IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ELIZAIDA RIVERA CARRASQUILLO, et. al. Plaintiffs, v. BHATIA-GAUTIER, et al., Defendants.	CIVIL NO. 13-1296 (FAB) (rel. Cases 13-1560-FAB / 13-1862-PG / 13-1896-PG) Civil Rights.

DEFENDANTS' OPPOSITION TO MOTION TO UNSEAL DOCUMENTS AT DOCKET 454, IN COMPLIANCE WITH ORDER AT DOCKET 455

TO THE HONORABLE COURT:

COME NOW Defendants, *Maritza Alejandro-Chevres, Tania Barbarrosa-Ortiz, Eduardo Bhatia-Gautier, José Hernández-Arbelo, Luis A. Ramos-Rivera, Denisse M. Rivera-González, and Juan Vázquez-López,* as well as the Commonwealth of Puerto Rico, collectively "the Defendants" for the purpose of this motion, and through the undersigned attorney, without waving any right or defense arising from Title III of Puerto Rico Oversight, Management and Economic Stability Act ("PROMESA"), 48 U.S.C. §§ 2101 *et seq.* and without submitting to the Court's jurisdiction, very respectfully set forth and pray:

I. INTRODUCTION

On February 15, 2022, journalist Oscar J. Serrano Negrón ("Mr. Serrano") filed a *Motion For Reconsideration And Requesting Order To Unseal Documents Currently Under Restricted Setting* (Docket No. 454). Mr. Serrano is not a party in this case. In said motion, Mr. Serrano requests that this Court: (i) unseal the Confidential Settlement Agreement at Docket No. 197; (ii) reconsider its Minute Order at Docket No. 453 granting Defendant's Motion to Restrict (Docket

No. 451); and (iii) proceed to unseal the filing that the Commonwealth made in compliance to the Court's Minute Order that refers to "all amount of payments made by the Commonwealth of Puerto Rico pursuant to Law 9, for each of the past ten (10) years" at Docket No. 452 (See, Docket No. 454, ¶ 3). On the same date, this Court entered an *Order* for "[t]he parties" to "respond to this motion no later than March 1, 2022" (Docket No. 455).

As to the Confidential Settlement Agreement ("CSA") at Docket No. 197, Defendants argue that the signatory parties are bound by the confidentiality clause in the settlement covenant, a contract the parties entered into voluntarily. Defendants are of the position that the confidentiality of the agreement, as expressed and agreed to in the document, should be primarily taken into consideration by this Honorable Court in order to determine if it will grant the unsealing of the same. Likewise, Defendants argue that the confidentiality of settlement agreements such as the one in controversy here at Docket No. 197, in which the Department of Justice represents government officials in their personal capacities pursuant to Act No. 104 of June 29, 1955 (also known as Act No. 9), is an extremely important mechanism that allows the settlement of claims, as well as for the Court to mediate, so as to achieve a prompt resolution of cases.

Defendants request that this Honorable Court not lose sight of the fact that the CSA is, at the very present, the subject of the controversy surrounding the case of caption, currently stayed under Title III of PROMESA. The automatic stay provided by PROMESA was modified by Order of

the First Circuit Court of Appeals solely "to make the liability determination sought by the Title III court." *See Corrected Order of Court at Docket No. 429*.[1]

As to the restricted documents at Docket Nos. 443 and 452 (the Law 9 payment certifications) filed by Defendants in compliance with this Honorable Court's orders at Docket Nos. 441 and 450, Defendants set forth that the restricted information disclosed to the Court, at its request, contains sensitive information totaling the amounts paid in settlements where, under the provisions and particularities of Law 9, the Commonwealth obligated itself. And as has been argued, the agreements and conditions under which the Commonwealth agreed to make those payments, have all been confidential. It is necessary to preserve such classification because otherwise, the Commonwealth's position at the negotiating table will be considerably undermined. As such, they should NOT be disclosed to the public. They are documents containing privileged information that was tailor-made to be presented exclusively to the Court in compliance with this Honorable Court's orders to disclose, which this Honorable Court issued "[t]o provide context for this assertion [that the "Commonwealth of Puerto Rico ought to pay from monies drawn from the public fisc which, as we all know, is a major component of the Debtor's Estate" (Case No. 13-1296, Docket No. 434 at p. 8)] and to conduct a comprehensive

