the material be filed in the public record," and that "[f]ailure to file a timely motion to seal may result in the document being placed in the public record." Further, "'bare allegation of harm'", without any evidentiary support is insufficient to meet the high bare required for sealing. *Williams v. Big Picture Loans, LLC*, Civ. No. 3:17-cv-461 at 2 (E.D.Va. May 30, 2023) quoting *Doe v. Public Citizen*, 749 F.3d 246, 269 (4th Cir. 2014).

Here, no party has satisfied its burden of rebutting the presumption of public access to the Sealed Documents. In a June 11, 2010, order, this Court "allow[ed] the parties to file certain exhibits to their summary judgment motions under seal *temporarily*," while "allowing those parties and non-parties asserting confidentiality over certain documents the opportunity *to move the court to maintain the documents under seal*." Doc. 308 (emphases added). The Court set a deadline of August 20, 2010, for the parties to move to seal the documents "should they so desire," and provided that any such motion must "comply fully with Local Civil Rule 5." *Id.* For over a decade, no party has moved to request that the Court maintain the documents under seal, let alone explained why sealing is justified. And because the parties have never moved to maintain the documents under seal, this Court has not made (or even been asked to make) the requisite findings about whether the standards for sealing are satisfied. Accordingly, pursuant to the First Amendment, the

common law, and this Court's own Local Rule, the requested records must be made available to Mr. Camoin.

B. Nelnet and Brazos argue that the public lacks a right to access the Sealed Documents because, as a result of settlement, this Court did not resolve the motions for summary judgment to which the Sealed Documents relate. Opp. 5–9. Neither the First Amendment nor the common-law right of access to records filed with the Court, however, is contingent on judicial action relating to those records.

1. "[T]he First Amendment right of access attaches to materials filed in connection with a summary judgment motion." *Company Doe*, 749 F.3d at 267 (citing *Rushford*, 846 F.2d at 252–53). In *Rushford*, the Fourth Circuit considered whether documents submitted in connection with summary judgment motions should be unsealed notwithstanding a protective order covering those documents. 846 F.2d at 252. The court observed that "[o]nce … documents are made part of a dispositive motion, such as a summary judgment motion, they 'lose their status of being "raw fruits of discovery."'" *Id*. (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 539, 544–45 (E.D.N.Y. 1983)). "Because summary judgment adjudicates substantive rights and serves as a substitute for a trial," documents submitted as part of a summary judgment motion are akin to documents "submitted to the court as evidence" in a trial. *Id*. Against that backdrop, the Fourth Circuit concluded that "the more rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case." *Id*. at 253; *accord Sprint Nextel Corp. v. Wireless Buybacks Holdings, LLC*, 938 F.3d 113, 120 n.2 (4th Cir. 2019) ("Summary-judgment materials are subject to the public's right of access to judicial records under the First Amendment."); *VDSP*, 386 F.3d at 578 (examining right of access to exhibits filed as part of an opposition to summary judgment under "the more rigorous First Amendment standard"

identified in *Rushford*); *see also Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993) (trial evidence in a case that settled before verdict could not be sealed except for "compelling reasons" (internal quotation marks omitted)).

The Fourth Circuit has never ruled that a settlement before decision on summary judgment has the effect of stripping the public of its First Amendment right to access summary judgment material. To the contrary, the court of appeals' recent decision in *Courthouse News Service v. Schaefer*, 2 F.4th 318 (4th Cir. 2021), supports the principle that a judicial decision is not a prerequisite to the existence of that right. In *Courthouse News Service*, the Fourth Circuit held that the public had "a First Amendment right of access to civil complaints, even before any judicial action in the case." *Id.* at 327. Moreover, the court explained that, where the right exists, access must be granted "as expeditiously as possible." *Id.* at 329. The expeditiousness requirement is consistent with the notion that the right to access is not contingent on court action on a summary judgment motion. Indeed, in *Company Doe*, the Fourth Circuit faulted the district court for allowing the "motion to seal to remain pending for nine months while it adjudicated the merits of Company Doe's claims," thereby preventing the public and the press from "monitor[ing] the progress of the litigation as it unfolded." 749 F.3d at 273.

The common law likewise "recognize[s] a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (footnote reference omitted). Judicial records covered by the common-law right of access include "documents filed with the court … if they play a role in the adjudicative process, or adjudicate substantive rights," such as motions "filed with the objective of obtaining judicial action." *In re United States*, 707 F.3d 283, 290–91 (4th Cir. 2013). "[D]ocuments submitted to a court for its consideration in a summary judgment motion are—as a matter of law—

judicial documents to which a strong presumption of access attaches" under the common law. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir. 2006).

