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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: BLUE CROSS BLUE SHIELD	**}**	**Master File No.: 2:13-CV-20000-RDP**
	}	
ANTITRUST LITIGATION	**}**	**This document relates to all cases.**
(MDL NO.: 2406)	**}**	

ORDER UNSEALING OSTLUND AND CARDEN DEPOSITION TRANSCRIPTS

This matter is before the court on (1) Subscriber Plaintiffs' Motion to Unseal Alabama Department of Insurance Deposition Transcript (Doc. # 719) and (2) certain submissions made in connection with the court's Order Regarding Revised Sealing Procedures (Doc. # 665) related to the depositions of Steven Ostlund on behalf of the Alabama Department of Insurance (Doc. # 773-10), and Noel Carden on behalf of Blue Cross Blue Shield of Alabama (Doc. # 773-11). The question before the court is whether there is sufficient cause for these depositions to remain under seal.[1] After careful review, the court concludes there is not.[2]

I. Background

The court entered its Order Regarding Revised Sealing Procedures (Doc. # 665) on July 7, 2016. On August 23, 2016, the court unsealed a number of documents pursuant to that Order.

[1] The court adopted its Order Regarding Revised Sealing Procedures (Doc. # 665) due to the inordinate number of documents which have been filed under seal in this case. The court had relied on counsel, as officers of the court, to file under seal only documents warranting sealing. (Doc. # 145). However, it has become clear to the court that many documents were being filed under seal simply based on a party's confidentiality designation. Because of this practice, the court issued its Order Regarding Revised Sealing Procedures, and the issue of sealed documents has taken on a life of its own. It has consumed much of the court's and the parties' time and attention, and delayed rulings on other more substantive matters. Therefore, the parties are forewarned that the court is considering vacating that portion of the Protective Order (Doc. # 145) under which sealing without advance approval is allowed, and requiring a document by document justification for filing sealed documents *in advance* of their filing.

[2] This Order addresses only the Ostlund and Carden depositions. But the court notes that there is a backlog of sealed documents in this case which should be examined, and those documents will be examined in due course.

(Doc. # 716). On August 24, 2016, Subscriber Plaintiffs filed their Motion to Unseal Alabama Department of Insurance Deposition Transcript (Doc. # 719). On August 29, 2016, Defendants filed their Amended and Restated Motion Based on the Filed Rate Doctrine for Summary Judgment on the Alabama Subscribers' Damages Claims. (Doc. # 733). Thereafter, there has been a flurry of filings and submissions regarding whether the Ostlund and Carden depositions, and other documents filed in connection with the Motion, should remain under seal. Ostlund testified as the corporate representative of the Alabama Department of Insurance. (Doc. # 773-11). Carden testified as the corporate representative of Blue Cross Blue Shield of Alabama. (Doc. # 773-10).

In their Motion Based on the Filed Rate Doctrine for Summary Judgment on the Alabama Subscribers' Damages Claims (Doc. # 733), Defendants seek summary judgment on damages claims asserted by the Alabama group customers of the named Subscriber Plaintiffs -- C B Roofing, Inc. and American Electric Motor Service, Inc. -- in their two Alabama cases. Defendants' Motion is premised on the argument that they are entitled to judgment as a matter of law because the rates paid by Plaintiffs to BCBSAL were validly filed with the Alabama Department of Insurance, the agency vested with the authority to regulate the reasonableness of those rates. Defendants argue that this "filed rate doctrine" bars a subset of the Alabama Subscribers' damages claims. In support of their Motion, Defendants filed the Declaration of Noel Carden, which had attached to it fifty-five exhibits. (Docs. # 738-2 through 738-57). No less than fifty-four of those exhibits were filed under seal by Defendants. (*Id.*). Defendant also filed under seal the deposition of Steven Ostlund, the health actuary for the Alabama Department of Insurance, and the twenty-six exhibits thereto. (Docs. # 738-58 through 738-86). In fact, (and inexplicably), of all the items filed in support of Defendants' Motion, only four were *not* filed

under seal: (1) a redacted version of Defendants' brief, (2) a redacted version of Carden's Declaration, (3) a document containing BCBSAL's filed rates, which is available on the internet, and (4) Alabama Department of Insurance Regulation Chapter 482-1-116. (Docs. # 734, 735 and 738).