[1] On February 24, 2022, this Court entered an Opinion and Order denying plaintiffs' motion to compel payment from individual capacity defendants pursuant to the terms of the confidential settlement agreement (Docket No. 456). The Court ruled that "[T]he law in this action requires the Commonwealth of Puerto Rico to pay the settlement amounts. Id. The Opinion and Order is currently under the "Selected Parties" viewing restriction, given that the parties were granted until March 1, 2022, to respond to Mr. Serrano's request to unseal (Docket No. 455). A reading of the Opinion and Order reveals numerous detailed references to the agreement, including the specific terms and amount to be paid. These terms were negotiated and agreed to in confidence, with multiple facts taken into consideration. Thus, Defendants respectfully request the Opinion and Order at Docket No. 456 continue to remain under the "Selected Parties" restriction.

review of the parties' arguments…". *See Order at Docket No. 439 at 4; see also Order at Docket No. 441.*

II. ARGUMENT

A. Argument in favor of preserving confidentiality of the CSA at Docket No. 197 (under seal).

The common law presumes a right of public access to judicial records. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). Similarly, "First Amendment policy concerns underlie this common law right of access to government information." *In re Globe Newspaper Co.*, 920 F.2d 88, 96 (1st Cir. 1990); *In re Providence J. Co., Inc.*, 293 F.3d 1, 10 (1st Cir. 2002). The reasoning behind said presumption is that "[p]ublic access to judicial records and documents allows the citizenry to monitor the functioning of our courts, thereby ensuring quality, honesty and respect for our legal system." *F.T.C. v. Stand. Fin. Mgt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (internal quotation marks omitted). **However, although the public's right of access "is vibrant, it is not unfettered**. Important countervailing interests can, *in given instances*, overwhelm the usual presumption and defeat access." *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 9-10 (1st Cir. 1998) (emphasis added). In other words, "[i]t is uncontested … that the right to inspect and copy judicial records is not absolute." *See Warner Commc'ns, Inc*., supra, at 598.

The United States Supreme Court has held that an access decision is "one best left to the sound discretion of the trial court." *Warner Commc'ns, Inc*., supra, at 599. Courts must employ a balancing test between "the presumptively paramount right of the public to know against the competing private interests at stake." *Stand. Fin. Mgt. Corp.*, 830 F.2d at 410. When addressing a request to unseal, a court must carefully balance the presumptive public right of access against the competing interests that are at stake in a particular case, as stated in *Warner Commc'ns, Inc.*,

id., keeping in mind that "only the most compelling reasons can justify non-disclosure of judicial records that come within the scope of the common-law right of access." *In re Providence Journal,* supra, at 10.

Sealing a confidential settlement agreement, like other sealing decisions, is "best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Warner Commc'ns, Inc*., supra, at 599. "It is axiomatic that protection of the right of access suggests that the public be informed of attempted incursions on that right." *United States v. Kravetz*, 706 F.3d 47, 59 (1st Cir. 2013). Those incursions include sealing the record or its constituent parts. Informing the public may take place through motions to seal filed on the case docket, the disposition of those motions, or the court's recorded justification for sealing. *Id.* at 59–60. Some circuits require "notice and an opportunity to be heard" before documents to which a public right of access attaches may be sealed. *See In re Hearst Newspapers*, 641 F.3d 168, 182 (5th Cir. 2011) (collecting cases). The First Circuit has not adopted a requirement that the Courts give notice and opportunity to the public to be heard before the sealing of a document, giving Courts the sole discretion to determine when a document is to be sealed. It is against this backdrop, and given the importance of confidential agreements and negotiations in the course of the Commonwealth's handling of its civil and criminal cases, that this Honorable Court should consider any request to unseal confidential settlement agreements.

First, as the Court can attest, the mere fact that a settlement agreement is to be paid pursuant to Act No. 104 of June 29, 1955 (also known as Act No. 9), does not bar the **parties** to engage in a confidential covenant. There are multiple compelling reasons as to why a CSA may

be filed as a sealed document in a specific case. One of the main compelling reasons is that publishing settlement agreements, when the P.R. Department of Justice represents public employees sued in their individual capacity, would discourage negotiations in order to reach an agreement to settle, thus, rendering future settlements unachievable. That is, because it may lead plaintiffs and their attorneys to create unreasonable expectations as to the settlement value of their case based on settlements reached in other cases, regardless of the difference in circumstances surrounding the claims.

