UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Clarksburg Division

THEODORE HOSAFLOOK,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 1:17-cv-00028
v.	)	(Judge Irene M. Keeley)
	)	
OCWEN SERVICING, LLC,	)	
	)	
Defendant.	)	

REPLY MEMORANDUM OF PUBLIC CITIZEN, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, WEST VIRGINIA CONSUMER PROTECTION ALLIANCE, AND WEST VIRGINIA ASSOCIATION FOR JUSTICE SUPPORTING THEIR MOTIONS FOR LEAVE TO INTERVENE AND TO UNSEAL COURT RECORDS

1. The Motion to Intervene Should Be Granted.

Defendant Ocwen Servicing has filed an opposition to the motion of Public Citizen, National Association of Consumer Advocates, West Virginia Consumer Protection Alliance, and West Virginia Association for Justice to unseal certain court records, but it has not opposed their motion for leave to intervene. Because no opposition has been filed, this brief is bring efiled as a reply only to the motion to unseal. But intervenor status matters: it would enable movants to defend a favorable ruling on unsealing it it were appealed by Ocwen, and it would give movants the opportunity to appeal an unfavorable ruling on the motion to unseal. Therefore, movants ask that the motion to intervene be granted and not simply assumed.

2. The Court's Previous Sealing Rulings and the Parties' Protective Order Should Be Given No Weight at This Stage of the Proceeding.

Ocwen's opposition to the motion to unseal ("Opp.") relies throughout on the claimed soundness of the Court's previous decision on the sealing of Exhibit M and on the sealing of the summary judgment ruling. Ocwen argue that intervenors are evading those rulings as well as the parties' previous agreement to a protective order. It also relies at length on the Fourth Circuit's decision in *Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004). Upholding the seal, Ocwen contends, is needed to protect the government's interest in effective discovery. None of these arguments is sound, for several reasons.

First, defendants have offered no rebuttal to the argument in intervenors' opening brief that this Court's sealing of Exhibit M and its summary judgment opinion were procedurally defective, both because the public was denied notice of the proposed sealing and because no explanation of the reasons for sealing has ever been made public. Although Ocwen tries to support the Court's sealing decisions post hoc in its brief and an affidavit, it has not argued that the Court could properly have granted sealing given defendants' failure to present any **evidence** to show its claimed need for confidentiality. Because the Court's previous rulings on this subject were made in the absence of such evidence and such notice, the Court should approach the question of sealing both the exhibit and the opinion de novo.[1]

Second, the fact that the parties agreed to a protective order and that Exhibit M was produced pursuant to a protective order has no weight now that the issue is whether the public

[1] Ocwen's only response to the procedural flaws is to suggest (at 13) that they are cured by the fact that representatives of the public interest are now arguing for access. If, however, the Court's ruling on those arguments are influenced in any way by its previous determinations on that point, then the procedural flaws in the original ruling would infect the ruling on this motion to unseal.

interest in access to court records is presented. Intervenors cited several cases in their opening brief, at 8, standing for the proposition that the parties to litigation cannot agree to waive the public's right of access to judicial records or the presumption that specific records should be open. Defendants have not rebutted that argument or offered contrary authority.

Even assuming that the documents were properly considered confidential during the discovery stage, that says very little about whether it is proper to keep documents used to support or oppose summary judgment on the merits under seal. *Rushford v. New Yorker Magazine*, 846 F.2d 249 (4th Cir.1988) (even when documents are subject to pretrial discovery protective order, once the documents are made part of a dispositive motion, they lose their status as being "raw fruits of discovery"; after all 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."); *see also Rosenfeld v. Montgomery Cty. Pub. Sch.*, 25 F. App'x 123, 132 (4th Cir. 2001) ("The First Amendment right of access, which provides a stronger presumption in favor of access than the common-law right, applies to documents submitted in support of summary judgment motions in civil cases [and] requires a showing that the denial of access is necessitated by a compelling government interest and is narrowly tailored to serve that interest in order to justify the sealing of documents.").