Due to Defendants' confidentiality designations, Subscriber Plaintiffs filed their Consolidated Memorandum of Law in Opposition to Defendants' Motion and their Cross Motion, as well as eleven exhibits (including the Deposition of Noel Carden, and the Rule 56(d) Declaration of Daniel P. Moylan regarding additional discovery needed to fully respond to Defendants' Motion) under seal. (Docs. # 771 and 773). Plaintiffs also filed their Cross Motion in a heavily redacted format. (Doc. # 770).

It is worth noting that both of the cases in which Defendants have filed their filed rate summary judgment motions, and seek to dismiss certain damages claims, are putative class actions. *See American Electric Motor Services Inc. v. Blue Cross and Blue Shield of Alabama, et al*., Case No. 2:12-cv-02169-RDP; *Conway v. Blue Cross and Blue Shield of Alabama, et al*., Case No. 2:12-cv-02532-RDP. Therefore, in essence, Defendants seek to preclude a potential class of plaintiffs from recovering a certain category of damages without allowing the factual basis for their motion (and, concomitantly, any decision by the court) to be publicly available. That is, if left under seal, the materials will not be available to the putative class of plaintiffs whose damages claims may be affected by the motion.[3]

[3] To be clear, when Plaintiffs filed their Motion to Unseal Alabama Department of Insurance Deposition Transcript (Doc. # 719), Ostlund's deposition had not been filed in relation to a substantive motion. At that time, Defendants' Amended and Restated Filed Rate Doctrine Summary Judgment Motion (Doc. # 733) had not yet been filed. Now, however, both the Ostlund deposition and the Carden deposition have been filed with the court as a basis for a substantive motion (i.e. Defendants' filed rate summary judgment motion).

II. Applicable Law

"[C]ourts have long recognized the 'general right to inspect and copy public records and documents, including judicial records and documents.'" *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 142 (2d Cir. 2016) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L.Ed.2d 570 (1978) (footnote omitted)); *see also Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311 11th Cir. 2001) ("The common-law right of access to judicial proceedings, an essential component of our system of justice, is instrumental in securing the integrity of the process.... [T]he common-law right of access includes the right to inspect and copy public records and documents."). "The 'right to inspect and copy judicial records is not absolute,' however, and a court may exercise its 'supervisory power over its own records and files' to deny access 'where court files might have become a vehicle for improper purposes.'" *Bernstein*, 814 F.3d at 142 (quoting *Nixon*, 435 U.S. at 598, 98 S. Ct. 1306 (internal quotation marks omitted)). "Once the court has determined that the documents are judicial documents and that therefore a common law presumption of access attaches, it must determine the weight of that presumption." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006).

"The weight of the presumption is a function of (1) 'the role of the material at issue in the exercise of Article III judicial power' and (2) 'the resultant value of such information to those monitoring the federal courts,' balanced against 'competing considerations' such as 'the privacy interests of those resisting disclosure.'" *Bernstein*, 814 F.3d at 142 (quoting *Lugosch*, 435 F.3d at 119–20 (internal quotation marks omitted)); *see also United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995).

The Second Circuit recently held that "a report submitted to a court in connection with a summary-judgment motion is entitled to a strong presumption of access. *Bernstein*, 814 F.3d at 142 (citing *Joy v. North*, 692 F.2d 880, 894 (2d Cir.1982)). "Since such a document is the basis for the adjudication, only the most compelling reasons can justify sealing." *Bernstein*, 814 F.3d at 142 (quoting *Joy*, 692 F.2d at 894) (internal quotations omitted). "Unlike information merely exchanged between the parties, [t]he public has a strong interest in obtaining the information contained in the court record." *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 305 (6th Cir. 2016) (quoting *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983) (internal quotations omitted)).

