

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-CV-81205-REINHART

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S NOTICE OF FILING
MEMORANDUM PURSUANT TO THE COURT'S APRIL 26, 2021 ORDER**

I. INTRODUCTION

Non-party witnesses John Pauciulo and Eckert Seamans Cherin & Mellott LLC (“Eckert Seamans”) are interfering in this case by making bad faith assertions of confidential information, and in contravention of the procedures set forth in the Court’s Protective Order (DE 437).

The Protective Order in this case is limited. (DE 437, Section 1). As the Protective Order makes clear:

It is the intent of the parties that information *will not be designated as confidential for tactical reasons* and that nothing be so designated without a *good faith belief* that *it has been maintained in a confidential, non-public manner*, and there is *good cause* why it should not be part of the public record of this case.

(DE 437 at Section 1.B).

The burden for maintaining a Confidentiality designation is on the designating party. *Id.* The Protective Order only affords a Confidential designations where the Good Faith burden is met, and there is good cause for making the designation. *Id.* Yet, it appears Pauciulo and Eckert Seamas are asserting confidentiality designations for tactical reasons in this case, and without a good faith

believe that the information they now claim is privileged has been maintained in any confidential manner whatsoever.

The issue presented is whether witnesses (here, Pauciulo and Eckert Seamans) who:

- Are in possession of the Court's Protective Order before the witnesses' depositions;
- Consent to third parties attending the witness' deposition;
- Fail to ask any third party attendee to sign the Acknowledge and Agreement to be Bound by the Protective Order; and
- Take no steps whatsoever to protect or maintain the confidentiality of any purportedly confidential information

can subsequently maintain a good faith designation that portions of the transcript of that same deposition are confidential and non-public.

Plaintiff Securities and Exchange Commission asserts that the witnesses cannot. The Protective Order is clear that nothing can be designated as confidential "without a good faith belief that it has been maintained in a confidential, non-public manner." Moreover, the witnesses failed to comply with the procedures set forth in the Protective Order for designating information as confidential.

III. BACKGROUND

A. The Protective Order

The Court entered a Protective Order in this case upon the request of the Receiver and the Defendants, as a method for addressing the Receiver's objections and concerns concerning the production of certain Receivership Entities' financial information to the Defendants and the use of that information. (DE 434). The Protective Order does not automatically make all discovery in

this case confidential. Instead, the Protective Order identifies what “Confidential” means, consistent with Federal Rule of Civil Procedure 26(c), and lays out the procedure for parties and non-parties to follow if there is good cause why that information should not be part of the public record in this case, and even then, only if the information has been maintained in a confidential, non-public manner. (DE 437).

The Protective Order states:

It is the intent of the parties that information will not be designated as confidential for tactical reasons and that nothing be so designated without a good faith belief that *it has been maintained in a confidential, non-public manner*, and there is *good cause* why it should not be part of the public record of this case.

(DE 437 at Section 1.B).

The Protective Order makes clear that:

It is the intent of the parties that information will not be designated as confidential for tactical reasons and that nothing be so designated without a good faith belief that *it has been maintained in a confidential, non-public manner*, and there is *good cause* why it should not be part of the public record of this case.

(DE 437 at Section 3).

Thus, the Protective Order is clear that it is only applicable to information which – among other things – the designating party has maintained in a confidential, non-public manner.

As set forth below, the designating parties, John Pauciulo and Eckert Seamans, have not and cannot meet that portion of their burden.¹

¹ Despite the Commission’s requests, Pauciulo and Eckert Seamans have not identified the portions of the transcripts they believe in good faith are confidential. Therefore, we cannot address their specific designations at this time.

B. The Commission’s Subpoenas To Pauciulo and Eckert Seamans, And Their Repeated Waiver of Confidentiality and Failure to Comply with the Protective Order Procedures

It is important to address the documents Pauciulo/Eckert Seamans have produced, because the information contained therein and the documents themselves, are the matters at issue in the Depositions they now contend are Confidential.

The 2018 and 2019 Productions With No Confidential Designation. In 2018 and 2019, Pauciulo/Eckert Seamans produced Eckert Seamans documents to the Commission in the course of an investigation (the “2018/2019 Production”). We have had these documents since then. No Confidentiality designation was made as to these documents – until now, years later, as set forth below.

The 2020 and January 2021 Productions. In 2020 and January 2021, Eckert Seamans produced documents to the Receiver, Bates stamped as “ES_Receiver.” They made no “Confidential” designation to any document they produced. None whatsoever. Nor have they ever gone back to the Receiver to seek a Confidential designation of any of these documents. Therefore, these documents (stamped ES_Receiver) have been in circulation for some time, without restraint or limitation on their use. As set forth below, Pauciulo/Eckert *now* for the first time claim these documents and their contents are Confidential.

The Commission’s March 2021 Subpoenas. In early March 2021, the Commission issued subpoenas to Pauciulo and Eckert Seamans, for documents and deposition testimony. In advance of the response dates, we provided their counsel with the docket entry for the Protective Order so that they were aware of it. Eckert Seamans began producing documents in March 2021.

This March-April 2021 production falls into three general categories:

1. A copy of the production Eckert Seamans previously made to the Receiver (ES_Receiver);
2. A copy of the 2018/2019 Production that Pauciulo previously made to the Commission;
3. Additional documents, stamped “ES_SEC”.

In March and April 2021, Pauciulo/Eckert Seamans Claim – For the First Time – That the Documents They Have Been Producing Without Any Confidential Designation For Years And The Deposition Testimony Concerning Same, Are Now “Confidential”. Eckert Seamans did not stamp or affix any “Confidential” or “Highly Confidential” legend to any document they produced to the Commission in response to the Subpoenas, as the Protective Order *requires* if a party or non-party seeks to designate a document as confidential. (DE 437, at Section 5.4(a)). Therefore, they failed to properly designate any material as Confidential.

Instead, and in contravention of the Protective Order, Eckert Seamans merely *stated a blanket confidentiality designation* in its cover letters – namely, by stating with no explanation whatsoever, that it was designating *every single document it produced as Confidential*. Thus, in March and April 2021, they purported to designate as Confidential, via a blanket Confidentiality designation, all documents they previously produced to the Commission and Receiver without any confidential designation and, in some instances, years ago.

On April 16, 2021, the Commission, pursuant to the Protective Order procedure for challenging Confidentiality designations, wrote counsel and challenged these designations. Under the Protective Order, Eckert Seamans was required to respond in writing within 7 days, with the specific basis for the Confidential designation as to each document (DE 437, at Section 6.2). They failed to respond, or to provide any information whatsoever.

III. The April 9 and 14, 2021 Depositions Of John Pauciulo and Eckert Seamans Did Not Concern Confidential Matters, And They Were Not Conducted In A Confidential, Non-Public Manner

The Commission took the depositions of Pauciulo and Eckert Seamans on April 9 and 14, respectively. Before depositions commenced, Pauciulo and Eckert Seamans both consented to third parties observing the depositions. Pauciulo and Eckert Seamans were aware that third parties were observing, and these third parties were visible on the WebEx video and apparently taking notes. These third parties stated their names before we went on the record, introduced themselves, and they appear on the transcript.

Pauciulo's deposition occurred first. His counsel took no steps during the deposition to address any purported confidentiality concern. Nor did she do so beforehand. Instead, they waited until the *end* of this 7-hour deposition before ever indicating any belief that the deposition should be designated as confidential – this was *after* the third parties had already heard and observed his entire testimony, without objection. Even then, only an improper blanket designation of the transcript was made, which is impermissible under the Protective Order. (DE 437 at Section 5.4(b)). Specifically, at the conclusion of the deposition, Pauciulo's counsel, Catherine Recker, stated the following: “[W]e request that the deposition be designated confidential pursuant to the protective order entered on December 16 2016 on Docket Number 437.” No further explanation was provided.

Illustrating the absurdity of designating a deposition confidential – at the end of the deposition, after allowing third parties to attend and take notes, and without ever requesting that the third parties sign an “Acknowledgement and Agreement to be Bound” by the Protective Order – one of the third parties present responded on the record as follows:

“Ms. Recker, I don't know how -- I don't know how -- I don't know how you can do that if I'm sitting here listening to it for eight hours.... Please. Are you serious?”

Ms. Recker provided no reply or explanation and took no steps even then to request that the third parties maintain the confidentiality or what they had heard or to execute the Acknowledgement and Agreement to be Bound (though we would argue that would have been too late). Instead, she summarily announced, “I think the deposition is over,” and promptly left the deposition.

To this day, Pauciulo has not identified any basis for claiming the transcript should be designated Confidential – not even in response to the Commission’s efforts to confer in writing about the attempted designation. However, by failing to comply with the Protective Order, and instead simply making a blanket designation during the deposition, Pauciulo has not and cannot now designate portions of the transcript as Confidential. (DE 437, Section 5.4(b)).

The only thing we have gleaned about their Confidential designation is from what Pauciuolos’ counsel told this Court during the April 26 hearing on this matter. Specifically, Pauciulo/Eckert Seamans’ counsel told this Court that there was one third party in attendance and he was the current attorney for Pauciulo/Eckert Seamans’ former clients. To be clear:

(1) there was more than 1 third party observing, Pauciulo knows this, and the transcript reflects it because the third parties introduced themselves; and

(2) as for the supposed single individual Pauciulo/Eckert Seamans’ identified at the April 26 hearing as having attended the deposition, he is in fact an attorney representing a group of individuals and entities who have sued Pauciulo/Eckert Seamans for malpractice. Thus, the individual is not, as Pauciulo seemed to imply, someone with any joint interest with Pauciulo/Eckert Seamans – he is actually their opposing counsel in an ongoing malpractice case against them. Further, there is no Protective Order in that malpractice case, which is currently pending in Pennsylvania state court.

On April 14, 2021, the Commission took the deposition of Eckert Seamans. Again, third parties were present. Counsel for Eckert Seamans stated on the record as follows, “we request confidential treatment pursuant to 5.4B of the Protective Order.”

Neither Pauciulo nor Eckert Seamans asked any third party to refrain from taking notes, or to sign an Acknowledgement and Agreement to be Bound to the Protective Order. Instead, they allowed the third parties to attend and take notes, and now seek to designate portions of the transcripts as Confidential.

We will address their designations when we receive them, and only address now whether they can conceivably meet their “Good Faith” burden of showing they maintained the confidentiality of the information about which they testified. If they cannot, we need not even address the designated portions.

As set forth above, Pauciulo and Eckert Seamans did not maintain the confidentiality of their testimonies. They allowed third parties to attend and take notes. They never sought – or even inquired – about these third parties agreeing to keep the information they heard confidential. They did not seek the notes from the third parties. And the deposition covered matters discovered in documents produced without any confidentiality designation, or from other evidence not subject to any confidentiality designation.

Pauciulo and Eckert Seamans utterly failed to maintain the confidentiality of their testimony, and made no efforts to do so. Instead, they allowed the testimony to be shared with third parties, knowing that one of the third parties was attending to gain information in another case against them where there is no Protective Order at all. Therefore, under the explicit terms of

the Protective Order, they cannot meet their burden of showing Good Faith, which is required for any Confidentiality designation, and cannot now designate the transcripts as confidential.²

April 28, 2021

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2021, I electronically filed the foregoing response with the Clerk of Court using CM/ECF and copies were delivered via the CM/ECF system to counsel of record, including Damian and Leonard because they filed Notices of Appearance in this case, as well as via email to pro se Defendant Michael Furman.

By: s/Amie Riggle Berlin

² This filing does not address objections at the depositions based on the attorney-client privilege and attorney work product. Such matters are not at issue at this time, and are matters separate and apart from the “Confidential” designations contemplated in the Protective Order.