

STATE OF NORTH CAROLINA
FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17 CVS 5275

GATEWAY MANAGEMENT
SERVICES, LTD., d/b/a PREMIUM
2000+,

Plaintiff/Counterclaim
Defendant

v.

TRUNORTH WARRANTY PLANS
OF NORTH AMERICA, LLC;
COMPASS ONE WARRANTY PLANS
OF NORTH AMERICA, LLC; and
CARRBRIDGE BERKSHIRE
GROUP, INC.,

Defendants/
Counterclaim Plaintiffs.

**ORDER ON COUNTERCLAIM
PLAINTIFFS' MOTION FOR LEAVE
TO FILE UNDER SEAL**

1. THIS MATTER is before the Court on Counterclaim Plaintiffs TruNorth Warranty Plans of North America, LLC, CompassOne Warranty Plans of North America, LLC, and the Carrbridge Berkshire Group, Inc.'s ("Counterclaim Plaintiffs") motion, pursuant to Rule 5.2 of the General Rules of Practice and Procedure for the North Carolina Business Court ("BCR"), for leave to file certain documents under seal (the "Motion") filed on September 19, 2018. (ECF No. 73 ["Mot."].) For the reasons set forth below, the Court DENIES the Motion without prejudice to refile a proper motion within ten days of this Order.

2. The Motion arises in the context of Counterclaim Plaintiffs' motion to compel Counterclaim Defendant Gateway Management Services, Ltd. ("Counterclaim Defendant") to produce certain discovery. (ECF No. 71.)

3. In support of its discovery motion, Counterclaim Plaintiffs provisionally filed under seal the affidavit of one of its counsel, Hayden J. Silver, Esq. (the "Silver Affidavit"), which sets forth a procedural chronology of the discovery dispute, the alleged shortcomings of Counterclaim Defendant's discovery responses and document production, and attaches twenty-eight (28) separate documentary exhibits. (ECF No. 75 ["Sealed Silver Aff."].)

4. Counterclaim Plaintiffs disclosed in the Motion that eight of the twenty-eight exhibits attached to the Silver Affidavit (Exhibits 16, 19–24, and 28) were being filed under seal because Counterclaim Defendant designated them as confidential and/or attorney's eyes only when it produced them during discovery, pursuant to the Consent Protective Order entered in this case. (Mot. ¶¶ 1, 3; *see* Consent Protective Order, ECF No. 60.) The Consent Protective Order expressly provides that the filing with the Court of confidential information is to be in compliance with BCR 5.2. (Consent Protective Order ¶ 11.) The sealed version of the Silver Affidavit is completely and entirely filed under seal, even though only the eight exhibits in question, containing a total of approximately thirty-one (31) pages, are arguably worthy of protection from public view.

5. Immediately prior to filing the provisionally sealed Silver Affidavit, Counterclaim Plaintiffs filed a "public" version of the Silver Affidavit. (ECF No. 74

["Public Silver Aff."] The public version of the Silver Affidavit and its attachments span two hundred and twenty-two (222) pages. The public version of the Silver Affidavit includes eight single pieces of paper as place holders for Exhibits 16, 19–24, and 28. The eight single pieces of paper do not describe the exhibits in non-confidential terms or in any way identify their form or contents. Instead, the place holders provide solely that each was "Provisionally FILED UNDER SEAL." (Public Silver Aff. Exs. 16, at attachment, 19–24, 28.)

6. Documents filed in the courts of this State are "open to the inspection of the public," except as prohibited by law. N.C. Gen. Stat. § 7A-109(a); *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 463, 515 S.E.2d 675, 685 (1999). Nevertheless, "a trial court may, in the proper circumstances, shield portions of court proceedings and records from the public." *France v. France*, 209 N.C. App. 406, 413, 705 S.E.2d 399, 405 (2011) (quoting *Virmani*, 350 N.C. at 463, 515 S.E.2d at 685) (emphasis omitted). Such shielding of court proceedings and records should be done only "when its use is required in the interest of the proper and fair administration of justice[.]" *Virmani*, 350 N.C. at 463, 515 S.E.2d at 685.

7. The filing of documents under seal in this Court is governed by BCR 5, which is carefully drafted to provide specific, detailed procedures for sealed filings. There are at least two reasons for the procedures set forth in BCR 5. First, these procedures ensure that sensitive, confidential information may be provisionally filed under seal, thus protecting litigants from potential harm caused by the information's public disclosure, until the Court determines whether sealing is warranted. BCR

5(b), (c). Second, these procedures ensure that, even when documents are provisionally filed under seal pending the Court's ruling, the public has prompt notice of the provisional sealing and a non-confidential description of the documents requested to be sealed. *See* BCR 5(d). In short, this Court's procedures for filing under seal are intended to strike an appropriate balance between protecting confidential information and providing the public with notice of the Court's proceedings from the moment a party moves to file a document under seal.

