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

THEODORE HOSAFLOOK,

Plaintiff,

v.

Civil Action No. 1:17-cv-00028
(Judge Irene M. Keeley)

OCWEN SERVICING, LLC,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION OF PUBLIC CITIZEN, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, WEST VIRGINIA CONSUMER PROTECTION ALLIANCE, AND WEST VIRGINIA ASSOCIATION FOR JUSTICE TO UNSEAL COURT RECORDS

In this case, Plaintiff Russell Hosaflook alleged that Defendant Ocwen Loan Servicing, the largest non-bank servicer of mortgage loans in the United States, involving more than a million homeowners, was engaged in willful and systematic misconduct in servicing his mortgage loan. Intervenors have moved to unseal one of the exhibits filed in support of Plaintiff's motion for partial summary judgment and the Court's memorandum opinion denying the parties' cross-motions.

BACKGROUND

Defendant moved for summary judgment, and Plaintiff cross-moved for partial summary judgment. In support of his motion for partial summary judgment, Plaintiff submitted as Exhibit M a document that he had obtained from Defendant pursuant to a protective order. As required by that order, he submitted the document under a temporary seal, pending the Court's decision about whether the seal should become permanent.

Defendant did not move to seal Exhibit M—a five-page document from 2015, two pages of which set forth some of Defendant's basic policies for payment processing. DN 82, at 3-4. Defendant sought sealing only in a document styled as an "opposition" to temporary sealing. DN 80. Nor did Defendant provide an affidavit or any other evidence in support of its brief contending that disclosure of the document could harm its competitive interests. Defendant did not argue that a "compelling" countervailing interest justified sealing. Thus, Defendant never placed the public on notice that permanent sealing had been sought, and it never supplied evidence in support of its contention that the law justified sealing.

On the date of the pretrial conference, the Clerk sent the parties an email attaching the Court's ruling denying summary judgment for either side and provided the parties with a thirty-eight-page opinion explaining the reasons for its ruling. The email indicated that the ruling was being filed under seal. At the pretrial conference, the Court acceded to Defendant's request that Plaintiff's Exhibit M be placed under a permanent seal, and stated that it had decided, *sua sponte,* that the summary judgment decision itself would be sealed. Although the Court gave the parties an oral explanation of reasons for sealing its ruling, it never embodied that reasoning in a written ruling, and no transcript containing the reasoning has been prepared. Thus, the reasoning for sealing the two documents is not available to the public.

The parties settled the litigation before trial. After judgment was entered based on that settlement, Plaintiff moved to unseal the summary judgment opinion. The Court denied the motion on the ground that Plaintiff had willingly accepted the settlement, including all of the Court's rulings that had preceded the settlement, and had "failed to sustain the heavy burden" of justifying relief under Rule 60(b) of the Federal Rules of Civil Procedure for undoing a preliminary ruling which, the Court suggested, had helped produce the settlement. DN 181, at

13. The Court acknowledged that both the common law and the First Amendment give the public a presumptive right of access to court records, but it did not address those rights because only a **party** was requesting unsealing. This ruling was published by Westlaw at 2019 WL 3432412 (N.D.W.Va. July 30, 2019).

Intervenors learned about this case and reached out to the parties to seek their concurrence to this motion. Levy Affidavit ¶ 4. Plaintiff has concurred; Defendant has not responded. Levy Affidavit ¶¶ 4, 5.

ARGUMENT

"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) (citing *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 n.17 (1980), *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978), and *Media Gen. Operations v. Buchanan*, 417 F.3d 424, 428 (4th Cir. 2005)). "The right of public access springs from the First Amendment and the common-law tradition that court proceedings are presumptively open to public scrutiny." *Id.* (*citing Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004)). The United States Court of Appeals for the Fourth Circuit, along with other federal and state courts across the country, have consistently held that the common law and the First Amendment afford the public a presumptive right of access to court hearings and court records in civil cases. *Company Doe*, 749 F.3d at 265; *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 576, 575 (4th Cir. 2004).[1] Rulings on dispositive

[1] Decisions from other jurisdictions include *Flynt v. Lombardi*, 782 F.3d 963, 966 (8th Cir. 2015); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 657 (3d Cir. 1991); *Public Citizen v. Liggett Grp.*, 858 F.2d 775, 783 (1st Cir.1988); *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139 (2d Cir. 1987); *Rocky Mt. Bank v. Google, Inc.*, 2010 WL 11545710, at *2

motions, *Company Doe*, 740 F.3d at 267, and briefs and evidence submitted in support of or in opposition to such motions, *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988), are within the ambit of the First Amendment right of public access.