Further, the Court's role as a mediator between the parties on settlement conferences or on Court-Annexed Mediation under Local Civil Rule 83J—when the Department of Justice is providing legal representation to a defendant—would also be impracticable because plaintiffs would be influenced by other settlement agreements, regardless of the difference in circumstances surrounding their claims. The Defendants contend that they, as individuals afforded legal representation by the Department of Justice pursuant to Act No. 104 of June 29, 1955 (also known as Act No. 9) are common and ordinary parties entitled to the same protections available to a party that retains a non-governmental counsel, which includes the filing of sealed settlement agreements, irrespective of who pays the settlement. *See Ayuso-Figueroa v. Rivera-González*, 229 F.R.D. 41, 43 (D.P.R. 2005) (holding that legal duties imposed under Act 9 mirror what a non-government attorney does). After all, the filing of any sealed documents in the docket must be approved beforehand by the Court, which creates a strong presumption that a balancing of interest analysis was made when allowing such filing. *See Siedle*, 147 F.3d at 10 (holding that the court must carefully balance the competing interests that are at stake when the unsealing of an order is requested). Thus, the Defendants respectfully move for this Court to avoid the

adoption of a general rule in which the only consideration for allowing the filing of a sealed settlement agreement is the party's counsel or the origin of the monies but continues to analyze all requests for unsealing of documents on a case-by-case basis.

Again, Defendants' position is that that the signatory parties are bound by the confidentiality clause in the settlement covenant into which they entered voluntarily. This Court should uphold and continue that position, as expressed and agreed to in the document, determining that the unsealing the agreement is unwarranted. The CSA in controversy here contains clauses that preclude the publication of its terms (Docket No. 197 at 6), to which the parties consented, and any breach ultimately affects them. Thereby, to avoid the deterrence of future settlement negotiations, it is respectfully requested that the Court under a balance of interest analysis deny the request made by Mr. Serrano based on: (1) the opposition herein expressed by the Defendants regarding the unsealing of the CSA; (2) the confidentiality clauses contained and agreed by the signatory parties in the covenant; and (3) the grounds set forth by Mr. Serrano in his motion to unseal the sealed documents identified by him in his motion at Docket No. 454 (*see*, *Siedle*, 147 F.3d at 10). In short, Defendants request that Mr. Serrano's request to unseal the Confidential Settlement Agreement at Docket No. 197 be denied.

B. Defendants support the restriction of the documents at Docket Nos. 443 and 452.

As stated above, this Honorable Court's orders to disclose at Dockets 443 and 452 were issued "[t]o provide context for this assertion [that the "Commonwealth of Puerto Rico ought to pay from monies drawn from the public fisc which, as we all know, is a major component of the Debtor's Estate" (Case No. 13-1296, Docket No. 434 at p. 8.)] and to conduct a comprehensive review of the parties' arguments…". *See Order, Docket No. 439 at 4; see also Order at Docket No.*

441. In other words, the purpose of the Order was to help the Court in its effort to conduct a comprehensive review of the parties' arguments, which, as the Court noted, has been fully briefed.

Considering the limited purpose of this Court's orders stemming from the limited modification of the automatic stay, there is no valid justification for Mr. Serrano to gain access to the information provided in the sealed documents, as can be ascertained from the arguments already before the Court's consideration in his motion at Docket No. 454. The assessment of the information contained in the custom-made sealed documents is to be conducted by the Court and, as such, the Court is the only entity who should have access to the confidential and sensitive information contained therein. To grant access to the information provided by the Commonwealth in the identified documents would essentially open the door to further inquiry, contravening the very purpose of Act 9. Access, in whatever form or with whatever boundaries, would result in a slippery slope of requests that may seriously and irreparably jeopardize the protections Law 9 affords. The information provided to this Court, as ordered, stems from the archives, files, and documents covered by either Law 9 and/or confidential settlement agreements. Their protection is essential to the former, current, and future public employees who seek legal representation when sued.

WHEREFORE, it is respectfully requested that this Honorable Court take notice of the above and consequently, DENY Mr. Serrano's request to unseal documents in the present case.

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court, using CM/ECF system, which will send notification of such filing to all parties and attorneys of record.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico on this 1ST of March 2022.

DOMINGO EMANUELLI HERNÁNDEZ
Secretary of Justice

SUSANA PEÑAGARÍCANO BROWN
Deputy Secretary in Charge of Civil Litigation

MARCIA PÉREZ LLAVONA
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