Litigants may not override the presumption of public access by simply referencing a protective order. *Shane Grp., Inc.*, 825 F.3d at 307 ("that a mere protective order restricts access to discovery materials is not reason enough [] to seal from public view materials that the parties have chosen to place in the court record."). "Rather, district courts must scrutinize sealing requests; otherwise, parties could effectively circumvent the public's right of access to judicial documents through the expedient of labeling everything confidential." *Allstate Ins. Co. v. Regions Bank*, 2015 WL 4073184, *2, n.3 (S.D. Ala. 2015); s*ee also Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir. 2011) ("[P]arties cannot overcome the presumption against sealing judicial records simply by pointing out that the records are subject to a protective order in the district court. Rather, the parties must articulate a real and substantial interest that justifies depriving the public of access to the records that inform our decision-making process."); *Joao Bock Transaction Systems, LLC v. Fidelity Nat'l Information Services, Inc*., 2014 WL 279656, *1 (M.D .Fla. Jan. 24, 2014) ("Though a stipulated protective order may provide that documents designated confidential are presumptively protected, a party's calling a document confidential

pursuant to a protective order does not make it so when it comes to filing the document with the court.") (citation and internal quotation marks omitted); *Procaps S.A. v. Patheon Inc*., 2013 WL 5928586, *2 (S.D .Fla. Nov. 1, 2013) ("a party's designation of whether a document is 'confidential' under the Protective Order does not control whether the document is entitled to be sealed ").

Although material filed with discovery motions is not subject to the common-law right of access, "'material filed in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right' of access." *Romero v. Drummond Co*., 480 F.3d 1234, 1245 (11th Cir. 2007) (quoting *Chicago Tribune*, 263 F.3d at 1312). "'In civil litigation, only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault),' is typically enough to overcome the presumption of access." *Shane Grp., Inc*., 825 F.3d at 308 (quoting *Baxter Int'l, Inc. v. Abbott Labs*., 297 F.3d 544, 546 (7th Cir. 2002)). Concern about "competitively-sensitive financial and negotiating information" has been held to be an inadequate basis for sealing documents. *Shane Grp., Inc*., 825 F.3d at 307.

III. Analysis

Defendants hang their "seal" hat on Alabama Code Section 27-2-24(g). They argue that section establishes a privilege that cloaks its dealings with the Department of Insurance in a privilege, and that for this reason both depositions should remain sealed. The court disagrees.

Alabama Code Section 27-2-14(b), which is titled "Records, documents and files -- Custody; inspection; reproduction; destruction" reads as follows: "[t]he records of the commissioner and insurance filings in his office *shall be open to public inspection*." (Emphasis

added.). Therefore, the statutory language itself acknowledges that the overarching rule regarding filings made with the Department is that they "shall be open to public inspection." The section cited by Defendants in support of their privilege argument, section 27-2-24, is titled "Examinations -- Report; confidentiality of information." However, neither deposition is a report on an examination. To be sure, the Ostlund and Carden depositions dealt with Defendants' rate filings with the Department of Insurance and variances therefrom. But even if the depositions could be characterized as relating to an examination conducted by the Commissioner, subsection (f)(1) of § 27-2-24 provides:

> Upon the adoption of the examination report under subdivision (1) of subsection (c), the commissioner shall hold the content of the examination report as private and confidential information *for a period of 20 days* except to the extent provided in subsection (b). *Thereafter, the commissioner may open the report for public inspection unless a court of competent jurisdiction has stayed its publication*

Ala. Code § 27-2-24(f)(1) (emphasis added).

