IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ALYSSON MILLS, IN HER CAPACITY AS RECEIVER FOR ARTHUR LAMAR ADAMS AND MADISON TIMBER PROPERTIES, LLC,

Plaintiff,

v.

THE UPS STORE, INC.; HERRING VENTURES, LLC d/b/a THE UPS STORE; AUSTIN ELSEN; TAMMIE ELSEN; COURTNEY HERRING; DIANE LOFTON; CHANDLER WESTOVER; RAWLINGS & MACINNIS, PA; TAMMY VINSON; and JEANNIE CHISHOLM,

Defendants.

Case No. 3:19-cv-364-CWR-FKB

Arising out of Case No. 3:18-cv-252, *Securities and Exchange Commission v. Arthur Lamar Adams and Madison Timber Properties, LLC*

Hon. Carlton W. Reeves, District Judge

**DEFENDANT THE UPS STORE, INC.'S[1] MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER**

## I. INTRODUCTION

This Court has before it two competing protective orders – one proposed by Plaintiff Allyson Mills, and one proposed by Defendants. The protective order proposed by the Defendants is standard, fully consistent with the Local Rules that govern practice in this district, and patterned after protective orders this Court has entered. The Defendants' [Proposed] Protective Order provides that (1) discovery materials will be used only for purposes of this litigation and (2) any party wanting to have information filed under seal must make a showing that sealing is necessary and narrowly tailored. By contrast, the protective order proposed by

[1] The Herring Ventures Defendants and Rawlings & MacInnis Defendants join The UPS Store, Inc. ("TUPPS, Inc.") in opposing Plaintiff's motion.

Plaintiff is inconsistent with the Federal Rules of Civil Procedure, would violate the Local Rules, and, as far as Defendants can tell, is unprecedented in that it would require that Defendants (1) redact from all Court filings any material that Plaintiff chooses to mark "Confidential" and (2) not utilize certain discovery information to defend this action.

For strategic reasons, Plaintiff wants this Court to enter a scheduling order before Plaintiff has produced basic documents that identify the investors who invested in Lamar Adams' Ponzi scheme allegedly in reliance on documents notarized at a The UPS Store® owned by Defendant Herring Ventures or at the law firm of Rawlings & MacInnis, or the amounts that those investors invested. Plaintiff withheld production of any of the documents until after the November 26, 2019, case management conference (Plaintiff emailed the documents to counsel for TUPSS, Inc. *while the conference was occurring* so she could represent to the Court that the documents had been provided to TUPSS, Inc. while preventing TUPSS, Inc. from being able to comment about how heavily redacted that production is.) Because the resumed case management conference is scheduled for January 16, 2020, it is critical that those basic documents be provided promptly. Defendant TUPSS, Inc. respectfully requests that Defendants' Protective Order be entered.

Plaintiff filed this action on June 6, 2019, seeking to hold the Defendants jointly and severally liable for more than ***$85 million*** in losses caused by the Ponzi scheme orchestrated by felon Lamar Adams on the theory that the improper notarization of documents – and not Lamar Adams' admitted Ponzi scheme – was the proximate cause of investor losses. Immediately after this Court scheduled a Rule 16 conference, Defendants asked Plaintiff to produce the documents on which her case was based, the documents allegedly improperly notarized. Defendants could not prepare for this Court's scheduling conference without knowing how many documents were

allegedly improperly notarized, how many distinct investors allegedly relied on those notarized documents, and what were the losses associated with those investments.

Plaintiff has produced roughly 1,500 timber deeds to TUPSS, Inc. since the case management conference. Although TUPSS, Inc. agreed to accept these documents on an "attorneys' eyes only" basis pending entry of a protective order by the Court, Plaintiff nevertheless redacted ***all*** information identifying the investors in these documents and the amounts of the investments. Without that information, however, TUPSS, Inc. cannot conduct any meaningful analysis of those 1,500 timber deeds and the 1,500 other documents, such as promissory notes, that Plaintiff produced with investor identifying information redacted. For example, TUPSS, Inc. cannot determine how many investors received deeds – many appear to be duplicates, but TUPSS, Inc. cannot confirm that without identifying information. TUPSS, Inc. therefore cannot accurately estimate the scope of discovery, such as the number of non-party depositions needed. Plaintiff should not be permitted to hold the unredacted timber deeds hostage while the Court hears her motion for a protective order that flouts the Local Rules and well-established case law.

## II. ARGUMENT

### A. Plaintiff's Proposal That This Court Enter a Protective Order That Would Require the Names of Investors to Be Filed Under Seal, Without Any Further Showing, Would Violate the Local Rules.

Plaintiff's Proposed Protective Order provides that any material Plaintiff marks "confidential" must be redacted in any court filing, and that the names of any investors must be filed under seal. That proposal would be inconsistent with the Local Rules, which provide: "***No document may be sealed merely by stipulation of the parties. A confidentiality order or protective order entered by the court to govern discovery will not qualify as an order to seal***

***documents.***" L.U. Civ. R. 79(d) (emphasis added). That is, "Rule 79 explicitly states that a protective order governing discovery will not justify sealing under the rule." *BG v. Rob Banks*, No. 4:16-CV-64-DMB-JMV, 2016 U.S. Dist. LEXIS 179732, at *5 (N.D. Miss. Dec. 29, 2016). Per the Local Rules, a party seeking permission to file a document under seal, or requiring a document be filed under seal, must show that there is compelling need for sealing and that the sealing order is narrowly tailored.

Plaintiff's Motion is tantamount to asking this Court to make a finding ***now*** that there is a compelling need for every document that will ever be filed in this case containing an investor's name to be filed under seal and that sealing is narrowly tailored. The Local Rules plainly prohibit that sort of order, because the Rules provide that the party seeking sealing must make a showing as to each document that is filed. As this Court previously stated:

> Citizens have a common law right to view public documents, including those submitted to a court. This is an important right, as citizen inspection of court records can uncover abuses of the judicial system. For this reason, courts in the Southern District of Mississippi require 'clear and compelling reasons' to shield a document from public view.

*EEOC v. Halliburton Energy Servs.*, No. 3:16-CV-00233-CWR-FKB, 2018 U.S. Dist. LEXIS 83056, at *2 n.5 (S.D. Miss. May 17, 2018) (Reeves, J.) (quoting L.U. Civ. R. 79(b); *United States v. Apothetech Rx Specialty Pharm. Corp.*, No. 3:15-CV-00588-CWR-FKB, 2017 U.S. Dist. LEXIS 40382, 2017 WL 1100818, at *1 (S.D. Miss. Mar. 20, 2017) (Reeves, J.)).

Plaintiff's Motion is also inconsistent with Federal Rule of Civil Procedure 5.2, which very narrowly defines the information that is presumed to be worthy of sealing, without a party making a further showing of a "clear and compelling reasons" for sealing. Fed. R. Civ. P. 5.2 (requiring redaction of anything other than (1) the last four digits of the social security number and taxpayer identification number; (2) the year of the individual's birth; (3) a minor's initials;

and (4) the last four digits of a financial account number). Plaintiff here is asking this Court to add entirely new categories to Rule 5.2 – the names of every investor who lost money in a financial crime and and the amounts of their investment.

The information for which Plaintiff seeks blanket protection from public disclosure – the identities of investors – is not of the type that courts typically consider appropriate for sealing. The crimes here are financial crimes, not sexual assaults; the victims are adult, not minors; and there is no evidence or argument that disclosing the names of investors will interfere with any ongoing law enforcement investigations. Plaintiff does not cite a single case where a court has entered a blanket sealing order in these circumstances, and sealing was rejected in similar situations. *See, e.g.*, *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, No. 08-01789 (BRL), 2011 Bankr. LEXIS 1390, at *7 (Bankr. S.D.N.Y. Apr. 12, 2011) (denying a request to redact the names of non-party investors in Bernie Madoff's Ponzi scheme, holding that "the Defendants have not adequately established any harm beyond merely 'embarrassing or prejudicial' association with these Ponzi scheme proceedings, which is not sufficient cause for sealing").[2]

Furthermore, even if it were ever proper for a court to make a preemptive order requiring certain information to be sealed in every future filing, there is no way this Court could make a finding on this record that there are "clear and compelling reasons" for sealing in this case, where Plaintiff has not come close to making an adequate record. Plaintiff has not submitted ***any*** evidence – not a single declaration from any investor – showing that any, much less every, investor even wants their names, and the amounts of their investments, hidden from the public.

[2] The court based its holding under Section 107 of the Bankruptcy Code, which codifies the "common law public right of access" to judicial records that applies in this case. *See id*. at *5; *see also Halliburton Energy Servs.*, 2018 U.S. Dist. LEXIS 83056, at *2.

Indeed, some of the investors in Adams' scheme have willingly spoken to the press or initiated their own lawsuits related to Adams' scheme.[3] Similarly, U.S. Senator Roger Wicker voluntarily disclosed his investment in Adams' scheme as required by federal law.[4] The only justification Plaintiff has provided for maintaining under seal investors' names is that "Victims tell the Receiver that they fear being singled out. They believe public exposure will feel like a revictimization." (ECF No. 58.) Not only does Plaintiff not submit a declaration from a single investor, Plaintiff does not even submit a declaration herself. Moreover, what investors allegedly tell Plaintiff is inadmissible hearsay, and Plaintiff's beliefs about investor feelings is rank speculation. Further, Plaintiff does not explain how investors will be "singled out" if their names are in the public domain.

Of course, the mere fact that an investor might ***want*** their identity, and the amount of their investment, sealed would not resolve the matter. Many litigants might prefer to have cases resolved anonymously – it is likely most defendants would prefer not to be publicly accused of fraud and theft, for example – but, as this Court's Local Rules and case authorities show, that alone is not sufficient to warrant sealing. Plaintiff's Motion fails to offer any explanation as to why any investor's hypothetical desire for anonymity provides a clear and compelling reason to override the public's right to access to court records. (Parties seeking anonymity can choose private arbitration, but Plaintiff, in related proceedings, seeks to be excused from the arbitration agreements entered by Lamar Adams.)