2. Nelnet and Brazos seek to avoid the disclosure required by the First Amendment and the public's common-law access rights by invoking the protective orders under which the Sealed Documents were produced in discovery. *See* Opp. 6–9; *see also* Protective Order (Doc. 179). The protective order does not aid Nelnet and Brazos here. Paragraph 13 of the protective order provides that, if documents subject to the protective order are "required to be filed with the Court, the parties shall comply with paragraph 12 of the Court's January 5, 2010 Rule 16(b) Scheduling Order (Doc. 174)." Paragraph 12 of the Rule 16(b) Scheduling Order, in turn, provides that:

> Filings under seal are *disfavored and discouraged*. *See Va. Dep't of State Police v. Washington Post*, 386 F.3d 567, 575–76 (4th Cir. 2004). Any motion to file a document under seal, including a motion for entry of a protective order containing provisions for filing documents under seal, *must comply with Local Civil Rule 5* and must be noticed for a hearing in open court. The motion *must state sufficient facts supporting the action sought*, and each proposed order must include specific findings.

Doc. 174 (emphases added). Thus, this Court's prior orders have consistently incorporated the presumption that documents filed with this Court could remain shielded from public view only upon an affirmative showing that sealing was warranted. No such showing has been made here.

None of the cases cited by Nelnet and Brazos suggests that a protective order designed to facilitate discovery can forever shield documents filed with the Court in connection with summary judgment motions. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), held that a protective order that places "restraints … on discovered, *but not yet admitted*, information" does not offend the First Amendment. *Id.* at 33 (emphasis added). Documents filed in connection with a summary judgment motion, by contrast, are not merely "discovered," but have been filed in court. *Rushford* confirms this understanding of *Seattle Times*, explaining that "discovery, which is ordinarily

conducted in private, stands on a wholly different footing than does a motion filed by a party seeking action by the court." 846 F.2d at 252. Likewise, in *Level 3 Communications, LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572 (E.D. Va. 2009), the district court recognized that a protective order relating to "pre-trial discovery" does not "govern[] the public availability of materials that have been submitted to courts in connection with civil pleadings or motions (dispositive or otherwise) … whatever the materials' origins or pre-trial confidentiality status might previously have been." *Id.* at 576. Accordingly, Nelnet and Brazos's assertion that the Sealed Documents "are no different than the rather voluminous documents produced by the parties in discovery and protected under the Court's Order," Opp. 7, is incorrect. Documents "made part of a dispositive motion, such as a summary judgment motion," are fundamentally different from mere discovery documents. *Rushford*, 846 F.2d at 252.

Contending that disclosure is not appropriate because the Court did not resolve the summary judgment motions to which the Sealed Documents relate due to settlement, Opp. 7, Nelnet and Brazos selectively quote *VDSP* to argue that a court should evaluate whether "discovery materials should be kept under seal even after they are made part of a dispositive motion, […] at the time it grants a summary judgment motion." *Id.* at 5 (quoting *VDSP*, 386 F.3d at 576, quoting in turn, *Rushford*, 846 F.2d at 253); *see also id.* at 7. Both *VDSP* and *Rushford*, however, were about preventing the "continued effect to a pretrial discovery protective order" beyond a district court's decision on summary judgment. *VDSP*, 386 F.3d at 576 (quoting *Rushford*, 846 F.2d at 253). Neither decision suggests that a settlement that obviates the need for a summary judgment decision relieves a court of the obligation to determine whether the First Amendment and the common law permit summary judgment materials to remain under seal permanently.

Nelnet and Brazos argue that Mr. Camoin's unsealing request should be denied because "Mr. Camoin has failed to state any basis upon which the Court should unseal the documents." Opp. 4. The burden, however, rests on parties opposing release to demonstrate why such access should be denied. *See VDSP*, 386 F.3d at 575; *Rushford*, 846 F.2d at 253. Thus, it is *Nelnet and Brazos's* burden to demonstrate that the Sealed Documents should remain sealed, not Mr. Camoin's burden to demonstrate that they should be unsealed.

Neither of the cases on which Nelnet and Brazos rely suggests the contrary. In the unpublished decision in *Under Seal v. Under Seal*, 230 F.3d 1354, 2000 WL 1294239 (4th Cir. 2000) (per curiam), the Fourth Circuit stated that "[b]ecause the First Amendment and the common law provide different levels of protection, it is necessary for the district court to determine the source of the public's right to access before a claim may be evaluated." *Id.* at *1. The court of appeals did not impose that burden on the *requestor* but faulted *the district court* for sealing the record without explaining the basis for its decision. *Id.* at *2 ("[T]he district court's order failed to state whether its decision was based on the common law or the First Amendment, and the court sealed the record without indicating exactly what the record contained."). And in *Stephens v. County of Albemarle*, 422 F. Supp. 2d 640 (W.D. Va. 2006), the district court *granted* the request to unseal a settlement agreement even though the requestor "fail[ed] to identify which theory of public access she [was] pursuing, [or] point to any legal authority to support her request." *Id.* at 643. *Stephens* thus refutes Nelnet and Brazos's contention that Mr. Camoin carried the burden to justify his request to access the Sealed Documents.

II. Nelnet and Brazos's other arguments lack merit.

Nelnet and Brazos argue that the Court should maintain the seal for reasons that have nothing to do with the First Amendment or common-law standards. Their arguments lack merit.

To begin with, Nelnet and Brazos argue that they "were effectively precluded from filing … a motion [to seal] as a result of the Stay Orders of the Court." Opp. 3. Specifically, they refer to this Court's orders of August 13 and October 18, 2010 (Docs. 558 & 564), which provided that "[w]hile this matter is stayed no pleadings shall be filed other than those related to the resolution of the claims by the parties." Those orders, however, did not supersede the June 11, 2010 temporary-sealing order setting an August 20 deadline for any motions to maintain the seal on documents that had already been filed with the Court. For example, the August 13 order's reference to a stay of "all proceedings in this action relating to pending motions and the trial" supports that the purpose of the stay order was to halt filings relating to preparation of the case for trial, rather than to deny the public access to the Sealed Documents without any judicial determination that sealing was warranted. To the extent that Nelnet and Brazos had any questions about whether the August and October stay orders applied to the June temporary-sealing order, they had every opportunity to request clarification from this Court. They did not.

Moreover, even if the stay orders were intended to apply to motions to seal pursuant to the June 11 temporary-sealing order, Nelnet and Brazos provide no basis for their suggestion that the stay orders authorize maintaining the Sealed Documents under seal *indefinitely*. Such an outcome would nullify the public's First Amendment and common-law right of access to court records, as well as having the effect of circumventing the procedures for sealing court records set forth in Local Civil Rule 5.

Nelnet and Brazos's contention that their settlement agreement with Plaintiff Oberg and the federal government did not call for unsealing the Sealed Documents is beside the point. *See* Opp. 3. As Mr. Camoin has explained (Doc. 1000), Dan E. Moldea's book *Money, Politics, and Corruption in U.S. Higher Education: The Stories of Whistleblowers* recounts Mr. Oberg's

understanding that the settlement agreement did not *displace* this Court's order requiring parties seeking to maintain the Sealed Documents under seal to make the requisite showing for that relief. *See* Doc. 1000-1, at 4 ("Of particular importance to me was Judge Anderson's order of June 11, 2010, that unsealed all of the exhibits as of August 20th, including 'confidential' and 'highly confidential' information, unless the defendants made motions on particular exhibits to seal them permanently."). Nelnet and Brazos identify nothing in the settlement agreement that contradicts that understanding. In any event, a settlement agreement between the parties cannot strip third-party requestors like Mr. Camoin of their First Amendment and common-law rights to access judicial records.

Finally, Nelnet and Brazos question Mr. Camoin's purpose in seeking access to the Sealed Documents. Opp. 8–9. They suggest that he seeks to "promote a public scandal about practices" that were the subject of Mr. Oberg's False Claims Act claims, noting in particular that "Mr. Camoin is a documentary filmmaker with a record of producing films related to commercial lenders and servicers of student loans." *Id.* at 9. Mr. Camion's right to access judicial documents, however, is not conditioned on the use to which he would put them. *See Nixon*, 435 U.S. at 597–98 (recognizing that the "interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government" (internal citations omitted)). In any event, Mr. Oberg's claims did not concern a dispute between wholly private parties, but a qui tam action on behalf of the federal government concerning activities that affect taxpayers, borrowers, and the public at large. It is consistent with the First Amendment and the common-law right of access for Mr. Camoin to obtain the Sealed Documents for the purpose of raising public awareness about the operations of the student-loan

industry. Particularly here, where there has been *no* attempt to show that the presumption of access has been overcome, there is no basis for this Court to conclude that the Sealed Documents should remain hidden from public view.

Finally, in a footnote, Nelnet and Brazos request an opportunity to file a motion to permanently seal their documents should the Court grant Mr. Camoin's motion. Opp. 9 n.8. They offer no basis for a second bite at the apple. If, however, the Court grants their request to file such a motion, the Court should order the immediate unsealing of the Sealed Documents that were not originally produced by Nelnet and Brazos. *See* Opp. 8 n.5. Because no other party has opposed Mr. Camoin's request for access to the Sealed Documents, there is no reason to delay unsealing of, and Mr. Camoin's access to, those documents.

CONCLUSION

The motion to unseal should be granted.

June 2, 2023

Respectfully submitted,

/s/ *Leonard A. Bennett*

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CERTIFICATE OF SERVICE

I certify that on June 2, 2023, I caused the foregoing to be filed with the Clerk of the Court through the Court's CM/ECF system, which will serve a notice of the filing on all counsel registered in this case. I further certify that I caused the foregoing to be mailed by U.S. mail to the following non-CM/ECF participants:

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