

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 21788

AYM TECHNOLOGIES, LLC,
Plaintiff,

v.

GENE RODGERS; SCOPIA
CAPITAL MANAGEMENT LP; and
COMMUNITY BASED CARE, LLP,
Defendants.

**ORDER ON PLAINTIFF'S MOTION
TO FILE UNDER SEAL, NOTICE OF
CORRECTION, AND EMAIL NOTICE
OF ACCIDENTAL DISCLOSURE OF
CONFIDENTIAL INFORMATION**

1. **THIS MATTER** is before the Court on Plaintiff's Motion for Leave to File under Seal (the "Motion to File Under Seal"), (ECF No. 132), Plaintiff's Notice of Correction regarding its responses to Defendants' motions for summary judgment and related exhibits, (ECF No. 142), and Plaintiff's April 5, 2019 e-mail notice regarding accidental disclosure of confidential information in the above-captioned case.

2. On March 29, 2019, Plaintiff provisionally filed numerous exhibits under seal in support of its opposition to Defendants' motions for summary judgment. Plaintiff filed the Motion to File Under Seal that same day. On April 3, 2019, Plaintiff filed the Notice of Correction, together with an Affidavit of Raboteau T. Wilder, Jr. ("April 3 Wilder Affidavit"). In the April 3 Wilder Affidavit, Mr. Wilder identified and sought to correct various errors in Plaintiff's filings in opposition to Defendants' motions for summary judgment and in the Motion to File Under Seal. (ECF No. 143.) On April 5, 2019, Mr. Wilder advised the Court by e-mail that an additional exhibit

not identified in the Notice of Correction contained confidential information that Plaintiff accidentally failed to file under seal (“April 5 e-mail”).

3. 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).

4. After review, the Court concludes that it cannot determine Plaintiff’s Motion to File Under Seal on the current record due to numerous deficiencies in Plaintiff’s Motion that remain even after the Notice of Correction, the April 3 Wilder Affidavit, and the April 5 e-mail. These deficiencies include, but are not limited to: (i) failure to identify and discuss in the Motion to File Under Seal various exhibits provisionally filed under seal in connection with Defendants’ motions for summary judgment, (ii) failure to file certain exhibits under seal that were referenced in the Motion to File Under Seal, (iii) reference to Bates-numbered documents that were not made a part of the record before the Court, (iv) multiple, potentially conflicting references to the same Bates-numbered documents, and (v) failure to provide adequate explanation for the need for sealing.

5. Plaintiff also seeks to file under seal several deposition transcripts and an affidavit without a satisfactory explanation for why the complete transcripts and affidavit should be filed under seal. This testimony includes the August 8, 2017

Deposition of David Wittels, the January 17, 2019 Deposition of David Wittels, the January 17, 2019 Deposition of Michael Somma, the December 17, 2018 Deposition of Gene Rodgers, the August 17, 2017 Deposition of Gene Rodgers, and the March 29, 2019 Affidavit of Lewis Quinn (“Quinn Affidavit”) (collectively, the “Testimony”). To support sealing, Plaintiff states only that those “materials have either been designated by the parties pursuant to the Protective Order or the documents contain confidential information.” (Motion to File Under Seal ¶ 4.) Plaintiff must provide a more specific and persuasive justification if it seeks to successfully shield the Testimony from public view. *See Virmani*, 350 N.C. at 463, 515 S.E.2d at 685.

6. Plaintiff also seeks to seal the entirety of the Testimony in violation of Business Court Rule 5.2(d). That provision provides that “in the rare circumstance that an entire document is filed under seal,” the party filing the document must file “a notice that the entire document has been filed under seal” and “[t]he notice must contain a non-confidential description of the document that has been filed under seal.” BCR 5.2(d). Plaintiff has not filed a BCR 5.2(d) notice in connection with any of the Testimony, and the Court will require such a notice should Plaintiff continue to seek the sealing of any complete affidavit or deposition transcript.

7. In addition, the Court notes that the April 3 Wilder Affidavit identifies numerous additional errors in Plaintiff’s filings opposing Defendants’ motions for summary judgment. For ease of use and reference, the Court orders Plaintiff to file amended briefs in opposition to Defendants’ motions for summary judgment, corrected to address the numerous citation and related errors identified in the April

3 Wilder Affidavit. For the same reason, the Court will also require Plaintiff to refile Mr. Wilder's March 29 Affidavit ("March 29 Wilder Affidavit") referenced at paragraphs 7–9, and 29 of the April 3 Wilder Affidavit and previously located at ECF No. 133.1, along with the exhibits to the March 29 Wilder Affidavit which Plaintiff initially failed to attach, and the Quinn Affidavit, (ECF No. 137), each amended to address and correct the errors identified in the April 3 Wilder Affidavit. (*See* April 3 Wilder Aff. ¶ 12.)

8. Finally, in the April 5 e-mail, Plaintiff advised the Court that one of the documents the Court removed from its e-docket at ECF No. 133.1, Exhibit 50 to the March 29 Wilder Affidavit ("Exhibit 50"), contained confidential information that should have been filed under seal but was not. Because the Business Court Rules require that materials filed with the Court also be filed with the Clerk of Superior Court in the county of venue, the Court shall take the steps set forth below to limit access to Exhibit 50 in the office of the Mecklenburg County Clerk of Superior Court.

9. **WHEREFORE**, the Court **DEFERS** ruling on the Motion to File Under Seal, and in the exercise of its discretion, hereby **ORDERS** as follows:

- a. To address the deficiencies identified above, Plaintiff shall be permitted to file no later than April 15, 2019 (i) an amended Motion to File Under Seal with supporting brief, (ii) an amended compilation of Proposed Documents to be Filed under Seal, (iii) an amended Index of Exhibits, and (iv) if appropriate, notices consistent with BCR 5.2(d).

- b. Plaintiff shall also file no later than April 15, 2019 (i) the March 29 Wilder Affidavit with affected exhibits, (ii) the Quinn Affidavit with affected exhibits, and (iii) Plaintiff's briefs in opposition to Defendants' motions for summary judgment, each amended to address and correct the errors identified in the April 3 Wilder Affidavit.
- c. Defendants shall be permitted to file reply briefs in further support of Defendants' motions for summary judgment no later than April 29, 2019.
- d. The Proposed Documents to be Filed Under Seal shall remain under seal until otherwise ordered by the Court.
- e. The Mecklenburg County Clerk of Superior Court is directed to place under seal Exhibit 50 to the March 29 Wilder Affidavit until further order of the Court. No party or counsel shall be allowed to access the sealed Exhibit 50 absent Court permission.
- f. Plaintiff shall refile Exhibit 50 provisionally under seal and file a redacted version of Exhibit 50 consistent with N.C. Gen. Stat. § 132-1.10(d), each to be filed with the Mecklenburg County Clerk of Superior Court within the period provided by Business Court Rule 3.11.
- g. All parties shall destroy any copies of Exhibit 50 that are in their possession or control.

SO ORDERED, this the 8th day of April, 2019.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge