STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS SIXTH JUDICIAL CIRCUIT
COUNTY OF LANCASTER	2016-CP-29-01319

INDIAN LAND VENTURES, LLC,	)
	)
Plaintiff,	)
	)
vs.	)
	)
LANCASTER COLLINS ROAD, LLC, and FONVILLE & CO.,	)
	)
Defendants.	)

MEMORANDUM IN SUPPORT OF MOTION OF PUBLIC CITIZEN AND ADAM LEVITIN TO UNSEAL COURT RECORDS

In this case, plaintiff Indian Land Ventures, a company involving John M. ("Mick") Mulvaney, sued to foreclose on a piece of property, thereby cutting off the rights of a junior landholder. Mulvaney is a high-ranking federal official—indeed, he is both the acting chief of staff for President Donald Trump and director of the Office of Management and Budget, an agency within the Executive Office of the President. Consequently, there has been considerable media interest in this litigation.

To keep the factual details underlying the cross-motions for summary judgment from the public, plaintiff, with the consent of defendants, asked this Court to seal both the memoranda and the evidence filed in support of and in opposition to summary judgment. The sole basis offered to justify sealing was that discovery had been conducted under a protective order and that the parties had agreed, for unspecified reasons, that the entire briefing and evidence should remain secret. The parties' joint request offered no evidence that any of these materials contained trade secrets or any sensitive information, and offered no explanation of why a partial sealing would not sufficiently

protect any genuine secrets. Moreover, the Court's ruling in favor of secrecy made no findings on the need for secrecy or the inadequacy of alternatives to sealing.

"Judicial proceedings and court records are presumptively open to the public under the common law, the First Amendment of the federal constitution, and the [Open Courts provision of] the state constitution." *Ex parte Capital U–Drive–It,* 369 S.C. 1, 630 S.E.2d 464 (2006). The Supreme Court's decision in *Capital U-Drive-It*, together with well developed caselaw in the Fourth Circuit and Rule 41.1 of the South Carolina Rules of Civil Procedure, lay down both substantive and procedural standards for assessing motions to seal court records. As explained in the memorandum below, the sealing order in this case does not meet those standards, and should be lifted.

BACKGROUND

The plaintiff in this case, a company in which Mick Mulvaney holds a major stake, sued to foreclose on a mortgage. Because Mulvaney has served as a prominent member of Congress and holds prominent positions in the administration of President Donald Trump, his real estate activities have attracted significant public interest. The Washington Post, Charlotte Observer, and several other publications covered the real estate transaction that is the subject of this litigation.[1]

The parties took discovery from each other under a protective order. When plaintiff moved for summary judgment, the parties agreed to file all of the motion papers under seal. After summary

[1] *See Old land deal quietly haunts Mick Mulvaney as he serves as Trump's chief of staff*, https://www.washingtonpost.com/politics/old-land-deal-quietly-haunts-mick-mulvaney-as-he-serves-as-trumps-chief-of-staff/2019/01/14/ e1d3cd72 -07b8-11e9-a3f0-71c95106d96a_story.html; *White House official Mulvaney played role in disputed SC real estate foreclosure*, https://www.charlotteobserver.com/news/local/article224579880.html; CFPB's Mulvaney misled Congress about land deal, watchdog says, https://www.americanbanker.com/news/cfpbs-mulvaney-misled-congress-about-land-deal-watchdog-says; *Trump's "Fiscally Responsible" Chief of Staff Owes Ex-Biz Associate $2.5 Million*, https://www.vanityfair.com/news/2019/01/mick-mulvaney-charles-fonville-deal.

judgment was granted, the parties filed an agreed motion to maintain the seal on the summary judgment memoranda and three deposition transcripts that plaintiff had attached to its motion. Their motion recited their agreement that the summary judgment motion itself, as well as the order granting summary judgment, should be considered to be in the public record, and that, as far as they were concerned, the factual recitals in those papers together with the initial pleadings contained enough of the "underlying facts of this case necessary for an understanding of the issues in dispute." Motion ¶ 10. The agreed motion did not provide any evidence of a need for confidentiality of the summary judgment briefs and exhibits. Rather, the parties stated that "the privacy issues set forth in and forming the basis of the initial Protective Order still apply." *Id.* ¶ 12. Instead of analyzing the factors set forth in Rule 41.1 of the Rules of Civil Procedure, the parties rested on the conclusory statement that "balancing the factors set forth in Rule 41.1 supports the relief requested." *Id.* The parties submitted a proposed order that recited the facts set forth in the agreed motion and concluded: "The privacy interests set forth in and forming the basis for the initial Protective Order still apply. Balancing the factors set forth in Rule 41.1 of the South Carolina Rules of Civil Procedure supports the relief requested. The public interest in this specific matter and in open Court proceedings generally is protected by the pleadings that are already part of the Court record." *Id.* ¶ 12. The Court issued a letter that was filed, with the draft consent order attached, saying "so ordered." The Court's online docket reflects that the entire case is sealed.

Proposed intervenor Adam Levitin, a professor at Georgetown University Law Center who specializes in bankruptcy, commercial law, and financial regulation, wrote a January 22, 2020 blog post about the sealing of the court papers and the interesting legal issues raised by this "pretty amazing case that is fantastic for teaching purposes . . .." Levitin Affidavit ¶ 4, citing *Mick Mulvaney's South Carolina Land Shenanigans All Under Seal*, https://www.creditslips.org/creditslips/2020/01/mick-mulvaneys-south-carolina-land-shenanigans-all-under-seal.html. On January 23, 2020, counsel for Public Citizen contacted

the lawyers for the parties to ask about the justification for sealing each of the documents in the litigation. Levy Affidavit ¶ 2. Counsel for plaintiff, identifying himself as Mick Mulvaney's lawyer, responded that the parties' intention was only to have certain papers sealed; counsel explained that the problem was likely that the Court's electronic docket did not properly reflect the limited nature of the sealing. *Id.* ¶ 3. Public Citizen then contacted the Clerk's office to seek access to all the documents that were not within the limited scope of the sealing order as described by plaintiff's counsel. However, the Clerk's office representative said that, because the file was marked sealed, Public Citizen could not get access to **any** of the papers on the docket. *Id.* ¶ 4.

Plaintiff's counsel then sent Public Citizen copies of the summary judgment motion, the sealing motion and the sealing order However, the parties' counsel have not agreed to unseal or share the memoranda and filed transcripts. *Id.* ¶ 5.

ARGUMENT

In *Ex parte Capital U–Drive–It,* 369 S.C. 1, 630 S.E.2d 464 (2006), the South Carolina Supreme Court ruled that "[j]udicial proceedings and court records are presumptively open to the public under the common law, the First Amendment of the federal constitution, and the state constitution. S.C. Const. art. I § 9 ('[a]ll courts shall be public')." *Id.* at 10. Its decision is in accord with a line of authority from the United States Court of Appeals for the Fourth Circuit, which has stated, "The right of public access springs from the First Amendment and the common-law tradition that court proceedings are presumptively open to public scrutiny." *Company Doe v. Public Citizen*, 749 F.3d 246, 265 (4th Cir. 2014) (citing *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004)). Under these cases, along with decisions by other federal and state courts across the country, the common law and the First Amendment afford the public a presumptive right of access to court hearings and court records in civil cases. *See id.* at 265; *Virginia Dep't*

of State Police, 386 F.3d at 575.[2] Like rulings on dispositive motions, *Company Doe*, 740 F.3d at 267, briefs and evidence submitted in support of or in opposition to dispositive 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 South Carolina Supreme Court enumerated in *Capital U-Drive It* the very limited circumstances in which public access to court records may be restricted: "matters involving juveniles, legitimate trade secrets, or information covered by a recognized privilege," "trade secrets, identity of confidential informants, and privacy of children," and "intelligence-related information in possession of communications service providers due to national security concerns." 369 S.C. at 10. 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)). Similarly Rule 41.1 provides: "The motion shall state the reasons why sealing is necessary [and] explain why less drastic alternatives to sealing will not afford adequate protection."

More specifically, general references to litigants' interests in "privacy" and the potential for embarrassment, although they may be enough to warrant issuance of a protective order at the outset of discovery, do not override the right of public access to documents that the parties have properly filed in support of their summary judgment arguments: "Litigants who carry disputes to a publicly funded forum for

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

resolution must necessarily expect to surrender a good measure of their right to privacy. 'A claim that a court file contains extremely personal, private, and confidential matters is generally insufficient to constitute a privacy interest warranting the sealing of the file. Likewise, prospective injury to reputation, an inherent risk in almost every civil lawsuit, is generally insufficient to overcome the strong presumption in favor of public access to court records.'" *Capital U-Drive It*, 369 S.C. at 11 (quoting *Doe v. Heitler*, 26 P.3d 539, 544 (Colo. App.2001).

Capital U-Drive It also requires adherence to procedural standards before a motion to seal may be granted: "In deciding whether to seal or unseal a court record, the court must make specific factual findings, on the record, which weigh the need for secrecy against the right of access. The burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption. *Davis [v. Jennings*], 304 S.C. [502,] 506, 405 S.E.2d [601,] 603 [1991)]." *Id.* at 12. "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 Supreme Court requires that lower courts consider the seven factors set forth in Rule 41.1.

The sealing decision in this case contravened both the procedural and the substantive requirements imposed by these precedents. The motion did no more than recite the seven factors set forth in Rule 41.1, without any explanation or any effort to provide the Court with both evidence and reasoning that the Court could consider in deciding whether sealing was warranted. Nor was there any discussion of alternatives to sealing and why such alternatives did not adequately protect the relevant interests in secrecy. Moreover, so far as movants can tell, it is Mulvaney who was trying to protect his privacy—yet it was Mulvaney's company that initiated this litigation. In those circumstances, both he and his company "must necessarily expect to surrender a good measure of [their] right to privacy." Moreover, the pro forma recitals in the motion and order to the effect that access to other documents gives the public information it may want understates the constitutional requirement. The burden is not on the public to show a need for sealed

information. Rather as *Capital-U-Drive It,* Fourth Circuit decisions, and Rule 41.1 all state, the burden is on the proponent of secrecy to show such need for confidentiality before the constitutional right of public access can be overridden.

As a powerful figure in the federal government, Mulvaney has a reduced claim to privacy. And as Professor Levitin has explained, the case raises significant legal issues that would better understood in light of the entire summary judgment record. Because the parties have not made the required showing of a need for confidentiality that overrides the public's constitutional and common-law rights of access, the full record in this case should be unsealed.

CONCLUSION

The motion of Public Citizen and Adam Levitin to unseal should be granted.

Respectfully submitted,

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