Those kinds of vague concerns about a desire for privacy are invariably rejected by courts. In *Halliburton*, for example, this Court denied the EEOC's motion to seal all documents

[3] *See, e.g.*, https://www.wjtv.com/news/metro/jackson-man-pleads-guilty-to-wire-fraud; http://kingfish1935.blogspot.com/2018/05/mchenry-sues-lamar-adams-for-10-million.html.

[4] *See* https://www.clarionledger.com/story/news/2019/12/05/mississippi-ponzi-scheme-mchenry-found-not-guilty-adams-scam/2619798001/

filed in opposition to Halliburton's summary judgment motion. The EEOC argued that because those documents contained "personal information" of an individual who made a discrimination claim – and whose identify was in the public record – those documents should be kept under seal. *Id*. at *3. But the Court denied the sealing request, holding the that the EEOC "has not requested a surgical sealing that carefully balances the public's right to inspect documents against Anderson's right to privacy." *Id*. at *5. As stated, in nearly identical circumstances, the names of the victims of the Madoff Ponze scheme were ordered not to be redacted." *Bernard L. Madoff Inv. Sec. LLC*, 2011 Bankr. LEXIS 1390, at *7.[5]

Plaintiff has not provided any authority for the unprecedented order she seeks. None of the cited cases in Plaintiff's Motion even discuss the standard for seeking to keep information under seal; they merely speak to the power of a district court to enter protective orders generally. *S.E.C. v. Merrill Scott & Associates, Inc.*, 600 F.3d 1262, 1272 (10th Cir. 2010) (addressing motion by the Securities and Exchange Commission to modify protective order retroactively after sharing information with the Internal Revenue Service in violation of protective order); *In re for Wilson*, No. 8:12-CV-02078-JMC, 2017 WL 2536913, at *2 (D.S.C. June 12, 2017) (addressing motion to vacate protective order entered in order to give defendant access to documents including settlements that contained confidentiality provisions); *Zysman v. Zanett Inc.*, No. 13-cv-02813, 2014 WL 1320805, at *4 (N.D. Cal. Mar. 31, 2014) (granting motion to compel subject to terms of a protective order).

Equally important, Plaintiff's Proposed Protective Order purports to limit Defendants' ability to *use* information marked "Confidential." The order proposed by Plaintiff requires

[5] The court based its holding under Section 107 of the Bankruptcy Code, which codifies the "common law public right of access" to judicial records that applies in this case. *See id*. at *5; *see also Halliburton Energy Servs.*, 2018 U.S. Dist. LEXIS 83056, at *2.

Defendants to keep all information marked "Confidential" by Plaintiff as confidential, with a narrow carve out for subpoenas that Defendants might want to serve on investors. The implication is that Defendants cannot otherwise use or disclose the names of investors for such things as serving subpoenas on non-parties. Such limitations would violate Defendants' Due Process rights. Plaintiff's Motion does not provide any legal authority that would justify such an order.

**B. Defendants' Proposed Protective Order Is Standard and Not Controversial**

To be clear, TUPSS, Inc. has not "refuse[d] to treat victims' names and identifying information as confidential" for discovery purposes (ECF No. 58). That is, TUPSS, Inc. does not oppose entry of a protective order that gives the parties in this action the right to produce documents in discovery subject to a "confidential" designation, requiring that the information be used only in connection with this litigation. Nor does TUPSS, Inc. have any interest in publicizing the identities of investors. But TUPSS, Inc. does not believe that is appropriate for Plaintiff to seek entry of a protective order that overrides the Local Rules and the case law requirements for filing documents under seal. TUPSS, Inc. also objects to Plaintiff's attempt to shift the burden redacting the names of investors from any court filing or alternatively making a motion to this Court to be relieved of that obligation. The law puts the burden on a person seeking confidentiality and sealing to show that his or her privacy interests are so great as to overcome the presumption of open access to court records. Plaintiff seeks to shift to Defendants the duty to make some unspecified showing to this Court to allow filing out of seal. *See Halliburton Energy Servs.*, 2018 U.S. Dist. LEXIS 83056, at *4 (where "the documents sought to be sealed are exhibits to a dispositive motion . . . the weight afforded to the public's common-law right of access is necessarily greater" (citations omitted).

Moreover, Plaintiff's proposed protective order contains a vague requirement that the parties "take precautions to protect" the confidentiality of investors' identities, which puts TUPSS, Inc. at risk of violating a court order for serving subpoenas on non-parties – such as the investors' accountants – that ask for information about investors.

## III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's motion for a protective order.

Dated: December 27, 2019

Respectfully submitted,

**MORRISON & FOERSTER LLP**

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**CERTIFICATE OF SERVICE**

I, MARK R. MCDONALD, do hereby certify that I electronically filed the above and foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following counsel of record:

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THIS, the 27th day of December, 2019.

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