19-1540-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD J. TRUMP, DONALD J. TRUMP, JR., ERIC TRUMP, IVANKA TRUMP, DONALD J. TRUMP REVOCABLE TRUST, TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER LLC, TRUMP ACQUISITION LLC, TRUMP ACQUISITION, CORP.,

Plaintiffs-Appellants,

v.

DEUTSCHE BANK AG, CAPITAL ONE FINANCIAL CORPORATION,

Defendants-Appellees,

COMMITTEE ON FINANCIAL SERVICES OF THE UNITED STATES HOUSE OF REPRESENTATIVES, PERMANENT SELECT COMMITTEE ON INTELLIGENCE OF THE UNITED STATES HOUSE OF REPRESENTATIVES,

Intervenor Defendants-Appellees.

PLAINTIFFS-APPELLANTS' OPPOSITION TO MEDIA COALITION'S MOTION TO UNSEAL

This Court recently asked Deutsche Bank "whether it has in its possession any tax returns of any of the individuals or entities named or referred to (directly or indirectly) in paragraph 1 of the subpoenas" served by the Committees. CA2 Doc. 156. Deutsche Bank responded by submitting a letter confirming that it does indeed possess

tax returns for certain individuals or entities, and then took the unnecessary step of providing the Court with the actual names of those persons or entities. *See* CA2 Doc. 161. Deutsche Bank redacted that information in its public filings, citing statutory and contractual obligations to protect its customers' privacy, but filed an unredacted copy under seal with the Court. Various media groups have moved to intervene in this case for the sole purpose of unsealing the unredacted copy based on their asserted First Amendment and common-law right of access to those names, arguing that the redacted names are of "extraordinary public importance" and that the privacy interests asserted by Deutsche Bank are not sufficiently compelling. *See* Intervenors' Mot. 11-18.

Plaintiffs oppose this motion. Any presumption of access here is minimal, because the specific names that Deutsche Bank gratuitously included in its filing are neither responsive to the actual question posed by the Court nor relevant to its decision in this case. The members of the panel who requested this information did so to determine whether they needed to consider the relevance of a taxpayer-privacy statute, which restricts disclosures of tax-return information to Congress. The answer to that question turns entirely on *whether* tax-return information is in Deutsche Bank's possession, not *whose* tax-return information it is. The limited redactions are thus completely irrelevant to the Court's decision-making process, lowering the presumption of public access that might normally apply to judicial documents.

Even when the presumption of public access is high, it can be overcome by specific factual circumstances weighing against disclosure. There are compelling reasons

to keep the information here under seal. The redactions involve specific and sensitive financial details that are protected by multiple statutes, and that were provided to Deutsche Bank with the expectation of confidentiality. This Court has repeatedly restricted public access to information about individuals' and businesses' private finances, particularly when the restriction is narrowly tailored through limited redactions. Plaintiffs' interests are more than sufficient to justify the limited redaction of customer information—information that the Court never asked Deutsche Bank to disclose and that has no bearing on the legal decision the Court will make.

Intervenors' motion to unseal should be denied.

ARGUMENT

Intervenors assert a qualified right to the limited information that Deutsche Bank filed under seal, citing both the First Amendment and the common-law right to access court proceedings. Plaintiffs do not dispute the general contours of that right. *See, e.g., Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120, 124 (2d Cir. 2006) (acknowledging a "qualified First Amendment right to attend judicial proceedings and to access certain judicial documents"); *United States v. Amodeo* (*Amodeo I*), 44 F.3d 141, 145 (2d Cir. 1995) (describing "[t]he common law right of public access to judicial documents"). But the right is not absolute. "[D]ocuments may be kept under seal if 'countervailing factors' in the common law framework or 'higher values' in the First Amendment framework"—including the invasion of individuals' financial privacy—"so demand." *Lugosch*, 435 F.3d at 124. Those factors tip decisively against Intervenors' motion.

I. Deutsche Bank's gratuitous identification is not relevant to any judicial function in this case.

As Intervenors acknowledge, the presumption of access under the First Amendment and the common law depends on whether the materials are relevant to the judicial function. *See, e.g.*, Intervenors' Mot. 8 ("A judicial document or judicial record is a filed item that is relevant to the performance of the judicial function and useful in the judicial process." (cleaned up; citing *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139 (2d Cir. 2016))); *Lugosch*, 435 F.3d at 119. Thus, "[d]ocuments that play no role in the performance of Article III functions … lie entirely beyond the presumption's reach." *United States v. Amodeo* (*Amodeo II*), 71 F.3d 1044, 1050 (2d Cir. 1995) (citing *FTC v. Standard Financial Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987)).

