IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CASE NO. 5:13-CV-00527-F

U.S. TOBACCO COOPERATIVE INC.; U.S. FLUE-CURED TOBACCO GROWERS, INC.; and BIG SOUTH DISTRIBUTION, LLC, Plaintiffs, v. BIG SOUTH WHOLESALE OF VIRGINIA, LLC d/b/a BIG SKY INTERNATIONAL; BIG SOUTH WHOLESALE, LLC; UNIVERSAL SERVICES FIRST CONSULTING A/K/A UNIVERSAL SERVICES CONSULTING GROUP; JASON CARPENTER; CHRISTOPHER SMALL; EMORY STEPHEN DANIEL; ALBERT JOHNSON, and other unnamed coconspirators, Defendants.	**RESPONSE TO MOTION OF THE UNITED STATES TO STAY OPERATION OF THE COURT'S ORDER [DE 655] ON PLAINTIFFS' MOTION TO UNSEAL**

This case has been pending for approximately three and one-half years. [DE 1] The United States of America ("the United States") has been involved in the case since September 30, 2014. [DE 209] The parties will try this case beginning March 6, 2017, a fact everyone has known since September 14, 2016. [DE 627] Before March 6, the Court will decide pending motions for summary judgment. In light of the approaching decisions on substantive motions and the trial, Plaintiffs moved the Court on July 20, 2016, to unseal the record in this case and to modify the Sealed Amendment to the Protective Order, allowing the substance of this litigation to proceed in public view. [DE 520] The Court ruled on Plaintiffs' motion on December 7, 2016. [DE 655]

Under the United States Constitution and the litany of cases interpreting the First Amendment, both decisions on substantive motions and trials must proceed in open court, based upon on-the-record evidence, but according to the caption of publicly available Docket Entry 694, the United States now asks for a 60-day extension of implementation of the Court's ruling on Plaintiffs' Motion to Unseal.[1] [DE 694] The result of the United States' request would be that the Court's Order would not take effect until March 24 -- three weeks after the March 6 trial date.

The arguments of the original Defendants and of the United States to support the sealing of significant portions of the record have relied almost exclusively on issues of safety. However, the parties in the case have made numerous on-the-record statements that reveal that defendants Carpenter and Small participated in undercover law enforcement activities. Although the sealed records hide much of the detail from view, the underlying fact the government says it must protect is on the record and has been for several years. The Court can look behind the United States' conclusory claims of safety concerns and determine, for at least two reasons, that sealing is neither necessary nor justified.

I. Publicly Available Pleadings Reveal the Covert Operations at Play in this Case.

The public record contains repeated statements, confirmations and allusions to certain defendants' role in undercover government operations. In a Memorandum in Support of Motion for Proposed Discovery Plan, Defendants state: "Defendants executed the APA a few days later,

[1] Despite the Court's direction that the parties "provide access to docket entry 691 and all associated briefing to Mr. Apuzzo" [DE 697], Intervenor has received only certain "associated briefing," to wit, Proposed Sealed Motion, DE 691, and Proposed Sealed Memorandum In Support Regarding 691 Proposed Sealed Motion, DE 692. Intervenor has not been provided the memorandum in support of the United States' motion to file under seal. [DE 693] Accordingly, Intervenor – individually and as a surrogate for the public – is left to draw conclusions as to certain arguments of the government on the basis of incomplete information and the scant public record.

with all references to their covert law enforcement activities omitted." [DE 338] (emphasis supplied) The Answer filed by Universal Services First Consulting and Emory Stephen Daniel made several key statements, on the record, regarding Defendants Carpenter and Small, as well as the existence of an undercover operation. "[I]t is admitted that Big South Wholesale of Virginia, LLC ("Big South-Va.") and Big South Wholesale, LLC ("BSW") were engaged in certain transactions with the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF")." [DE 22, ¶ 18] Further, "it is admitted that a meeting was held with an agent for the ATF at which Daniel, Carpenter, Small, and USTC Board Chair Albert Johnson ("Johnson") were present. A number of matters were discussed, including undercover operations of the United States government." [DE 22, ¶ 25] Finally, the Answer states "it is admitted that an ATF agent attended the March 23, 2011, Meeting and that he made it known that Carpenter and Small had assisted the ATF in the past." [DE 22, ¶ 27]

Similarly, Carpenter and Small's own filings reference their work on undercover law enforcement activities. "Defendants deny Plaintiffs' contentions and counterclaim against Plaintiffs for breaching the asset purchase, employment, and consulting agreements *and for publicly disclosing confidential information related to Defendants' participation in undercover law enforcement activities*." [DE 188] (emphasis supplied) Thus, the arguments of the United States and other defendants with regard to safety are dispelled by the already public record of ATF involvement and cooperation in undercover investigations.

While certain documents and allegations of *this* case remain under seal, significant allegations (and additional information) recently were put on the public record in a Florida case, demonstrating that both the involvement of the relevant parties and many of the allegations of wrongdoing already are known. U.S. Flue-Cured Tobacco Growers, Inc. – a plaintiff in the

instant case -- is a defendant in *Vibo Corp., Inc. v. U.S. Flue-Cured Tobacco Growers, Inc., et al.,* Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, Case Number 132016CA033342000001. The complaint in the Florida case includes allegations that U.S. Flue Cured Tobacco Growers, Inc. worked hand in hand with the ATF and employed undercover agents and informants. The complaint alleges

> Defendants Anderson, Lesnack, Simonye, Unknown Named Informant, Unknown Named Agents of ATF, U.S. Flue Cured and Premier conspired, combined, confederated and agreed to deprive and did deprive Plaintiff of its property.

Id. ¶ 23. Likewise, some of the individuals involved in *this* case are implicated in the Florida case. It simply is not plausible for the United States or any defendant in this case to argue that filings and evidence contain highly confidential information that warrants extraordinary court secrecy. They do not.

II. The Court Should Unseal the Record Prior to Ruling on Substantive Motions or Trial.

Even if the parties (and others) had not placed in the public record the nature of the activities giving rise to this case, unsealing now is proper. For four months, the United States has supported a public trial in this case. For just as long, the United States has been aware of the rapidly approaching March 6, 2017, trial date. The government has had ample time to take whatever precautions it deems necessary to prepare for a public trial -- the same precautions necessary for the Court's unsealing order to go into effect. The government may want more time. But it surely does not need it.

Because a summary judgment ruling is akin to a trial, the public has a right of access to related documents, just as they would an actual trial. *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir.1986)

(recognizing that documents submitted as a part of motions for summary judgment are subject to public right of access); *Joy v. North*, 692 F.2d 880, 893 (2d Cir.1982) ("documents used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons").

Access to trials is also fundamental to our justice system. As the Third Circuit ruled in *United States v. Antar*, 38 F.3d 1348 (3d Cir. 1994), the public is entitled to contemporaneous access to trial proceedings. "[W]hen the conduct of public officials is at issue, the public's interest in the operation of government adds weight in the balance toward allowing permission to copy judicial records" *United States v. Beckham*, 789 F.2d 401, 413 (6th Cir. 1986). *See also Smith v. United States District Court for Southern District*, 956 F.2d 647, 650 (7th Cir. 1992) (appropriateness of making court files accessible is accentuated in cases where the government is a party). Indeed, in September 2016, even the United States voiced its commitment to public trials in general and a public trial in this case:

- "[T]he Government opposes the closure of the courtroom for the purposes of the upcoming trial … ."
- There are "extremely important interests of the public in open judicial proceedings … ."
- "[T]he public interest in open judicial proceedings is a vital one, particularly for a trial."
- "Mr. Apuzzo and the general public should have the benefit of an open trial with appropriate safeguards and the United States opposes the complete sealing of the courtroom for purposes of the trial in this matter."

[DE 614].

Despite the partial public record, it has become increasingly clear that activity of the United States is key to the proceedings of this case. It is equally clear that the United States has

had ample time to undertake whatever precautions were necessary to prepare for a public trial. Not only would it be a contravention of bedrock Constitutional law to proceed to summary judgment or with a trial while shielding from public view the core documents and evidence on which the Court will rely; it would be bad public policy. The United States should not be permitted to proceed with activities on the assumption that their behavior will remain forever shielded from public view. Even if operations must be covert for a time, even the government ultimately is accountable for their actions. Since this case was filed in 2013, the United States has been on notice that the time for accounting was at hand. The Court should not indulge the government's eleventh hour request for an extension of that time, particularly when the request for extension would infringe and violate core Constitutional principles of judicial transparency.

Respectfully submitted this the 17th day of January, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2017, I electronically filed the foregoing Response To Motion of the United States to Stay Operation of the Court's Order [DE 655] on Plaintiffs' Motion To Unseal with the Clerk of Court using the CM/ECF system addressed to the following counsel:

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This 17th day of January, 2017.

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