The Fourth Circuit has erected both substantive and procedural protections for the application of the First Amendment right of public access to court records. On the merits, the presumption of public access is a heavy one that can be overcome only if the party seeking secrecy shows (1) that restricting access is necessary to further a compelling governmental interest; (2) that the restriction is narrowly tailored to serve that interest; and (3) that no less restrictive means are available to adequately protect that interest. *See Virginia Dep't of State Police*, 386 F.3d at 575 (*quoting Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988)). "Even with findings adequate to support closure, the trial court must consider reasonable alternatives before access may be restricted." *In re Knight Pub. Co.*, 743 F.2d 231, 234 (4th Cir. 1984).

The Fourth Circuit has also demanded strict compliance with procedures that are designed to ensure that the public has a fair opportunity to assert its right of access and to have that right considered carefully before a seal is imposed. A court may temporarily seal the documents while the motion to seal is under consideration so that the issue is not mooted by the immediate availability of the documents. *In re Knight Pub. Co.*, 743 F.2d at 235 n.1; *In re Washington Post Co.*, 807 F.2d 383, 391 (4th Cir. 1986). Before sealing more permanently, the district court must:

(1) provide reasonable notice to the public that a hearing will be conducted on a

(N.D. Cal. Jan. 27, 2010), *rev'd on other grounds*, 428 Fed. App'x 690, 692 (9th Cir. 2011); *Verni ex rel. Burstein v. Lanzaro*, 404 N.J. Super. 16, 960 A.2d 405 (2008); *Hammock by*

> motion to restrict access;
>
> (2) provide the public with a reasonable opportunity to object to the motion;
>
> (3) consider less drastic alternatives to closure; and
>
> (4) if the district court determines that restricting access is appropriate, it must support its decision with specific findings, both as to the competing interests and as to potential alternatives, and state them on the record.

See Virginia Dep't of State Police, 386 F.3d at 576 (4th Cir. 2004); *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000).[2] When a district court does not observe the procedural prerequisites, the Fourth Circuit generally will remand the issue to the district court for further consideration using correct procedures and correct substantive standards. *See Under Seal v. Under Seal*, 230 F.3d 1354 (4th Cir. 2000); *In re Washington Post Co.*, 807 F.2d at 393; *Stone*, 855 F.2d at 182.

The sealing decisions in this case contravened both the procedural and the substantive requirements imposed by these precedents. First, there was no advance notice to the public that the permanent sealing of either the summary judgment ruling or Exhibit M to Plaintiff's summary judgment motion was going to be under consideration, and no member of the public was able to appear at a hearing on that issue to question the need for sealing and to represent the public interest in access to that record. "The opportunity to be heard on a closure or sealing

Hammock v. Hoffman-LaRoche, 142 N.J. 356, 662 A.2d 546 (1995).

[2] Several district courts within the Fourth Circuit have incorporated both the procedural and the substantive requirements for sealing into their local rules. *See, e.g.*, Local Civil Rule 4, Eastern District of Virginia; Local Rule 105(11), District of Maryland; Local Civil Rule 6.1, Western District of North Carolina; Local Civil Rule 5.03, District of South Carolina. Inclusion of these requirements in the local rules serves as a useful reminder to litigants of steps that are needed to limit later controversies.

motion is the "central requirement." *In re South Carolina Press Ass'n,* 946 F.2d 1037, 1039–40 (4th Cir. 1991). Second, the Court has never stated in a written ruling why the exhibit and the summary judgment ruling were sealed. Although "the Court articulated on the record its reasons for the sealing," DN 181, at 8, that explanation was not and is not available to the public. Indeed, the Court's explanation remains unavailable to the public because it has never been transcribed. Volokh Affidavit ¶ 4. Thus, for procedural reasons alone, the sealing orders must be vacated.

