UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KIRK DAHL, et al., Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. BAIN CAPITAL PARTNERS, LLC, et al., Defendants.	)	No. 1:07-cv-12388-EFH **Leave to File Granted on September 12, 2012**

DEFENDANTS' SUR-REPLY TO THE NEW YORK TIMES' MOTION TO INTERVENE AND UNSEAL THE FIFTH AMENDED COMPLAINT AND ITS ASSOCIATED EXHIBITS

ARGUMENT

As Defendants' opposition explained, the New York Times' motion seeks to unseal Defendants' confidential, proprietary information, which could harm the competitive position of Defendants and their portfolio companies. Although the Times never attempted to meet and confer, Defendants offered to provide the Times with a redacted complaint as a compromise. The Times never reached out to Defendants to discuss this option, but now acknowledges in its reply that a redacted complaint might be an acceptable alternative to unsealing the entire complaint and the documents that it quotes. (*See* New York Times Proposed Reply in Support of Motion to Intervene [Dkt. 707-1] ("NYT Proposed Reply") at 8-9 (citing case law "approving limited redactions to protect defined trade secrets").) Defendants have now filed the attached, redacted complaint in the hopes of mooting the Times' motion. (*See* Ex. 1.) As courts have repeatedly found, this is a "practical, narrowly tailored strategy for balancing the interest in public access and the interest of [Defendants] in the confidentiality of sensitive information." *Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Secs. Dealers, Inc.*, No. 07-CV-2014 (SWK), 2008 WL 199537, at *16 (S.D.N.Y. Jan. 22, 2008). There is accordingly no basis for the Court to grant the Times' motion to unseal the entire complaint and the documents it cites.

Nor is there any need for the Court itself to redact the 216-page, 643-footnote complaint, as the Times suggests. Trial courts have "considerable leeway in making decisions of this sort," *Siedle v. Putnam Invs., Inc.*, 147 F.3d 7, 10 (1st Cir. 1998), and the Times' request would be unnecessary and unduly burdensome in light of the complaint's length. The redactions Defendants propose in the attached document eliminate competitively-sensitive information and fully accommodate the Times' interest in monitoring this action. The Court should thus exercise its "considerable leeway" to deny the Times' motion to unseal and instead find that the filing of the redacted complaint by Defendants is sufficient.

In addition, the Court should deny the Times' motion because of three fundamental problems with their sweeping unsealing request:

The Court already denied the same relief. The New York Times' motion to unseal asks for the same basic relief that Plaintiffs requested and the Court denied over a year ago. Contrary to Plaintiffs' suggestion, their earlier motion, like the Times' motion here, asked that the Court "disclos[e] to the public any filings with the Court including the Fourth Amended Class Action Complaint." (Pls.' Mem. In Supp. Of Mot. To Modify the Protective Order [Dkt. 414] at 4.) The Court summarily rejected that motion. The Times' reply presents no good reason why the Court should abandon that ruling here. It literally says nothing about the earlier briefing or order at all. Instead, the Times makes the same arguments about public interest and confidentiality that Plaintiffs made and the Court rejected last year. And it fails to explain why a redacted complaint would be insufficient to meet its needs to monitor this Court's docket. The Court already ruled that the redactions to the Fourth Amended Complaint were acceptable, and the redactions that Defendants propose here cover the same types of confidential information. There is no need for the Court to depart from its previous ruling here.

The redacted portions of the Complaint contain confidential information. The Times' reply does not address the problem that disclosure of the entire Fifth Amended Complaint and the documents it cites could harm the competitive position of Defendants and the companies that they took private. The Times instead argues that the information at issue here is "stale" and "no longer has competitive value." (NYT Proposed Reply at 7; *see also* Pls.' Resp. to Defs.' Joint Opp. to NYT Mot. to Intervene [Dkt. 721-1] ("Pls. NYT Resp.") at 5.) That is untrue: unsealing the complaint and discovery materials it cites would harm Defendants' *present*

business interests. (Defs.' Opp. to Times' Mot. to Intervene at 9-10.) By way of example, the Times would have this Court unseal:

- Internal investment committee materials that outline Defendants' methods of evaluating target companies and even include Defendants' valuation models. (*See, e.g.*, 5AC ¶¶ 211 (citing APOLLO011850-83), 424 (citing APOLLO131378-95), 237 (citing BX-1753535-65).) These constitute trade secrets and are not strictly time-sensitive.

- Documents detailing Defendants' approaches to diligence, deal structure, and negotiations—all of which are still central to Defendants' business models and relevant today. (*See, e.g.*, 5AC ¶ 195 (citing SLTM-DAHLS-E-0057989-8006).)

- Going-forward business plans for portfolio companies, which, if released, would serve as blueprints for competitors. Contrary to Plaintiffs' suggestion, these materials include "information regarding the business practices of the portfolio companies that Defendants operate." (Pls. NYT Resp. at 5.) Because many of these portfolio companies are still owned by Defendants, the disclosure of these business plans could impact later efforts to sell those companies. (*See, e.g.*, 5AC ¶¶ 424 (citing APOLLO131378-95), 237 (citing BX-1753535-65).)

- Lists of investors in Defendants' funds. (*See, e.g.*, 5AC ¶¶ 463 (citing BC-E00112808-21), 101, 394 (citing BC-E0054381-96).) Defendants compete vigorously for investors; maintaining the confidentiality of past investors is thus critical to achieving a competitive edge in raising capital.

The Times also suggests that this information is already public—and Plaintiffs claim that Defendants shared "confidential business practices with each other on a regular basis"—but that is simply not the case. (*See* NYT Proposed Reply at 7; Pls. NYT Resp. at 5.) The Times offers no evidence that the materials at issue have been disclosed to the public, nor could they: Defendants have taken every precaution to ensure that their confidential business information is protected. And Plaintiffs' so-called support does not show, as they claim, that Defendants exchanged the confidential material that Defendants seek to keep under seal here.

Nor can unsubstantiated blanket assertions that the information here relates to conspiratorial conduct defeat Defendants' confidentiality claims. (*See* Pls.' NYT Resp. at 4-5.) This Court has not found that such a conspiracy exists, and neither Plaintiffs nor the Times can

establish one by say-so or allegations alone, especially given that the allegations in the complaint are consistent with common place—and lawful—business conduct.

The Times gains no ground by faulting Defendants for not "fil[ing] an affidavit in support of their opposition." (NYT Reply at 6.) Local Rule 7.2, which provides the mechanics for sealing publicly-filed materials, does not require an affidavit or declaration to justify sealing—only a showing of "good cause." That showing is easily met by Defendants' signed pleading, just as Defendants met their burden in similar briefing when they opposed Plaintiffs' attempt to unseal the Fourth Amended Complaint last year.[1]

There is no presumptive right of access. The Times does not save its motion by arguing that the entire Fifth Amended Complaint and the documents it references are subject to a presumptive right of access. The presumption of public access "does not encompass discovery materials," *Anderson v. Cryovac, Inc*., 805 F.2d 1, 13 (1st Cir. 1986), and thus cannot apply to the actual documents that the complaint references, which even Plaintiffs admit were not filed with the complaint. Nor can the Times circumvent that rule by the fortuity that such materials were described in Plaintiffs' 216-page, 643-footnote complaint. Those descriptions are unnecessary in a notice pleading. This case is thus unlike *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006), and the other cases the Times cites, all of which involved unsealing exhibits to dispositive motions. (*See* NYT Proposed Reply at 2-3). Unlike in those decisions, the Fifth Amended Complaint does not "reflect[] this Court's substantive rulings on the evidence adduced in discovery," as the Times contends. (NYT Proposed Reply at 4.) This Court has made no evidentiary rulings beyond the effect of the releases, and even motions to dismiss relating to the latest complaint concerned only legal disputes about the statute of

[1] Similarly, Plaintiffs' opposition ignores that Plaintiffs have never challenged any of Defendants' confidential designations and, in fact, filed the Fifth Amended Complaint under seal in the first place without voicing any objection to doing so.

limitations and releases concerning several transactions added to the complaint—not the information the Times seeks to unseal.

Even if there were a right of access to the complaint or the documents cited in it, Defendants' interest in preserving the confidentiality of proprietary business information would outweigh that interest. Courts routinely allow competitively-sensitive information to remain under seal (*see* Defs.' Opp. at 10-11), and the Times' reply provides no reason why the public interest here is so special as to break the mold. The Times' "inherent interest" in investigating Defendants' business practices (NYT Proposed Reply at 7) fails to implicate the bedrock rationale for judicial access—to enable the public to "keep a watchful eye on the workings of public agencies" and monitor "the operation of government," *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978), both of which the Times can do with the redacted version of the complaint attached hereto. The Times admits, moreover, that Governor Romney was not part of Bain Capital during the time of any of the transactions in question, and the fact that he, like hundreds of others, might have an interest in funds advised by Bain Capital is insufficient to defeat Defendants' interest in keeping proprietary information out of the hands of competitors.

In the end, neither the Times nor Plaintiffs provide any reason to believe that a redacted complaint would be insufficient here. The Times does not need access to Defendants' investor lists to "allow the public to understand the factual basis for the Court's decision on August 18, 20120 to permit the Plaintiffs to add [] eight additional transactions to the case." (NYT Mot. to Intervene at 8.) Nor is unsealing the entire complaint necessary to understand this Court's ruling on Defendants' motion to dismiss, which cited none of the redacted materials at all. The Court should accordingly deny the Times' motion and order that the redacted complaint be entered.

Dated: Boston, Massachusetts
September 12, 2012

Respectfully Submitted

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CERTIFICATE OF SERVICE

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