8. Of direct relevance to the Motion, BCR 5.2 provides that every motion for leave to file under seal must contain "a non-confidential description of the material sought to be sealed." BCR 5.2(b)(1). The rule also provides that, when a party files a document under seal, it must, within five business days, file a public version of the document. BCR 5.2(d). "The public version may bear redactions or omit material, but the redactions or omissions should be as limited as practicable." BCR 5.2(d). The rule refers to the filing of an entire document under seal as "[a] rare circumstance" and further provides that, in such instance, the party provisionally filing a document under seal must file a separate notice indicating that the entire document has been filed under seal, and that the notice must contain a "non-confidential description of the document." BCR 5.2(d).

9. The Court concludes that, as applied to the Motion, Counterclaim Plaintiffs failed to comply with BCR 5.2 in several ways. First, Counterclaim Plaintiffs failed to limit their filing under seal as much as practicable as required by BCR 5.2(d). Specifically, Counterclaim Plaintiffs filed the Silver Affidavit in an entirely sealed

format even though, at most, only eight of the twenty-eight exhibits (31 of 253 pages of the affidavit and its attachments) even arguably deserve protection. The Silver Affidavit should only be filed once, with the eight exhibits in question filed under seal.

10. Second, Counterclaim Plaintiffs failed to include in the Motion non-confidential descriptions of the eight exhibits provisionally filed under seal as required by BCR 5.2(b)(1). Instead, the Motion represents that non-confidential descriptions of the exhibits “are set forth in the publicly filed portions of the Silver Affidavit.” (Mot. ¶ 2.)

11. Third, Counterclaim Plaintiffs failed to separately file a notice for the public describing in non-confidential terms the documents that are filed under seal. BCR 5.2 speaks to the filing of “documents” under seal. Each of the exhibits attached to an affidavit constitutes a separate document for purposes of BCR 5.2(d). As a result, when an entire exhibit to an affidavit is deemed to be confidential and worthy of protection, the requirements of BCR 5.2(d) are triggered, and a notice of filing of a document under seal, with a non-confidential description, must be separately filed.

12. The Motion also fails to satisfy BCR 7.3’s requirement that “all motions,” save and except for specific types of motions not relevant here, set forth consultation with and the position of opposing counsel as to the relief requested in the motion.

13. Finally, by way of instruction, counsel electronically filing an affidavit with referenced exhibits (whether or not in conjunction with a motion for leave to file under seal) should file the affidavit and separately file each of the exhibits as separate attachments to the affidavit, rather than filing the affidavit and all exhibits as one,

unified .pdf formatted document. The Court's e-filing system allows counsel to file a "lead document," such as an affidavit, motion, or brief, and then separately file each exhibit thereto as an attachment to that lead document. In this way, the filer may designate as confidential and file under seal none, some, or all of the exhibits under the provisions of BCR 5.2. Doing so makes both opposing counsel's, the Court's, and the public's work of reviewing such filings easier and more efficient.

14. THEREFORE, the Court DENIES the Motion without prejudice and ORDERS as follows:

A. First, Counterclaim Plaintiffs are directed to file no later than ten days following entry of this Order a proper motion seeking leave to file the eight exhibits to the Silver Affidavit in question under seal. The motion shall be in conformity with this Order and BCR 5.2. Without limiting the requirements for a proper filing under that Business Court Rule, counsel for Counterclaim Plaintiffs are directed to specifically describe in the motion each of the documents filed under seal by exhibit number and include a non-confidential description of each exhibit as required by BCR 5.2(b)(1). The motion shall also set forth consultation with opposing counsel and opposing counsel's position as to the motion as required by BCR 7.3.

B. Second, Counterclaim Plaintiffs shall re-file the Silver Affidavit as a "lead document" and separately file as attachments thereto each of the twenty-eight exhibits referenced in and made a part of the affidavit.

Utilizing that process, Counterclaim Plaintiffs may provisionally file the eight exhibits in question under seal.

- C. Third and finally, Counterclaim Plaintiffs shall separately file a single notice for the benefit of the public, as required by BCR 5.2(d), identifying by number each of the exhibits attached to the Silver Affidavit that are provisionally filed under seal and include within the single notice a non-confidential description for each such exhibit.
- D. Counterclaim Defendant shall file its supplemental memorandum, if any, in compliance with BCR 5.3 following Counterclaim Plaintiffs' filings as required herein.

SO ORDERED, this the 21st day of September, 2018.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases