

Michael E. Tankersley
Naomi Takagi
Brian Berggren
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580
mtankersley@ftc.gov
(202) 326-2991
ntakagi@ftc.gov
(202) 326-3668
bberggren@ftc.gov
(202) 326-3229

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Federal Trade Commission,

Plaintiff,

v.

Grand Canyon Education, Inc.;

Grand Canyon University; and

Brian E. Mueller,

Defendants.

No. CV-23-02711-PHX-JZB

**MOTION TO TEMPORARILY
SEAL COMPLAINT**

Plaintiff Federal Trade Commission (“Plaintiff” or “FTC”) respectfully moves this Court, pursuant to LRCiv 5.6, 15 U.S.C. § 57b-2, and 16 C.F.R. § 4.10(g), for an order temporarily sealing the unredacted Complaint in this action for fourteen days. The FTC makes this request to comply with its regulations that allow entities to designate information

submitted to the FTC in response to compulsory process as confidential, and to give defendants that made such designations – Grand Canyon Education, Inc. and Grand Canyon University (collectively, the “Corporate Defendants”) – an opportunity to waive their confidentiality claims or demonstrate that compelling reasons warrant denying public access to redacted portions of the Complaint.

The FTC does not claim that any information in the Complaint should remain under seal, and it has filed the redacted Complaint solely to afford the Corporate Defendants the opportunity to show otherwise. The Corporate Defendants provided responses to FTC Civil Investigative Demands (“CIDs”) and designated their responses as confidential pursuant to federal statute and FTC rules. *See* 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10(e), (f); *see also* 16 C.F.R. § 2.7(b) (describing CIDs as the only form of compulsory process in investigations into unfair or deceptive acts or practices). The Complaint references images and information that Corporate Defendants designated confidential. FTC regulations afford parties who submit confidential information “an opportunity to seek an appropriate protective or *in camera* order” before the FTC can publicly disclose such information in a court or administrative proceeding. 16 C.F.R. § 4.10(g). Plaintiff has accordingly filed a redacted version of the Complaint on the public docket, Dk. No. 1, lodged the unredacted Complaint, and filed this Motion to temporarily seal the unredacted Complaint pending an opportunity for the Corporate Defendants to evaluate their previous confidentiality designations

and seek appropriate relief from the Court, if needed. The FTC has provided the Corporate Defendants with a copy of the unredacted Complaint, and will serve a copy of any order the Court enters with respect to this Motion.

To expedite the process of making court records public, the FTC requests that the Court unseal the unredacted Complaint if no motion to seal has been filed within fourteen days after the Court issues an order to temporarily seal this document.

LEGAL STANDARD

The public has a general right to inspect judicial records and documents, such that a party seeking to seal a judicial record must overcome “a strong presumption in favor of access.” *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (internal quotation marks and citations omitted). “Courts have consistently treated complaints as judicial records for purposes of determining whether the common-law right of access applies.” *FTC v. AbbVie Prod. LLC*, 713 F.3d 54, 62 (11th Cir. 2013). Moreover, the courts have recognized a First Amendment right of prompt access to civil complaints. *Courthouse News Service v. Planet*, 947 F.3d 581, 591-95 (9th Cir. 2020).

To overcome these rights of access, a party must “articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure.” *Kamakana*, 447 F.3d. at 1178-79 (internal quotation marks and citations omitted). The “stringent” compelling reasons standard applies to filings that

are “more than tangentially related to the merits of a case.” *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1096, 1101 (9th Cir. 2016). Under this standard, the party seeking to seal a judicial record bears the burden of showing that it has “compelling reasons supported by specific factual findings” to keep the information secret, and that those compelling reasons “outweigh the general history of access and the public policies favoring disclosure.” *Kamakana*, 447 F.3d at 1178-79 (internal quotation marks and citations omitted). “The mere fact that the production of records may lead to a litigant’s embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records.” *Id.* at 1179.

This Court’s procedures for protecting access to judicial records include LRCiv 5.6. It provides that a party that maintains that a civil filing should remain under seal must seek a court order and set forth: “a clear statement of the facts and legal authority justifying the filing of the document under seal.” LRCiv 5.6(b). Likewise, when a document previously designated confidential pursuant to a protective order or confidentiality agreement is lodged with the court as part of a filing, the party that requested confidential treatment has fourteen days to file and serve either (i) a notice withdrawing the confidentiality designation, or (ii) a motion to seal and a supporting memorandum with facts and legal authority justifying the filing of the document under seal. LRCiv. 5.6(d).

ARGUMENT

The FTC respectfully requests that the Court temporarily seal the unredacted Complaint for fourteen days to afford the Corporate Defendants an opportunity to demonstrate they have a basis for overcoming the interests in access to material in the Complaint that they have asserted is confidential. During the FTC’s investigation, the Corporate Defendants provided documents, interrogatory responses, and testimony, and designated all the material they provided as confidential. The FTC may disclose such material “in judicial proceedings to which the Commission is a party,” 15 U.S.C. § 57b-2(d)(1)(C), (d)(2), but FTC regulations require that, prior to public disclosure of such information, the producing parties “be afforded an opportunity to seek an appropriate protective or *in camera* order.” 16 C.F.R. § 4.10(g).

Plaintiff has filed a public version of the Complaint that redacts allegations that are based solely on information the Corporate Defendants designated as confidential in their CID responses. In a separate filing, lodged under seal with this motion, Plaintiff has filed the unredacted Complaint. The FTC does not contend that the redacted material reveals information that would justify preventing public access; redactions have been made to allow the producing parties time to either demonstrate a compelling interest in withholding this information, or waive the confidentiality designations. Filing of the redacted Complaint, coupled with a short period for the Corporate Defendants to file a motion to seal, is the

least restrictive alternative for preserving public access consistent with 15 U.S.C. § 57b-2 and 16 C.F.R. § 4.10.

Local Rule 5.6(d) imposes a requirement to confer and submit a notice where a document has been designated as confidential by another party “pursuant to a protective order or confidentiality agreement.” Here, the Complaint references materials that are not subject to an order or confidentiality agreement, but were marked confidential during an agency investigation subject to the FTC’s rules, prior to the filing of the Complaint. Nonetheless, to the extent the Court finds the Local Rules require a conference in connection with this motion to temporarily seal the Complaint, the FTC respectfully requests the Court waive those requirements because the FTC could not have conferred with the Corporate Defendants prior to filing the Complaint without revealing its then-nonpublic lawsuit.

CONCLUSION

For the reasons above, the Court should enter the Proposed Order and temporarily seal portions of the Complaint to permit defendants Grand Canyon Education, Inc. and Grand Canyon University to file and serve either a notice waiving any claim that public access should be denied to the unredacted Complaint or a motion to seal the unredacted Complaint, or

portions thereof, and a supporting memorandum that sets forth the facts and legal authority that justify denying public access.

Dated: December 28, 2023

Respectfully submitted,

/s/

Michael E. Tankersley
Naomi Takagi
Brian Berggren
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580
mtankersley@ftc.gov
(202) 326-2991
ntakagi@ftc.gov
(202) 326-3668
bberggren@ftc.gov
(202) 326-3229

Attorneys for Plaintiff Federal Trade
Commission