UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16383

In the Matter of

CHARLES L. HILL, JR.,

Respondent.

DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENT'S MOTION FOR PROTECTIVE ORDER

In advance of Respondent's planned motion for summary disposition, he has moved to place several categories of documents under seal. The Court should deny Respondent's motion for two reasons. First, Respondent fails to describe in sufficient detail the information that he seeks to maintain under seal in this insider trading case. Respondent asks that whole categories of information – such as his "business activities" – be placed under seal. The Court cannot meaningfully assess whether information described in such vague and broad terms should be kept off the public record. The Court should require Respondent to describe the information that he wants to keep under seal in greater detail before ordering that whole categories of information be withheld from the public.

Second, Respondent's motion fails to overcome the strong presumption in favor of placing evidence presented during an administrative proceeding brought by a federal agency on the public record. Here, Respondent wants to shield from public disclosure: (i) business records that show why Respondent had extra funds to invest in Radiant Systems, Inc. ("Radiant") in 2011 and his long-term plans for that money; (ii) telephone records that show communications between the original source of the alleged material, non-public information that Respondent received before investing in Radiant and the person who allegedly provided that information to Respondent; and (iii) financial records that show Respondent inexplicably investing a significant portion of both his liquid and his overall net worth in Radiant at the precise time that the company was being acquired. This highly probative evidence should be placed on the public record. The Court should reject Respondent's attempt to shield it from public view.

BACKGROUND

This is an insider trading case in which the Respondent is charged with violating Section 14(e) of the Exchange Act and Rule 14e-3, which prohibit any fraudulent, deceptive, or manipulative acts in connection with a tender offer. (*See generally* Order Instituting Proceedings ("OIP").) The Division of Enforcement ("Division") alleges that, in May 2011, Respondent learned from his close friend that NCR Corporation ("NCR") was trying to acquire Radiant. (*Id.*) Respondent's

close friend learned about the deal from the then-Chief Operating Officer ("COO") of Radiant, who is also friends with Respondent's close friend and was involved in the negotiations. (*Id.*) Between June 1, 2011 and July 8, 2011, Respondent invested more than $2 million in Radiant stock, including his personal funds and funds held in his daughters' brokerage accounts. (*Id.*) Respondent had never invested in Radiant before, and he had not purchased any security during the prior four years. (*Id.*) NCR and Radiant announced their deal on July 11, 2011. (*Id.*) Respondent sold all of his Radiant shares the next day, generating around $744,000 in profits. (*Id.*) Respondent denies that he engaged in insider trading.

On April 7, 2015, Respondent's counsel called counsel for the Division to confer regarding a few issues, including this motion. Respondent's counsel indicated that they would like to place certain information under seal in this proceeding, including business information, telephone records, and certain sensitive personal information, such as social security and bank account numbers. Counsel for the Division indicated that it has no objection to redacting sensitive personal information like social security and bank account numbers from its exhibits, but that the relevant business, telephone, and financial records are important parts of the case and should be accessible by the public. On April 10, 2015, Respondent filed the instant motion.

STANDARD OF REVIEW

There is a "strong presumption in favor of public access to judicial proceedings." *United States v. Hubbard*, 650 F.2d 293, 317 (D.C. Cir. 1980). The public's "common law right to inspect and copy judicial records is indisputable, *In re Nat'l Broadcasting Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981), and is "fundamental to a democratic state." *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Commun., Inc.*, 435 U.S. 589 (1978). The right of access to judicial records assures a well-informed public opinion, permits public monitoring of the courts, and promotes confidence in the fairness and justice of the court system. *Id. See also Hubbard*, 650 F.2d at 314-15 (noting that "access to records serves the important functions of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally"). The "starting point in considering a motion to seal court records is" that judicial proceedings will be public unless the party seeking to maintain information under seal meets the high burden of showing that the information should not be placed on the public record. *Upshaw v. United States*, 754 F. Supp.2d 24, 27-28 (D.D.C. 2010).

The Commission has expressly made the presumption in favor of public disclosure of court records applicable to administrative proceedings. *See* 17 C.F.R. § 201.322(b) ("Documents and testimony introduced in a public hearing are

presumed to be public."). Indeed, the Commission has made clear that information should be placed under seal "only upon a finding that the harm resulting from disclosure would outweigh the benefits of disclosure." *See* 17 C.F.R. § 201.322(b). The Commission's desire for its administrative proceedings to be public is informed by the fact that the need for public access to court documents is heightened when the government is a party to the case. *Federal Trade Comm'n v. Standard Fin. Mgt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) ("The appropriateness of making court files accessible is accentuated in cases where the government is a party."). Courts have recognized that documents integral to a legal proceeding involving the government should generally be made available to the public. *Cf. United States ex. rel. v. Oce N.V.*, 577 F. Supp.2d 169, 172 (D.D.C. 2008).

ARGUMENT

I. The Court Should Deny Respondent's Motion Because It Does Not Adequately Describe The Information That He Seeks To Maintain Under Seal.

The Court should deny Respondent's motion for protective order because it does not describe in sufficient detail the information that he seeks to keep off the public record. *See* 17 C.F.R. § 201.322(a). Respondent has moved to place several vague categories of information under seal. These categories include, for example, "information related to Respondent's financial accounts;" "information pertaining to Respondent's business activities;" and "Respondent's confidential business relationships." (*See* Respondent's Mot. at 1-2.)

Courts have admonished parties seeking to maintain information under seal not to take such a "cursory" approach when filing a motion for protective order. *See, e.g.*, *Zapp v. Zhenli Ye Gon*, 746 F. Supp.2d 145, 150 (D.D.C. 2010). Rather, the party seeking to keep information under seal should, to the extent practicable, "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations." *Baxter Int'l Inc. v, Abbott Labs.*, 297 F.3d 544, 548 (7th Cir. 2002). Respondent made no effort to engage in such an analysis here. Respondent has the burden of showing that specific information should be kept off the public record. He cannot and has not met that burden in this case. The Court should not prophylactically keep the type of general categories of information identified in Respondent's motion under seal.[1] *Id.*

The Court should be particularly reluctant to place information that relates to a dispositive motion under seal. *See, e.g.*, *Foltz v. State Farm*, 331 F.3d 1122, 1135-36 (9th Cir. 2003) (holding that information in a dispositive motion should be placed on the public record absent some "overriding interest" in keeping the information under seal); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252-54 (4th Cir. 1988) (holding that information used in a dispositive motion should almost always be unsealed). Respondent is seeking to withhold information

[1] As the Division explains below, it has no objection to keeping sensitive personal information that is not germane to the merits of this case (like social security numbers) off the public record.

from public view that he is filing in connection with his motion for summary disposition. The Court should not permit him to keep such information under seal by simply asserting that the public release of it will be harmful to him or others. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir.1986) (noting that "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning," are insufficient to warrant placing information under seal).

II. The Court Should Deny Respondent's Motion Because This Case Should Be Litigated On The Public Record.

Respondent's motion falls far short of rebutting the strong presumption in favor of placing evidence in administrative proceedings on the public record. The Division addresses below the specific categories of information that Respondent seeks to place under seal in this case. With the limited exception of sensitive personal information, the evidence in this case should not be placed under seal.

Financial Account Information: Respondent seeks to place "information related to [his] financial accounts" under seal, but this information goes to the heart of this insider trading case. Respondent admits in his Answer that he had never traded Radiant securities before May 2011, and he had not purchased any security for at least four years prior to purchasing Radiant stock. (Answer ¶ 29.) Respondent also admits that he opened two new brokerage accounts so that he could purchase Radiant stock. (Answer ¶ 30.) Respondent ultimately bought more than $2 million worth of Radiant stock in these two new brokerage accounts and

his daughters' brokerage accounts during the precise period that Radiant was being acquired. Respondent's investment in Radiant represented a significant portion of his liquid and his gross assets, and in less than two months his Radiant holdings increased by more than $740,000. All of this information is reflected in Respondent's financial account statements, and should be placed on the public record so that the public can view the evidence for itself when assessing this case.[2] *Hubbard*, 650 F.2d at 314-15.

Business Relationships: Respondent asks this Court to place under seal "information pertaining to [his] business activities" and his "business relationships." (Respondent's Mot. at 2.) But Respondent is not a doctor trying to protect the confidentiality of a patient. Respondent is in the commercial real estate business. (*Id.* at 3.) He buys real estate and then leases the property to commercial clients such as restaurant chains. It is not at all clear how it will be detrimental for these companies to be referenced in this litigation. Even if it is somehow slightly embarrassing for them, courts have consistently held that "[t]he mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation, will not, without more, compel the court to seal its records." *Kamakana v. Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006); *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993) (holding that "in

[2] The Division has no objection to redacting the account numbers or other sensitive information related to these financial accounts (e.g., Respondent's PIN numbers).

the absence of extraordinary circumstances, commercial embarrassment is not a 'compelling reason' to seal a trial record.").

Moreover, Respondent's business dealings are an important part of this case. Respondent claims that he had additional money in the spring of 2011 because of his commercial real estate deals, and that he was planning to use some of the money he invested in Radiant to purchase real estate later that year. Evidence showing that Respondent invested money in Radiant that was essentially earmarked for another purpose is important evidence, especially when considering that Respondent failed to place a stop loss order on any of his Radiant stock purchases. This information should be placed on the public record. *Baxter*, 297 F.3d at 547 ("many litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed.").

Telephone Records: Respondent seeks to place his "telephone records" and "telephone numbers" under seal, *see* Respondent's Mot. at 2, but this information is vital to the Division's case and should be made public. The gravamen of this insider trading case is that Respondent received material, non-public information regarding a proposed acquisition of Radiant from a close friend and then traded based on that information. (*See generally* OIP.) These individuals communicated with each other numerous times by phone, and the Division has the phone records

that detail these communications. There is no reason why these phone records should be placed under seal.

As for the telephone numbers themselves, the White pages and internet contain such information for hundreds of thousands (if not millions) of individuals. There is no reason why this information should be placed under seal either. Indeed, Respondent and other witnesses will almost certainly be examined about their telephone records and their specific phone numbers during the hearing in this matter. The courtroom should not have to be cleared so that witnesses can identify their phone numbers and confirm through phone records that they spoke with a close friend on a particular date and time. *Cf.* U.S. District Court for the Northern District of Georgia, Standing Order No. 04-02 (listing social security numbers, names of minor children, dates of birth, financial account numbers, and home addresses as personally identifiable information that should generally be redacted from filings).

Sensitive Personal Information: Finally, Respondent contends that sensitive personal information (such as social security numbers) should not be placed on the public record. The Division agrees, and informed defense counsel as much during their discussion on April 7, 2015. The Division anticipates redacting such information from its exhibits. The Division has no objection to Respondent redacting the same information from his exhibits.

CONCLUSION

For the foregoing reasons, Respondent's motion for protective order should be denied.

April 13, 2015

Respectfully submitted,

Harry B. Roback
Joshua Mayes
Senior Trial Counsel
Securities and Exchange Commission
950 East Paces Ferry Road, Ste. 900
Atlanta, GA 30326-1382
Telephone: 404-942-0690
Email: RobackH@sec.gov

Counsel for the Division of Enforcement