U.S. DISTRICT COURT
DISTRICT OF VERMONT
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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

GREEN MOUNTAIN CHRYSLER PLYMOUTH DODGE JEEP, *et al.*	)	
PLAINTIFFS,	)	**Docket Nos. 02:05-CV-302**
	)	**02:05-CV-304**
v.	)	**(Consolidated)**
GEORGE CROMBIE, *et al.*	)	
DEFENDANTS,	)	
GREENPEACE, INC.	)	
INTERVENOR.	)	

DR. PATRICK J. MICHAELS' MEMORANDUM IN SUPPORT OF HIS MOTION TO INTERVENE AND DR. MICHAELS' OPPOSITION TO GREENPEACE MOTION TO UNSEAL CERTAIN RECORDS, OR TO COMPEL SHOWING OF CONFIDENTIALITY[1]

INTRODUCTION

On June 8, 2007, Greenpeace, Inc. filed a motion to intervene and to unseal confidential business records of Dr. Patrick J. Michaels. Greenpeace seeks access to information showing the clients of Dr. Michaels' wholly-owned consulting firm, New Hope Environmental Services, Inc., and the amount of money these clients paid to New Hope. This information was produced in discovery and designated as "highly confidential" under the First Amended Stipulation and Protective Order Regarding Handling of Confidential Information, entered by this Court on July

[1] For convenience and to avoid repetition, Dr. Michaels combines in this single document his memorandum in support of his motion to intervene and his opposition to Greenpeace's motion to unseal.

11, 2006. Greenpeace states that it intends to publicize Dr. Michaels' confidential information on the internet.

Plaintiffs retained Dr. Michaels as a testifying expert. Dr. Michaels, however, withdrew from the case and did *not* testify at trial nor did plaintiffs ever rely on Dr. Michaels' confidential information at trial or in any pre-trial motions. Therefore, no public right of access exists as to Dr. Michaels' material of which Greenpeace can avail itself and, if one does exist, it is extremely weak.

In contrast, disclosure of this information will cause devastating personal and financial harm to Dr. Michaels and his business. Many of New Hope's clients provide funding to New Hope with the understanding that the funding will be confidential. Public exposure of the funding will therefore result in the loss of some or all of New Hope's clients, leading either to destruction of the business or a significant curtailment of its operations. Since Dr. Michaels and other research scientists obtain a significant portion of their income from New Hope, the damage to New Hope will seriously diminish their livelihoods. This damage far outweighs any Greenpeace interest in the material it seeks.

Dr. Michaels therefore requests that the Court (1) grant his motion to intervene for the purpose of opposing Greenpeace's motion to unseal Dr. Michaels' confidential information and (2) deny Greenpeace's motion.

FACTUAL STATEMENT

1. Dr. Michaels is an expert climatologist and environmental scientist. He has published four books on climate change, approximately seventy articles in the peer-reviewed scientific literature, and hundreds of technical and popular articles on climate change and its influence on society. *See* attached Affidavit of Patrick J. Michaels, ¶ 1.

2. Dr. Michaels is also the sole owner of New Hope, a consultancy whose mission is to publicize findings on climate change and scientific and social perspectives that may not otherwise appear in the popular literature or media. *Id.*, ¶ 2.

3. Plaintiffs retained Dr. Michaels in the present lawsuit to provide expert testimony at trial about the effect the Vermont motor vehicle regulations at issue would, or would not, have on global climate. *Id.*, ¶ 3.

4. As a part of discovery in the case, Dr. Michaels was asked to produce a number of his personal files, including a list of New Hope's clients and the amount of money they have paid New Hope. Many of New Hope's clients have informed New Hope that their funding is contingent on confidentiality. *Id.*, ¶ 8. Dr. Michaels understood that he was required to produce these files but that his list of clients and the amounts they had paid his company would be kept confidential. *Id.*, ¶ 4. Dr. Michaels' list of clients and client payments, in fact, was designated as "highly confidential" information in accordance with the First Amended Stipulation and Protective Order Regarding Handling of Confidential Information, entered by this Court on July 11, 2006.

5. On March 8, 2007, Plaintiffs filed a Motion to Exclude the Testimony of James E. Hansen, Phd. On March 23, 2007 Defendants and Defendant-Intervenors filed an Opposition to that Motion. The Opposition attached a Declaration of Benjamin A. Krass. The Krass Declaration, in turn, attached the two exhibits that are the subject of Greenpeace's motion to unseal – Exhibit E and Exhibit BB. Exhibit E is two pages of transcript from Dr. Michaels' deposition in which he revealed his two largest funders in response to a question from defendants' counsel. Exhibit BB is a list, prepared by Dr. Michaels and produced in discovery, of his funders for the years 2001-2006. Both Exhibit E and Exhibit BB are marked Highly

Confidential in accordance with the Court's protective order. The Krass declaration was filed under seal.