Defendants argue that section 27-2-24(g)(1) "casts a wide net." But they cite nothing in support of that assertion other than the statutory text of that subsection regarding Examinations. In actuality, it is the more generally applicable section 27-2-14(b) which casts a wide net, particularly given that a subsection of that statute (*i.e.*, section § 27-2-24(f)(1), not the one cited by Defendants) discusses examination reports being open for public inspection. Read as a whole, the statute creating the Department of Insurance counsels in favor of a presumption of access. Ala. Code § 27-2-14(b).[4]

But there is more. Even if section 27-2-24(g)(1) could be read to cloak these depositions in a privilege (and, to be sure, it cannot), by filing the Motion for Summary Judgment based on

[4] Defendants further argue that a formal examination is not required to trigger application of section 27-2-24(g)(1). They argue that it applies whenever the Department conducts an analysis of a company's market conduct. The court disagrees. The language of the statute simply does not support that contention.

filed rates, Defendants have placed their market conduct regarding rates squarely at issue in this case. An example relating to a much more well-established privilege is illustrative of this point.

Clearly, a well-recognized privilege protects a patient's communications with her psychologist or psychiatrist. However, where a plaintiff puts her psychological state at issue in a case -- for example, by making a claim for more than garden variety emotional distress damages -- the privilege is deemed to be waived. So, while psychological records (unlike Department of Insurance records) are clearly privileged, courts nevertheless regularly find that privilege is waived when a plaintiff puts her emotional state at issue by making such a claim. *See, e.g, Maday v. Pub. Libraries of Saginaw*, 480 F.3d 815, 821 (6th Cir. 2007) (concluding that by seeking emotional distress damages, the plaintiff had "put her emotional state at issue in the case" and therefore waived any psychotherapist-patient privilege); *Doe v. Oberweis Dairy*, 456 F.3d 704, 718 (7th Cir. 2006) ("If a plaintiff by seeking damages for emotional distress places his or her psychological state in issue, the defendant is entitled to discover any records of that state."); *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) (The plaintiff "place[d] ... her medical condition at issue" by seeking emotional distress damages and therefore waived the psychotherapist-patient privilege.); *Fisher v. Southwestern Bell Tel. Co*., 2010 WL 257305, *3 (10th Cir. 2010) ("Ms. Fisher's request for emotional-distress damages placed her psychological state in issue and entitled [the defendant] to discover her therapy records.").

This same analysis fully applies to the attorney-client privilege. *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994). The attorney-client privilege may be one of the oldest privileges, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), but even it is not entirely sacrosanct. As the Eleventh Circuit explained in *Cox*, "the attorney-client privilege was intended as a shield, not a sword. … [A defendant] waives the privilege if it injects into the case

an issue that in fairness requires an examination of otherwise protected communications." *Cox*, 17 F.3d at 1418–19 (citations omitted) (internal quotation marks omitted). Under the sword and shield doctrine, a party who raises a claim that will necessarily require proof by way of a privileged communication cannot then insist that the communication is privileged. *Allstate Ins. Co. v. Levesque*, 263 F.R.D. 663, 667 (M.D. Fla. 2010) (citing *GAB Bus. Serv. Inc. v. Syndicate* 627, 809 F.2d 755, 762 (11th Cir.1987)).

Similarly, here, by filing their Motion based on rates filed with the Alabama Department of Insurance, Defendants have put those rates at issue, and have waived any privilege that might have otherwise attached to an examination of its market conduct.

IV. Conclusion

The court is not convinced that any privilege applies to the Ostlund and Carden depositions. But, alternatively even if one does apply, the court finds that the depositions should be unsealed for two reasons. First, they were filed in connection with a summary-judgment motion; therefore, a strong presumption of access exists. *Bernstein*, 814 F.3d at 142 (citing *Joy v. North*, 692 F.2d 880, 894 (2d Cir.1982)). Second, Defendants waived any privilege by injecting issues raised in those depositions into a substantive motion in this litigation. The public, and the parties whose damages claims may be affected by Defendants' Motion, should be allowed access to the evidence filed in support of Defendants' Motion.

Therefore, Subscriber Plaintiffs' Motion to Unseal Alabama Department of Insurance Deposition Transcript (Doc. # 719) is **GRANTED**. Both the Ostlund and the Carden depositions will be unsealed. The Clerk of the Court is directed to unseal the following documents: Doc. # 738-58 and Doc. # 773-11 (Ostlund's deposition) and Doc. # 773-10 (Carden's deposition).

DONE and **ORDERED** this October 18, 2016.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE