

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL
CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA
COMPLEX BUSINESS DIVISION

CASE NO. 16-000158 (07)

JUDGE : JACK TUTER

BERGERON ENVIRONMENTAL AND
RECYCLING, LLC, a Florida limited
liability company,

Plaintiff,

v.

LGL RECYCLING, LLC f/k/a SUN
RECYCLING LLC, a Florida limited
liability company; WASTE MANAGEMENT INC.
OF FLORIDA , a Florida corporation;
ANTHONY LOMANGINO, an individual;
CHARLES GUSMANO, an individual;
CHARLES LOMANGINO, an individual;
and JOHN C. CASAGRANDE, an individual

Defendants

MOTION PURSUANT TO FLORIDA RULE OF JUDICIAL ADMINISTRATION
2.420(e)(5)

COME NOW, the Movants Broward Bulldog Inc., d/b/a Florida Bulldog and Dan Christensen, by and through their undersigned attorney, and makes and files this their motion pursuant to Florida Rule of Judicial Administration 2.420(e)(5) to order the unsealing of records designated as confidential and in support thereof would show as follows:

1. This is an action arising from a joint venture designed to compete with Waste Management Inc., of Florida (WMIF) for the control of waste disposal in Broward

County. As the Court noted in its Nov. 7, 2018 order, the heart of this case is about the legitimacy of the merger of Waste Management and Southern Waste Systems (SWS).

2. The public, especially the residents of the 17 Broward municipalities that contracted with the Sun Bergeron Joint Venture to process tons of their recycled trash, have a great interest in understanding the state and federal anti-trust investigations that allowed the merger. For many, their recycling costs recently have skyrocketed as a result.
3. Movant Broward Bulldog Inc., d/b/a Florida Bulldog is a news site which delivers fact-based watchdog reporting upon matters of concern to the residents of Broward County which is essential to a free and democratic society. Florida Bulldog is committed to delivering original, local, issue-oriented news and information our community needs. FloridaBulldog.org is a member of the Institute for Nonprofit News.
4. Dan Christensen is the editor in chief and a reporter of Florida Bulldog. Christensen is an award-winning former investigative reporter for The Miami Herald and Daily Business Review, and one of South Florida's most experienced reporters as well as a citizen of Florida.
5. Plaintiff contends Defendant Waste Management Inc. of Florida (WMIF) misled Department of Justice (DOJ) and Florida antitrust regulators. Review of the record reflects that Plaintiff asked this Court on August 21, 2018 to authorize it to transmit to both DOJ and the Florida Attorney General's Office exhibits marked confidential by Waste Management (apparently hoping those documents might trigger a reconsideration of the antitrust decision) however because of the Order sealing the records, the public cannot ascertain if they or the Department of Justice who is charged with protecting them, have been the victim of criminal behavior or fraud by WMIF.

6. The Florida Supreme Court in *Bainter v. League of Women Voters of Fla.*, stated “this Court is committed to the principle that "all trials, civil and criminal, are public events and there is a strong presumption of public access to these proceedings and their records." *Bainter v. League of Women Voters of Fla.*, 150 So. 3d 1115, 1119 (Fla. 2014).
7. The movants are seeking to have the records and filings in this matter open to public inspection and review in accordance with the Florida Constitution, the rules of this Court and case law which holds that litigation should, absent extraordinary circumstances, be open to the public.
8. During the course of this litigation this Court has entered a series of Orders directing the pleadings, discovery and depositions of witnesses including public officials and employees of governmental entities be sealed and hidden from the view of the public.
9. Under Florida law and more particularly pursuant to Rule 2.420(a) of the Florida Rules of Judicial Administration enacted pursuant to the rulemaking power of the Florida Supreme Court, the “public shall have access to all records of the judicial branch of government”.
10. The Florida Supreme Court has acknowledged that “the Florida Constitution mandates that the public shall have access to court records, subject only to certain enumerated limitations, see art. I, § 24, Fla. Const.,” *In re Amendments to Fla. Rule of Judicial Admin. 2.420--Sealing of Court Records & Dockets*, 954 So. 2d 16, 17 (Fla. 2007).
11. Yet, notwithstanding the foregoing authority, this Court has allowed the parties to file records under seal and to redact and preclude review of such materials including the depositions(s) of municipal representatives which should be open to the public. As more particularly set forth below, Movants seek to have the records unsealed and opened to the public.