Pittston, the one case that Ocwen cites on this point, is inapposite. There, it was a **party** that was arguing for unsealing, and it said it needed access to argue its case effectively. The Court of Appeals responded that Pittston's needs were met because it **did** have access. 368 F.3d at 406. Moreover, the records had been obtained from a non-party to the litigation, which implicates privacy interests not present in this case, where Exhibit M was obtained from a party to the litigation. *Id.* Defendant invokes a concern about parties evading protective orders by

submitting documents with their dispositive motion papers. Opp. at 10. But as the United States Court of Appeals for the Second Circuit explained, district courts may strike attachments obtained under protective orders from the record when they are filed without any genuine relevance to the summary judgment arguments, thus ensuring that they do not **become** judicial records subject to the presumption of access. *Brown v. Maxwell*, 929 F.3d 41, 51–52 (2d Cir. 2019). That concern has no bearing on Exhibit M, which was central to the issues in this case. In fact, Ocwen's opposition (at 13) admits that Exhibit M was so central that it was discussed on four separate pages of the Court's thirty-eight page opinion.

3. Exhibit M Should Be Unsealed, in Whole or in Part.

Relying on the affidavit of Sony Prudent, Ocwen argues that Exhibit M should remain under seal because it contains trade secrets. That argument is wrong, for several reasons.

First, although the Prudent affidavit incants conclusions that Exhibit M "reflect[s] policies and processes" that were developed over "a period of years" by "many teams of employees," and that disclosure of Exhibit M "would be valuable to competitors," the affidavit does not explain how competitors would derive value from seeing the Exhibit. Given how conclusory the affidavit is, defendant is essentially asking the Court to take Prudent's assertion on faith, rather than giving the Court sworn facts from which it can draw its own conclusions on the matter of Ocwen's need for secrecy. Moreover, the Prudent affidavit, in some respects, proves too much: Prudent states that Exhibit M provides Ocwen with a competitive advantage, but Prudent swears that this is equall**y** true of "many of the other documents . . . reviewed by this Court when deliberating on the cross-motions for summary judgment." DN 186-1 ¶ 8. According to Prudent's affidavit, **all** of these documents "provide the Defendant with a competitive advantage in the marketplace over its competitors." *Id.* Yet it is only Exhibit M that Ocwen

asked to be kept under seal; nothing in defendant's affidavit explains why disclosing Exhibit M would cause additional competitive harm. Indeed, although the Prudent affidavit insists that other Ocwen trade secrets are scattered throughout the public summary judgment record, nothing in the affidavit specifically says that Ocwen has suffered competitive harm from those disclosures. But if there is no evidence of such competitive harm, then why should the Court simply accept Prudent's ipse dixit that disclosing Exhibit M will cause genuine harm? For that reason alone, the Court should unseal Exhibit M in its entirety.

Second, the conclusory character of the affidavit is a particular concern given that Exhibit M is a four-year-old document, dating from 2015. Considering that plaintiff had already made a point of the possible outdated status of the document in DN 82, at 4, the failure of Ocwen's affiant to address whether the content of Exhibit M reflects current practices is striking. Moreover, there is good reason to believe that Exhibit M is no longer in effect, in that Ocwen has been forced by a series of recent consent decrees to changed its payment processing practices. Wagner Second Affidavit ¶ 6.

The question of Exhibit M's current status matters because sealing documents containing outdated information is improper unless the proponent of sealing can "proffer, by way of any specific and particularized allegation, how the release of such outdated information would result in a clearly defined and serious injury to the company." *Nelson v. Nissan N. Am.*, 2014 WL 12617593, at *7 (D.N.J. Dec. 22, 2014) (internal quotations and citations omitted); see also *Cameron Int'l Corp. v. Abbiss*, 2016 WL 8738399, at *1 (S.D. Tex. Nov. 4, 2016) (denying motion to seal finding that information sought to be sealed was not confidential, in part, because "much of the confidential information referenced during the hearing was outdated").

Third, parts of Exhibit M have already been disclosed in publicly filed documents that defendant never asked to be kept under seal: in two of plaintiff's briefs, as well as in excerpts of a deposition that was not subject to the protective order, which excerpts were publicly filed with the summary judgment papers. The specifics are set forth in paragraphs 2 and 3 of Ms. Wagner's attached affidavit. To the extent that Exhibit M contains materials discussing the same subject, confidentiality has been waived. *The Penn Mut. Life Ins. Co. v. Jonathan S. Berck*, 2010 WL 3609532, at *2 (D. Md. Sept. 14, 2010) (when party allows public filing of supposedly confidential materials it has waived confidentiality with respect to other documents relating to the same subject). At the very least, any parts of Exhibit M that have been publicly disclosed without objection from Ocwen should be unsealed.