In addition, the orders should be vacated for lack of sufficient justification for sealing. As the Fourth Circuit has held, the First Amendment guarantees public access to "a 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." *Company Doe*, 749 F.3d at 267 (citing cases).

Here, Exhibit M and the summary judgment ruling involved serious claims of misconduct against one of the country's biggest loan-servicing operations. The Court's description of the disputed and undisputed facts about Defendant's actions is of serious interest to intervenors and their members, and potentially to thousands of homeowners whose loans have been serviced by the Defendant company. Moreover, intervenors understand that the thirty-eight page ruling addresses several recurrent legal issues that arise in cases of this kind, and that the Court's conclusions and reasoning about how the law applies to common sets of facts, and why summary judgment had to be denied, could be of substantial use to many other litigants in similar cases. *See* Wagner Affidavit ¶ 2. The ruling would also help the public understand the basis for the Court's denial of the cross-motions for summary judgment and thus to understand better the

judicial process.

Intervenors understand that the summary judgment ruling quoted two sentences — less than four lines in all — from the sealed Exhibit M. Wagner Affidavit ¶ 5. Even if Exhibit M were properly sealed, the two sentences would not justify sealing any more than the quoted material. Moreover, even those sentences should be unsealed because they apparently are relevant to the Court's reasoning for its ruling on summary judgment. Accordingly, the public interest in seeing that part of the exhibit is at its apogee. In addition, although Defendant filed a brief arguing for the sealing of the exhibit in general terms, it submitted no evidence justifying sealing. As the Fourth Circuit held in *Company Doe v. Public Citizen*, evidence, not just briefing, is required to justify sealing:

> Company Doe does not point us to any evidence that buttresses the district court′s conclusion. After scouring the record on appeal, we find no credible evidence to support Company Doe′s fear that disclosure of the challenged report of harm and the facts of this case would subject it to reputational or economic injury . . .. This Court has never permitted wholesale sealing of documents based upon unsubstantiated or speculative claims of harm.

749 F.3d at 270.

See also United States ex rel. Thomas v. Duke Univ., 2018 WL 4211375, *5 (M.D.N.C. Sept. 4, 2018) ("Statements in a brief are not evidence and are insufficient to justify a motion to seal."); *Qayumi v. Duke Univ.*, 2018 WL 2025664, *2 (M.D.N.C. May 1, 2018) (citing *INS v. Phinpathya*, 464 U.S. 183, 188 n. 6 (1984)).

Similarly, Exhibit M to Hosaflook's motion should also be unsealed. The public has a First Amendment right of access to the exhibits accompanying summary judgment briefs, see *Rushford*, 846 F.2d 249; *Virginia Dep't of State Police*, 386 F.3d at 578, especially where, as here, the exhibit was specifically mentioned in the memorandum opinion deciding the summary

judgment motions. Wagner Affidavit ¶ 5. The public's interest in accessing summary judgment exhibits is particularly significant where the exhibits are important to the court's decision and are the subject of dispute by the parties. *Qayumi*, 2018 WL 2025664 at *3. The fact that the document was originally provided to Plaintiff through the discovery process that was subject to an agreed protective order is not a sufficient basis for sealing, because parties may not, by agreement, bypass the presumption of public access to judicial documents. *See Cochran v. Volvo Grp. N. Am.*, 931 F. Supp. 2d 725, 729 (M.D.N.C. 2013) (*citing In re Violation of Rule 28(D)*, 635 F.3d 1352, 1358 (Fed. Cir. 2011); *Sensormatic Sec. Corp. v. Sensormatic Elecs. Corp.*, 455 F. Supp. 2d 399, 437-38 (D. Md. 2006)). "[T]he mere fact that a court document was previously sealed does not suggest that it should remain sealed permanently." *Topiwala v. Wessell*, 2014 WL 2574504, *3 (D. Md. June 5, 2014) (citing *Columbus–Am. Discovery Grp. v. Atl. Mut. Ins.*, 203 F.3d 291, 303 (4th Cir. 2000)0. Because Defendant never submitted any evidence in support of its request for sealing of this exhibit, Exhibit M it should be unsealed in its entirety.

CONCLUSION

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

Respectfully submitted,

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November 13, 2019

Attorney for Public Citizen, *et al.*

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 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