12. The initial Complaint in this matter was not filed under seal but contained a redacted exhibit.
13. The first notification of filing confidential materials was filed in June of 2016 when Plaintiff filed the Amended Complaint. There was no finding by the Court that the exhibit attached to the Amended Complaint was confidential.
14. On December 30, 2016 a motion to determine confidentiality of certain Exhibits was filed with the Court. An Order was entered on January 12, 2017 granting that motion however that Order (as with the ensuing Orders) lacked the specific findings required by case law and by the applicable Rules of Judicial Administration.
15. The initial Order sealing records in this matter appears to have been on the basis of an agreement of the parties entered in September 2016.
16. The sealing of Court records and public records is an extraordinary measure which should not be undertaken lightly and which should be done in the least restrictive manner possible.

Court records may be sealed only for compelling reasons, which should be set forth by the court in order to facilitate review. Access to court records may be restricted to protect the interests of litigants only after a showing that the following three-prong test has been met: (1) the measure limiting or denying access (closure or sealing of records or both) is necessary to prevent a serious and imminent threat to the administration of justice; (2) no less restrictive alternative measures are available which would mitigate the danger; and (3) the measure being considered will in fact achieve the court's protective purpose. *Bundy State*, 455 So. 2d 330, 337 (Fla. 1984).

Cosio v. Merkle (In re Cosio), 841 So. 2d 693, 694(2nd DCA, 2003)

17. The wholesale preclusion of review of transcripts of the testimony of governmental agencies in cases that do not involve state secrets or security but merely apply to financial or business interests of private enterprises is improvident and contrary to the intent and spirit of Florida jurisprudence.

18. Under the Rule 2.420 (d)(3)(G) of the Rules of Judicial Administration, Orders sealing records must include findings by the Court that :

(i) the degree, duration, and manner of confidentiality ordered by the court are no broader than necessary to protect the interests set forth in subdivision (c); and (ii) no less restrictive measures are available to protect the interests set forth in subdivision (c).

19. This requisite finding under Rule 2.420 (d)(3)(G) is absent from the Court's Orders of January 12, 2017, March 29, 2018, May 1, 2018 and July 11, 2018 all of which pertain to sealing records or redacting public records.

20. In *Goldberg v. Johnson*, the Court held

in sealing records in a judicial proceeding, the court must determine that there are compelling reasons to do so and their reason must be specifically set forth in the order so that appellate review can be had, *News-Press Publishing Company, Inc. v. State*, 345 So.2d 865 (Fla. 2d DCA 1977). In the present case, the order sealing the documents failed to specifically set forth compelling reasons for closure and we find none suggested that would meet the three prong test, particularly the imminent threat to the administration of justice

Goldberg v. Johnson 485 So. 2d 1386, 1389, (4th DCA, 1986)

21. As in *Goldberg*, "the trial court failed to follow the established rules laid down by the cases in entering the original orders sealing the documents in question". *Id.*

22. It is apparent that this Court has permitted sealing of records based upon the 9/6/2016 agreement of the parties as to confidentiality. However the parties' agreement is not sufficient to warrant the sealing of public records or court records.

[A]litigant's preference that the public not be apprised of the details of his litigation is not grounds for closure. *Tyson*, 313 So.2d at 783-784. Were it otherwise, we suggest that a large percentage of the court proceedings in this nation would be closed.

Goldberg v. Johnson, 485 So. 2d 1386, 1389,

23. This is especially true where the information sealed may include data as to public hazards. Fla. Stat. §69.081 Sunshine in litigation, concealment of public hazards prohibited.
24. On August 10, 2018 this Court entered an Order pertaining to the deposition of public officials and employees of public agencies in this matter and the sealing of their deposition transcripts.
25. Transcripts of public officials and exhibits to those transcripts constitute public records where the subject matter of the deposition deals with official business of the government agency. Fla. Stat. § 119.011(12). It is the policy of this state that such records are open to public access. Fla. Stat. § 119.01.
26. Citizens of this state, including the movants have a right under Florida law to inspect and copy such records. Fla. Stat. §119.07
27. This Court expressly prohibited the parties from providing the witnesses who were public employees or officials with copies of their deposition transcripts to prevent such transcripts being available to the public by means of a public records request pursuant to Florida Statute 119.011.
28. This Court's Order is in contravention of the Florida Constitution and Florida Statute and imposes an unreasonable burden on citizens and municipalities regarding the inspection of records which is neither warranted nor necessary. Review of the docket reveals that deposition(s) of the Town of Southwest Ranches was taken in this matter. The sealing of

records and redaction of same make it difficult to ascertain if other municipalities or governmental officials have been deposed.

29. In July 2018 LGL Recycling moved for an order on Confidentiality of Public Official Deposition Transcripts and Exhibits to impede and impair the public's right to see otherwise public records.

30. As noted above Rule 2.420 (d)(3)(G) requires an order sealing records expressly find :

(i) the degree, duration, and manner of confidentiality ordered by the court are no broader than necessary to protect the interests set forth in subdivision (c); and (ii) no less restrictive measures are available to protect the interests set forth in subdivision (c).

31. This Court's Order of August 10, 2018 on Confidentiality of Public Official Deposition Transcripts and Exhibits does not contain such a finding.

32. The Order of August 10, 2018 imposes additional procedures and hurdles for reviewing public records outside of those provided by the Florida Statute without due cause or procedure.

33. Based upon the subject matter of the litigation and those records available to public scrutiny, it is the understanding of the movants that the depositions of public officials including the representative(s) of the Town of Southwest Ranches involve contracts between the litigants and governmental agencies. Such contracts, as well as their negotiation and implementation, are matters of public importance and public interest and such interest should not be frustrated by a blanket confidentiality order or by imposition of procedures beyond statutory requirements to obtain or view public records.

34. Movants seek an Order unsealing the deposition transcript of any governmental official taken in this matter and making same available to the public.

35. The record contains sealed materials which this Court has found are not subject to privilege or entitled to protection as privileged. Specifically this Court has issued an order finding a prima facie showing of criminal fraud with respect to certain documents which would preclude the application of the attorney client privilege. The Court has also directed production of documents produced by the Office of the Florida Attorney General pursuant to the Civil Investigation demand as not being privileged. Yet these materials remain hidden from the public.

36. Again these records appear to have been sealed merely upon the request and agreement of the parties without the requisite finding of the Court that the degree, duration, and manner of confidentiality ordered by the Court are no broader than necessary to protect the interests set forth in Rule 2.420 (c) and that no less restrictive measures are available to protect those interests.

37. In *Scott v. Nelson*, 697 So. 2d 207, 210, the court reaffirmed that “[s]pecific findings are mandated in an order sealing court [records].” The entry of orders sealing records without those findings is in error regardless of the good intentions of the Court or the request of the parties.

38. “Even if all parties were to agree to the sealing of documents, the trial court still must make the determination; because of the presumption of openness in court proceedings, denial of access 'may not be based solely upon the wishes of the parties to the litigation.’”

Rocket Group, LLC v. Jatib, 114 So. 3d 398, 400-401, (Fla. 4th DCA 2013)

39. Although there is a presumption of correctness when the Court enters an Order sealing records, that presumption is overcome when the record demonstrates that the original sealing order was in error. *Friend v. Friend*, 866 So. 2d 116, 117, (Fla 3rd DCA 2004)

40. The desires of the parties to shield information which is part of a Court procedure from public review “cannot serve as a sufficient predicate upon which to exclude the public and press *completely*. The courts belong to the people; "they have been established by the people for the administration of justice according to law and are not to be considered as the private domain of any person or group of persons." *Scripps*, supra, at 909. “ *State ex rel. Gore Newspapers Co. v. Tyson*, 313 So. 2d 777, 784, (Fla 4th DCA 1975).
41. Non privileged materials should not be sealed merely at the request or demand of the litigants and the Movants seek an Order of this Court unsealing the all non privileged materials for public inspection and review including Bergeron Environmental and Recycling’s August 21, 2018 Motion for an Order authorizing transmittal to the Department of Justice and the Office of Florida Attorney General and the exhibits thereto.
42. The Third Amended Complaint and Exhibits thereto were filed with the Court in September of 2018 with redactions and “place holders” of sealed information. Plaintiff has since filed a motion to unseal the Third Amended and Supplemental Complaint and its exhibits. The record does not reveal that the motion has been ruled upon.
43. The Fourth Amended Complaint and Exhibits thereto were filed with the Court on February 5, 2019 with redactions and “place holders” of sealed information.
44. The Movant also seeks an unsealing of the Third and Fourth Amended Complaints based on the argument above that the order sealing the pleadings in this matter was improperly entered.
45. This Court has ordered the unsealing of certain records merely upon the agreement of the litigants without hearing by the Court. See for example AGREED ORDER ON

MOTION TO DETERMINE CONFIDENTIALITY OF COURT RECORD dated 6/20/2016 which expressly states it is based upon an “agreement that the Alleged Confidential Documents shall be unsealed”.

46. If the Court is willing to unseal records on the agreement of the parties, then there is no justification for the Court to refuse to unseal those portions of the record which are not privileged and for which the proper procedure for sealing or redacting of records was not followed.

47. Movants ask the Court to unseal Plaintiff’s complete Aug. 21, 2018 Motion to Authorize Transmittal and its related exhibits to the Department of Justice, as well as documents found not to be privileged in the Court’s Orders of Nov.7 and 29, 2018.

48. Movants further ask the Court to unseal plaintiff’s Third Amended and Supplemental Complaint, including all exhibits, filed Sept. 4, 2018, and the October 30, 2018 deposition and associated exhibits of non-party Keith Poliakoff, designated representative and town attorney for Southwest Ranches and any and all other records for which the proper determination as to the propriety of filing under seal was not made.

WHEREFORE Movants seek an Order of this Court unsealing the depositions of all governmental officials and allowing proper access to such records, unsealing non privileged materials and unsealing the pleadings and other filings herein for which an order containing the specific findings required by Rule 2.420 (d)(3)(G) was not entered, together with such other and further relief as may be proper.

Respectfully Submitted,

By: */s/ Darlene M. Lidondci*
DARLENE M. LIDONDICI, ESQ.
Fla. Bar No.: 516521

Email: dml@fertig.com
Secondary Email: fertigservice@fertig.com
CHRISTOPHER R. FERTIG, ESQ.
Fla. Bar No.: 218421
Email: chris.fertig@fertig.com
Secondary Email: fertigservice@fertig.com

FERTIG & GRAMLING

200 S.E. 13th Street
Fort Lauderdale, FL 33316
Phone: (954) 763-5020
Fax: (954) 763-5412
Counsel for Movants
Broward Bulldog Inc., d/b/a Florida Bull Dog and
Dan Christensen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of February, 2019, I electronically filed the foregoing with the Florida Courts E-Filing Portal, which will serve it on the following counsel of record via electronic mail, as set forth on the attached service list.

By: /s/Darlene M. Lidondici
Darlene M. Lidondici
Fla. Bar No.: 516521
Email: dml@fertig.com

SERVICE LIST

<p>Mitchell W. Berger, Esq. Anthony Carriuolo, Esq. P. Benjamin Zuckerman, Esq. BERGER SINGERMAN LLP 350 East Las Olas Boulevard Suite 1000 Fort Lauderdale, Florida 33301 mberger@bergersingerman.com acarriuolo@bergersingerman.com bzuckerman@bergersingerman.com drt@bergersingerman.com jmaldonado@bergersingerman.com <i>Counsel for Plaintiff</i></p>	<p>L. Louis Mrachek, Esq. Roy E. Fitzgerald, Esq. MRACHEK FITZGERALD ROSE KONOPKA THOMAS & WEISS P.A. 505 S. Flagler Drive Suite 600 West Palm Beach, Florida 33401 lmrachek@mrachek-law.com rfitzgerald@mrachek-law.com <i>Counsel for Defendants LGL Recycling, LLC f/k/a Sun Recycling LLC, Anthony Lomangino, Charles Gusmano and Charles Lomangino</i></p>
<p>Brian H. Hole, Esq., Katherine M. Joffe, Esq. Phillip E. Rothschild, Esq. HOLLAND & KNIGHT LLP 515 East Las Olas Boulevard Suite 1200 Fort Lauderdale, Florida 33304 brian.hole@hklaw.com phil.rothschild@hklaw.com katherine.joffe@hklaw.com <i>Counsel for Defendant Waste Management Inc. of Florida</i></p>	