Fourth, there is significant reason to believe that parts of Exhibit M are contrary to law, as described in paragraph 5 of the attached Wagner affidavit. Moreover, the lawfulness of parts of Exhibit M were at the heart of the issues in this case, as shown by the fact that, according to defendant's own submissions, language from Exhibit M appears verbatim on four separate pages of the Court's summary judgment ruling. A corporation cannot have a proprietary interest in keeping confidential policies and procedures that violate the law. Defendant's efforts to do so here amount to an attempt to keep secret "embarrassing or injurious revelations about a corporation''s image [which is not] a compelling interest sufficient to defeat the public's First Amendment right of access." *Company Doe v. Public Citizen*, 749 F.3d 246, 269 (4th Cir. 2014).

Even when a party has met its burden of showing a need to keep some of its documents confidential, "the court must then 'balance . . . the public and private interests' to determine whether [sealing] is warranted." *In re Violation of R. 28(D)*, 635 F.3d 1352, 1358 (Fed. Cir.

2011), quoting *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002). Here, the public has a strong interest in learning about possible illegalities in Exhibit M, and in understanding the basis for the Court's ruling insofar as parts of Exhibit M were specifically quoted in the Court's ruling on the dispositive motions. The Court should strike the balance by unsealing the entire Exhibit or, at least, the parts that were discussed in the Court's opinion.

4. The Court's Summary Judgment Ruling Should Be Unsealed in Its Entirety.

Defendant Ocwen appears to concede that at least the great bulk of the Court's summary judgment ruling should be unsealed; it argues only that the specific passages on pages eight, nine, thirty-six and thirty-seven of the Court's opinion which, according to Ocwen's brief, "contain verbatim trade secrets" from Exhibit M, Opp. at 13, should be redacted. But the evidence submitted in support of sealing does not support that outcome, and the law does not support it either. The affidavit of Sony Prudent avers generally that Exhibit M reflects policies and processes whose disclosure to competitors could cause Ocwen competitive harm, but Prudent never avers specifically that the unsealing of the entirety of the summary judgment ruling would cause such harm. Given the lack of any evidence showing that public disclosure of these discrete passages would cause competitive harm, the entire opinion should be unsealed.

Furthermore, although without seeing the summary judgment ruling even in the redacted form that Ocwen now seeks, intervenors cannot argue specifically, intervenors note that in a 38 page opinion, it is likely that material appearing on pages eight and nine are in the Court's enumeration of the relevant facts of the case, while pages thirty-six and thirty-seven are likely to contain the Court's legal reasoning and ultimate conclusions on the summary judgment ruling. To the extent that language from Exhibit M appears verbatim in the Court's conclusions of law,

the public's interest in disclosure to enable understanding of the Court's ruling would be at its apogee.

As argued above on page 5, the law requires the Court to balance the public and private interests in making its determinations of this motion to unseal. Indeed, the First Amendment interest in access to summary judgment opinions is as strong if not stronger than the public's interest in access to the evidence submitted in connection with the motion:

> The public has an interest in learning not only the evidence and records filed in connection with summary judgment proceedings but also the district court's decision ruling on a summary judgment motion and the grounds supporting its decision. Without access to judicial opinions, public oversight of the courts, including the processes and the outcomes they produce, would be impossible. Indeed, it would be anomalous to conclude that the First Amendment right of access applies to materials that formed the basis of the district court's decision ruling on a summary judgment motion but not the court's opinion itself. We therefore hold that the First Amendment right of access extends not only to the parties' summary judgment motions and accompanying materials but also to a judicial decision adjudicating a summary judgment motion.

Company Doe, 749 F.3d at 267-68 (citations omitted).

Balancing the interests here compels the conclusion that the entire opinion, including the parts that contain language verbatim from Exhibit M, should be unsealed.

CONCLUSION

The motions of Public Citizen, National Association of Consumer Advocates, West Virginia Association for Justice, and West Virginia Consumer Protection Alliance for leave to intervene and to unseal should be granted.

Respectfully submitted,

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December 10, 2019

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the CM/ECF participants registered to receive service in this action.

/s/ Anthony J. Majestro