

NORTH CAROLINA
COUNTY OF MECKLENBURG

PATRICK SMITH, Derivatively on Behalf
of Nominal Defendant Horizon Lines, Inc,

Plaintiff,

v.

CHARLES G. RAYMOND, M. MARK
URBANIA, GABRIEL SERRA, R.
KEVIN GILL, GREGORY GLOVA,
NORMAN Y. MINETA, DAN A.
COLUSSY, JAMES G. CAMERON,
WILLIAM J. FLYNN, VERN CLARK,
ALEX J. MANDL, THOMAS P. STORRS,
JOHN V. KEENAN and ROBERT
ZUCKERMAN,

Defendants,

and

HORIZON LINES, INC.,

Nominal Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
10 CVS 5321

ORDER

The Court hereby **ORDERS** the parties in the above-captioned case to file, **within ten (10) days** of the date of entry of this Order, memoranda of law in support of the sealing of the Verified Shareholder Derivative Complaint (the “Complaint”).

BACKGROUND

The above-captioned matter was designated a mandatory complex business case by Order dated 15 April 2010, and was assigned to me on the same day. Before the case was assigned to the Business Court, Plaintiff filed a Motion for Leave to File Complaint Under Seal (the “Motion to Seal”), and a predecessor judge entered an Order granting the Motion. Plaintiff filed his Complaint under seal the same day.

The 9 March 2010 Order allowed the Complaint to be filed under seal for “good cause appearing.” Plaintiff’s Motion to Seal, however, alleges merely that Plaintiff is required to file the Complaint under seal due to a provision in paragraph 10 of a Stipulation and Order Governing the Treatment of Confidential Information (the “Stipulation”) in a foreign case (the “Delaware Chancery case”), *Smith v. Horizon Lines, Inc.*, C.A. No. 4573-CC (Del. Ch. filed Oct. 8, 2009).¹ Paragraph 10 of the Stipulation provides that if Plaintiff relies on confidential information obtained in the Delaware Chancery case to file derivative claims under state law on behalf of Nominal Defendant Horizon Lines, Inc., or direct claims against the Nominal Defendant’s directors or officers, Plaintiff shall first seek permission of the Delaware Chancery Court to file those claims under seal. (Pl.’s Mot. Ex. A ¶¶ 4, 10.)

BASIS FOR THE COURT’S ORDER

I may revisit decisions made by a predecessor judge presiding over this matter prior to its designation as a mandatory complex business case. *See Ruff v. Parex, Inc.*, 1999 NCBC 6 ¶ 38 (N.C. Super. Ct. June 17, 1999), <http://www.ncbusinesscourt.net/opinions/1999%20NCBC%206.htm> (suggesting that designation of an exceptional case under Rule 2.1 of the General Rules of Practice and Procedure for the Superior and District Courts is sufficient change in circumstances for the Business Court judge to modify orders entered by a predecessor judge); *see also Wachovia Bank, N.A. v. Harbinger Capital Partners Master Fund I, Ltd.*, 687 S.E.2d 487, 493 (N.C. Ct. App. 2009) (affirming North Carolina Business Court judge’s discretionary authority to revisit and modify a preliminary injunction order where “the case was reassigned to him by the Chief Justice, [and he] stepped into [the predecessor Superior Court judge’s] shoes.”).

¹ Plaintiff filed the Delaware Chancery case seeking an order allowing inspection of the books and records of Nominal Defendant Horizon Lines, Inc., pursuant to Del. Code Ann. Tit. 8, § 220 (2010). (Pl.’s Mot. Ex. A at 1.)

Given that the Motion to Seal was filed in accordance with a stipulation between Plaintiff and Nominal Defendant (whose officers and directors are named Defendants), there would be no way to test the legitimacy of the 9 March 2010 Order unless I revisited the issue.

In that regard, a request to seal court-filed pleadings is inconsistent with the North Carolina Public Records Act, N.C. Gen. Stat. §§ 132-1 to 132-10 (2009) (“the Act”). The Act provides for liberal access to public records. *See News & Observer Publ’g Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992). Absent “clear statutory exemption or exception, documents falling within the definition of ‘public records’ in the Public Records Law must be made available for public inspection.” *Id.* at 486, 412 S.E.2d at 19.

Court filings are “public records,” and to that end, the public’s right of access to court records is provided by section 7A-109(a) of the North Carolina General Statutes, which specifically grants the public the right to inspect court records in criminal and civil proceedings. *See* N.C. Gen. Stat. § 7A-109(a) (2009). A trial court may limit the public’s right of access to civil court proceedings and records only “when there is a compelling countervailing public interest and closure of the court proceedings or sealing of documents is required to protect such countervailing public interest.” *Virmani v. Presbyterian Health Servs.*, 350 N.C. 449, 476, 515 S.E.2d 675, 693 (1999).

After reviewing the Complaint, the Court is hard pressed to find that its wholesale, blanket filing under seal is warranted. First, Plaintiff did not attach any documents to the Complaint, and thus there is no concern that unsealing the pleading will compromise the parties’ Stipulation.² Second, while the Complaint quotes excerpts from documents that appear to have been produced in accordance with the Stipulation, these consist mostly of letters sent by Nominal

² In any event, the Stipulation was entered in the Delaware Chancery Court and contemplated that Plaintiff’s suit would be brought there. Put bluntly, the Stipulation does not bind this Court.

Defendant's Chief Executive Officer to Defendants, all of whom are or were officers or directors of the Nominal Defendant. (Compl. ¶¶ 100–118.) The Court sees nothing in these paragraphs (or anywhere else in the Complaint) that supports an order to seal the entire pleading.

In sum, the parties have not met their heavy burden to show a compelling countervailing public interest that would support sealing the entire Complaint. Accordingly, if the parties continue to believe that the Complaint should remain sealed, they shall file memoranda of law supporting their position **within ten (10) days** of the date of entry of this Order. The Court will thereafter rule on whether the Complaint shall remain under seal.

SO ORDERED, this the 27th day of May, 2010.

/s/ Albert Diaz
Albert Diaz
Special Superior Court Judge