Here, the redacted information that Intervenors seek was filed with the Court. But that alone is not enough to invoke the presumption; "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access." *Amodeo I*, 44 F.3d at 145. Rather, the "weight to be accorded the public right of access to judicial documents [i]s largely derived from the role those documents played in determining litigants' substantive rights—conduct at the heart of Article III—and from the need for public monitoring of that conduct." *Amodeo II*, 71 F.3d at 1049. The "weight of the presumption declines" with the relevance of the document to the judicial decision. *Id.* "Where testimony or documents play only a negligible role in the performance of Article III duties, the weight of the presumption

is low and amounts to little more than a prediction of public access absent a countervailing reason." *Id.* at 1050.

Here, the information that Deutsche Bank redacted from its filing plays *no* role in the performance of this Court's duties. That much is apparent from the question that Deutsche Bank was responding to, which asked only "whether" it was in possession of "any" responsive tax returns—not *whose* tax returns. *See* CA2 Doc. 156. Judge Newman's questions at argument likewise sought a yes or no answer, not the identity of the individuals. *See* O.A. Recording 1:33:33 ("JUDGE NEWMAN: I'm not asking you for the content of them at all, I'm asking, do you have them."). He then explained the relevance of the matter:

> JUDGE NEWMAN: Well we need to know, because there's a separate statute on disclosure of returns. If you don't have them, we don't have to worry about it. If you do have them, we have to worry about it. So it's a fairly important question in this case.

Id. at 1:33:51-34:05.

As this record makes clear, the Court never asked Deutsche Bank to identify any individual. It clearly wanted only a simple "yes" or "no" answer, because a "yes" would trigger its need to consider 26 U.S.C. §6103 and a "no" would make that issue irrelevant. The identity of the taxpayer, however, would not affect the applicability of that statute at all. As a result, the additional information that Deutsche Bank gratuitously provided to the Court (for whatever reason) will play no "role in the performance of Article III

duties," and as a result "the weight of the presumption"—if any—"is low" in this case. *Amodeo II*, 71 F.3d at 1050.

In that respect, this case is most similar to *Gambale v. Deutsche Bank AG*, 377 F.3d 133 (2d Cir. 2004), where a confidential settlement amount was disclosed in response to questioning by the court during a hearing, necessarily making its way into the hearing transcript. *Id.* at 143. But although the information had become "part of a judicial record to which some presumption of openness, however gauged, may have therefore attached," this Court found "that the presumption, such as it was, was a weak one under these circumstances." *Id.* Indeed, the Court noted the "troubling element of bootstrapping about the presumption of access here" because, in part, it arose from "the court's rather off-hand request for confidential information during the course of the hearing, and the subsequent filing of the transcript of the hearing with the Clerk of Court." *Id.* at 143 n.8. The same could be said here, where in response to questioning at oral argument, Deutsche Bank provided additional, unnecessary information to the Court that now serves as the basis for the Intervenors' motion.

In sum, the confidential taxpayer information that Deutsche Bank has redacted from the public record was not responsive to the Court's request. It has no bearing on the legal issue that prompted the inquiry. It should not *be* part of the record in this case. The actual matters relevant to judicial decision-making have been fully aired on the public docket. *See, e.g.,* CA2 Docs. 158, 166. Any presumption of access to the sealed

filing "is low and amounts to little more than a prediction of public access absent a countervailing reason." *Amodeo II*, 71 F.3d at 1050.[1]

II. The limited sealing of sensitive financial and taxpayer information is justified, particularly where Congress has protected such information from disclosure.

The redacted portion of Deutsche Bank's letter would identify by name certain taxpayers and confirm that they had provided particular documents to their financial institution in the course of their relationship. Under these circumstances, there are many countervailing reasons supporting nondisclosure, especially given the weakness of any presumption of access here.

This Court has acknowledged that "[f]inancial records of a wholly owned business" are among the matters that "weigh more heavily against access than conduct affecting a substantial portion of the public." *Amodeo II*, 71 F.3d at 1051; *see also United States v. Strevell*, 2009 WL 577910, at *4 (N.D.N.Y. 2009) ("Numerous courts have found privacy interests worthy of protection such as business and financial records"); *SEC v. Ahmed,* 2018 WL 4266079, at *2 (D. Conn. 2018) ("Both 'financial records' and 'family affairs' are among those 'privacy interests' which may support sealing of documents").

[1] Nor can Intervenors rely on general assertions about the public's interest in this case. *See* Intervenors' Mot. 17-18. Not every Plaintiff is a government official, the records sought by the subpoenas largely predate the President's election, and the specific information they seek does not bear on the important issues at issue in this appeal.