6. On March 28, 2007, this Court heard arguments on three motions *in limine*, including plaintiffs' motion regarding Dr. Hansen's testimony. During argument, plaintiffs' suspended their motion pending the testimony of Dr. Hansen. March 28, 2007 Transcript, page 102, Lines 11-12. Plaintiffs never renewed their motion, and this Court therefore never ruled on it or ever considered the Krass declaration or Dr. Michael's information attached to it.

7. On approximately April 7, 2007, Dr. Michaels informed Plaintiffs that he would not testify at trial for them. Dr. Michaels took this action out of concern that, contrary to his initial understanding when he first agreed to testify, his testimony at trial could result in a lifting of the confidential treatment of his business information. Michaels Affidavit, ¶¶ 5-6.

DR. MICHAELS' MOTION TO INTERVENE

Dr. Michaels seeks intervention as of right in this proceeding in order to oppose Greenpeace's effort to unseal his confidential information. "In order to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2), an applicant must (1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action." *In re: Bank of New York Derivative Litigation* 320 F.3d 291, 300 (2d Cir. 2003), citing *New York News, Inc. v. Kheel*, 972 F.2d 482, 485 (2d Cir. 1992).

Dr. Michaels meets these standards. Dr. Michaels' motion to intervene is timely since it was filed in accordance with a procedural schedule stipulated to by the parties and Greenpeace. *See* Unopposed Motion to Establish Briefing Schedule to Respond to Greenpeace Motion to Intervene and to Unseal Certain Records, or to Compel Showing of Confidentiality, June 18,

2007. Dr. Michaels' has a self-evident direct and immediate interest in this action, to the extent the Court permits Greenpeace to intervene and considers its motion to unseal Dr. Michaels' confidential business information. This interest will be impaired if Greenpeace's motion is granted because, as set forth in Dr. Michaels' affidavit, Dr. Michaels' company provides services to clients on a confidential basis. Michaels Affidavit, ¶ 8. Unsealing his confidential information puts his ability to continue to do so at risk. *Id.*, ¶¶ 9-10. Finally, although Dr. Michaels understands that plaintiffs are at least considering opposing the Greenpeace motion, they cannot represent Dr. Michaels' interest. Since Dr. Michaels did not testify at trial and since plaintiffs no longer retain him, their counsel does not represent Dr. Michaels' interests. *Id.* ¶ *12.* Moreover, plaintiffs have their own interests at stake in this litigation and are not solely concerned with protecting Dr. Michaels' confidential records. Only Dr. Michaels can speak for his own interests.

Alternatively, Dr. Michaels seeks permissive intervention. Permissive intervention is discretionary with the trial court. Under Fed. R. Civ. P. 24(b)(2), permissive intervention may be granted "when an applicant's claim or defense and the main action have a question of law or fact in common." This rule applies here, where Dr. Michaels seeks to assert a defense to a legal claim made (or at least sought to be made) in the underlying action. Additionally, a motion for permissive intervention invokes the discretion of the district court and, in exercising that discretion, the court should consider the same factors it considers for motions for intervention as of right. *In re: Bank of New York Derivative Litigation* 320 F.3d at 300 n.5. For the reasons set forth above, and because it is fair and equitable to allow Dr. Michaels to personally defend a motion seeking to unseal his confidential business records, the Court should grant Dr. Michaels' motion for permissive intervention.

OPPOSITION TO MOTION TO UNSEAL

1. Standards for Consideration of Greenpeace Motion.

This Court, in its March 23, 2007 Opinion and Order in response to Plaintiffs' "Motion to Present Certain Testimony *In Camera* to Protect Trade Secrets," explained the legal framework for determining whether information connected with judicial proceedings may be kept confidential. As the Court stated, under *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006), a right of public access exists under both the common law and the First Amendment, but neither right is absolute. As to the common law right of access, this Court stated that:

> A court must first determine whether the documents at issue are judicial documents. If a document is a judicial document, a presumption of access attaches. A court must next determine the weight of that presumption, ranging from matters that directly affect an adjudication to matters that are tangential. After determining the weight of the presumption, a court must balance any countervailing factors.

March 23, 2007 Opinion and Order at 8-9, citing *Lugosch*, 435 F.3d at 119-20.

As to the First Amendment right of public access, this Court explained that there were two approaches for determining the existence of such right. The "experience and logic" approach "requires the court to consider both whether the documents 'have historically been open to the press and general public' and whether 'public access plays a significant positive role in the functioning of the particular process in question.'" *Lugosch*, 435 F.3d at 120 (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004)). "The second approach considers the extent to which the judicial documents are 'derived from or [are] a necessary corollary of the capacity to attend the relevant proceedings." *Id.* (quoting *Hartford Courant Co.*, 380 F.3d at 93). If a qualified First Amendment right exists, "'documents may be sealed if specific, on the record findings are made demonstrating that closure is essential to preserve

higher values and is narrowly tailored to serve that interest.'" *Id.* (quoting *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987).

2. Greenpeace Failed to Show a Common Law Public Right of Access to the Information It Seeks.

Greenpeace correctly states that "judicial documents" are those that are "relevant to the performance of the judicial function and useful in the judicial process" (citing *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995) ("*Amodeo I*"), *SEC v. TheStreet.com*, 273 F.3d 222, 231 (2d Cir. 2001), and *Lugosch*, 435 F.3d at 119). Greepeace Motion at 6. Greenpeace is wrong, however, that the documents it seeks meet this test. Given that Dr. Michaels did not testify and that the Court did not rule on Plaintiffs' motion regarding Dr. Hansen because it was withdrawn, the documents in question were not relevant to the performance of this Court's function or either used or useful in the judicial process.

In the cases cited by Greenpeace where the courts found that documents are judicial documents, the information at issue, unlike Dr. Michaels' information here, played a central role in the judicial process. Thus, in *Amodeo I*, 44 F.3d at 146, the documents found to be judicial documents were status reports filed with a court by a receiver appointed under a consent decree in a RICO action, where the court reviewed the documents for the purpose of ensuring that the receiver was carrying out her duties under the Consent Decree. And in *Lugosch*, 435 F.3d at 120-23, the information at issue was attached to a summary judgment motion and therefore put at issue for consideration in the ultimate disposition in the case. *See also* this Court's March 23, 2007 Opinion and Order at 11, finding that the material Plaintiffs sought to maintain as confidential constituted judicial documents where Plaintiffs intended to submit the material at trial.

In contrast, in *TheStreet.com*, also cited by Greenpeace, the Court determined that discovery information does not constitute "judicial documents" because discovery "play[s] no role in the performance of Article III functions." *TheStreet.com*, 273 F.3d at 233 (citing *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995) ("*Amodeo II*"). According to the Court, "[t]he testimony did not 'directly affect an adjudication' nor does it significantly 'determine litigants' substantive rights'" (citing *Amodeo II*, 71 F.3d at 1049).

The information Greenpeace seeks is discovery information and therefore does not constitute judicial documents under *TheStreet.com*. Although an argument *might* exist that this material would constitute judicial records had plaintiffs not withdrawn their motion regarding Dr. Hansen, the fact that plaintiffs withdrew that motion means that the documents never played a role in any judicial determination or function. *See Lugosch* 435 F.3d at 115 ("'the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access,'" quoting *Amodeo I*, 44 F.3d at 145).

Even if the documents at issue are "judicial documents," their confidentiality should nevertheless be maintained. Since Dr. Michaels never testified and Plaintiffs withdrew their motion regarding Dr. Hansen, the documents were "tangential" to the litigation and therefore the weight of the presumption of public access given to the documents is extremely weak. *Lugosch*, 435 F.3d at 119-20. *See also Amodeo II*, 71 F.3d at 1050 ("Where testimony or documents play only a negligible role in the performance of Article III duties, the weight of the presumption is low and amounts to little more than a prediction of public access absent a countervailing reason"). Dr. Michaels' information thus is among the "abundance of statements and documents generated in federal litigation [that] actually have little or no bearing on the exercise of Article III judicial power." *Id.* at 1048.

Against this weak presumption of public access, the Court must consider the "countervailing factor" of Dr. Michaels' privacy interest. *Id.* at 1050-51. As the Second Circuit has stated, "'the privacy interests of innocent third parties...should weigh heavily in a court's balancing equation.'" *Id.* (quoting *United States v. Biaggi (In re New York Times Co.)*, 828 F.2d 110, 116 (2d Cir. 1987)). Moreover, the weight of the privacy interest should depend on "the degree to which the subject matter is traditionally considered private rather than public," with the *Amodeo II* Court specifically naming "financial records of a wholly owned business" as an example of protected privacy interests. *Id.* at 1051. *See also TheStreet.com*, 273 F.3d at 231-32.

Here, Dr. Michaels' privacy interests in the records of his wholly-owned business far outweigh any possible interest in disclosure. These records set forth his company's annual revenues – information that most closely-held businesses normally do not reveal. And because his business is small, revealing New Hope's earnings also, to a large degree, may be read as revealing Dr. Michaels' own personal compensation – which is also information that most individuals would not care to see on the internet. Moreover, as set forth in ¶¶ 8-9 of Dr. Michaels' affidavit, many of his clients demand confidentiality in employing his services. If that confidentiality is breached, some or all of those clients will not provide further funding for New Hope, imperiling the firm's future and the livelihood of Dr. Michaels and other scientists who are retained by New Hope.

In contrast, Greenpeace's interest in the information is tenuous at best. Since it was not a party to the litigation, it has no cognizable interest in the ultimate outcome of the case. The best reason Greenpeace can manage for wanting the information is to publicize it on its website, but it does not even attempt to show whether and to what extent its website would be affected by not having access to Dr. Michaels' confidential material. Nor, in the end, would it matter whether

the material would be of use to Greenpeace. While Greenpeace obviously has philosophical views on the global warming issue, that interest does not require this Court to breach the confidentiality of information that never formed any part of this Court's disposition of the underlying issues.

3. Greenpeace Failed to Show a First Amendment Public Right of Access to the Material It Seeks.

Because Greenpeace cannot prevail on a theory of common law right of public access, it cannot prevail on its First Amendment theory. The First Amendment right of access is more limited than the common law right of access, since the latter right applies to all judicial documents, whereas the former right applies only to "'*certain* judicial documents.'" *Lugosch*, 435 F.3d at 120 (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d at 91, emphasis supplied).

No First Amendment right of access exists here under the "experience and logic" approach because confidential business information has not "historically been open to the press and general public" and because public access to Dr. Michaels' confidential information did not "play[] a significant positive role in the functioning of the particular process in question," that is, the determination of the underlying (or, for that matter, any) legal questions in this case. *Hartford Courant Co.*, 380 F.3d at 92. Nor does a First Amendment right of access exist here as a result of Dr. Michaels' documents having been "derived from or [having been] a necessary corollary of the capacity to attend the relevant proceedings." *Hartford Courant Co.*, 380 F.3d at 93. To the contrary, Dr. Michaels' documents played no role at all in the public's ability to attend and fully understand the judicial proceedings here. Revealingly, Greenpeace fails to cite any case demonstrating that discovery information never used at trial or in the resolution of any judicial matter raises First Amendment concerns. There is no First Amendment issue here.

4. Greenpeace Cannot Justify a Retroactive Modification of the Protective Order.

The last paragraph of Greenpeace's motion apparently sets forth an alternative ground for relief by claiming that Dr. Michaels' information should never have been deemed confidential under the protective order in the first place. But, for the reasons discussed above, this information was personally and commercially sensitive and entitled to protection under the protective order. Additionally, Greenpeace's attempt to retroactively change the terms of the protective order should be denied under *Martindell v. Int'l T&T Co.*, 594 F.2d 291 (2d Cir. 1979). As interpreted in subsequent decisions, *Martindell* held that where the information sought to be produced does not constitute judicial documents, and "[w]here there has been reasonable reliance by a party or deponent, a District Court should not modify a protective order granted under Rule 26(c) 'absent a showing of improvidence in the grant of [the]order or some extraordinary circumstance or compelling need.'" *TheStreet.com*, 273 F.3d at 229 (quoting *Martindell*, 594 F.2d 291, 296). As the Court stated:

> We suggested [in *Martindell*] that there is a strong presumption against the modification of a protective order and affirmed the decision of the District Court to decline to modify its protective order, thereby denying the Government access to the transcripts. *Id.* at 296. As we stated in *Martindell*, protective orders issued under Rule 26(c) serve "the vital function . . . of 'securing the just, speedy, and inexpensive determination' of civil disputes . . . by encouraging full disclosure of all evidence that might conceivably be relevant. This objective represents the cornerstone of our administration of civil justice." *Id.* at 295 (citations omitted). Without an ability to restrict public dissemination of certain discovery materials that are never introduced at trial, litigants would be subject to needless "annoyance, embarrassment, oppression, or undue burden or expense." Rule 26(c). And if previously-entered protective orders have no presumptive entitlement to remain in force, parties would resort less often to the judicial system for fear that such orders would be readily set aside in the future.

Id. at 229-30.

Greenpeace cannot justify a retroactive modification of the protective order under these standards. Dr. Michaels' records are not judicial documents. Dr. Michaels relied on the protective order in producing his confidential information in discovery. Indeed, he refused to testify at trial out of concern that his trial testimony could result in the loss of confidentiality of his business information. Finally, Dr. Michaels' material was properly designated as confidential, and Greenpeace makes no attempt to show otherwise.

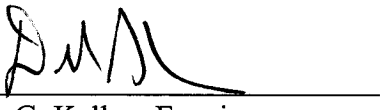
CONCLUSION

Greenpeace's motion to unseal Dr. Michaels' confidential business records must be denied. No public right of access exists as to this material under either the common law or First Amendment and, even if one does, that right is weak and outweighed by Dr. Michaels' privacy and business interests.

WHEREFORE, Dr. Michaels respectfully requests that he be granted intervention for the purpose of opposing Greenpeace's motion to unseal his confidential information and that Greenpeace's motion be denied.

Dated: July 6, 2007

Respectfully submitted,



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