Indeed, as Deutsche Bank has noted, the information filed under seal is protected by statute. Under the Gramm-Leach-Bliley Act ("GLBA"), Pub. L. No. 106-102, 113 Stat. 1338 (1999), a financial institution generally "may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information." 15 U.S.C. §6802(a). "[N]onpublic personal information" includes personally identifiable financial information, including names, where those details are disclosed in a manner that indicates the associated names are clients of a financial institution. *See* 16 C.F.R. §313.3(n)(l)(i), (3)(ii). And the definition specifically includes any "description ... of consumers ... that is derived using any personally identifiable financial information that is not publicly available." *Id.* §313.3(n)(1)(ii). That definition plainly encompasses a list of names of consumers who provided a financial institution with particular categories of documents.[2]

There are some exceptions to the GLBA's nondisclosure rule, but as Deutsche Bank has explained, none of them apply here. *See* 15 U.S.C. §6802(e). The closest exception in this case would be the "respond to judicial process" exception, *id.* §6802(e)(8), but "the courts that have addressed [the judicial process exception] have concluded that the GLBA should not bar a proper discovery request *so long as the*

[2] Intervenors' suggestion that Plaintiffs have forfeited the privacy protections of the GLBA by bringing this suit misses the mark. *See* Intervenors' Mot. 14. Plaintiffs have identified themselves generally as customers of Deutsche Bank and/or Capital One, Complaint ¶51, but did not provide greater specifics, let alone describe the private information that they each had conveyed to either financial institution.

disclosure is made subject to an appropriate protective order." *Alpha Funding Group v. Contl. Funding, LLC*, 848 N.Y.S.2d 825, 831 (N.Y. Sup. Ct. 2007) (emphasis added) (collecting cases). "[T]he judicial process exception to the general privacy purposes of the GLBA does not provide a license to undercut the express interest of Congress in protecting the privacy of consumers' financial information." *Martino v. Barnett*, 595 S.E.2d 65, 72 (W. Va. 2004). And, as noted above, the redacted information here was not even responsive to the question asked by the Court.[3]

The countervailing privacy interests at issue here are heightened when the case touches on the identity of taxpayers. *See, e.g.*, *Solomon v. Siemens Indus., Inc.*, 8 F. Supp. 3d 261, 285 (E.D.N.Y. 2014) ("Tax returns are generally afforded special protection from public disclosure."). Indeed, Congress has recognized and protected "the civil rights of taxpayers, including the right to privacy," through various forms of legislation. *See, e.g.*, *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 316 (1985) (discussing a third-party intervention statute designed to ensure taxpayer privacy); *Church of Scientology of Calif. v. IRS*, 792 F.2d 153, 159 (D.C. Cir. 1986) (Scalia, J.) (noting that Congress intended "to provide … increased assurance of confidentiality" to taxpayers by providing "*greater*

[3] Intervenors argue that if the GLBA applies here to protect the redacted names, then the GLBA violates the First Amendment. *See* Intervenors' Mot. 13-15. But in making this argument, intervenors ignore precedent upholding the constitutionality of the GLBA's nondisclosure provisions under the First Amendment, *Trans Union Corp. v. FTC*, 245 F.3d 809 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 915, (2002), as well as this Court's own holdings that "documents may be kept under seal if . . . 'higher values' in the First Amendment framework so demand." *Lugosch*, 435 F.3d at 124.

protection against improper disclosure of [tax] information than FOIA provides against disclosure of data"); 26 U.S.C. §7213 (criminalizing the disclosure of tax returns); 18 U.S.C. §1905 (criminalizing the disclosure of certain confidential information in government filings).

Public disclosure of the redacted information would also have the effect of ignoring Plaintiffs' claim under the Right to Financial Privacy Act, which (among other things) protects customers of financial institutions from the disclosure of their records. 12 U.S.C. §3402. Plaintiffs have argued that the subpoenas seek RFPA material, and confirming the possession of such information to the Committees would prejudge part of that dispute. *See* Appellants' Br. 37-45; Reply Br. 15-22.

Finally, the sealing in this case is narrowly tailored. The only information in Deutsche Bank's letter that is under seal are the names of certain taxpayers. Redaction is an appropriate and preferred method of tailoring in these circumstances. *See, e.g., United States v. Donato*, 714 Fed. Appx. 75, 76 (2d Cir. 2018); *United States v. Gerena*, 869 F.2d 82, 85-86 (2d Cir. 1989).

CONCLUSION

For these reasons, the Court should reject Intervenors' motion to unseal.

Respectfully submitted,

Dated: September 27, 2019

s/ Patrick Strawbridge

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CERTIFICATE OF COMPLIANCE

This motion complies with Rule 27(d)(2) because it contains 2,371 words, excluding the parts that can be excluded. This motion also complies with Rule 27(d)(1)(E) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: September 27, 2019

/s/ Patrick Strawbridge
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I filed a true and correct copy of this motion with the Clerk of this Court via the CM/ECF system, which will notify all counsel who are registered CM/ECF users.

Dated: September 27, 2019

/s/ Patrick Strawbridge
Counsel for Plaintiffs-Appellants