IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
ROCK ISLAND DIVISION

KEWU ZHAN,	)	
	)	
	)	
Plaintiff,	)	
	)	No. 4:18-cv-04126-SLD-JEH
v.	)	
	)	Judge Darrow
PATRICK F. HOGAN,	)	
CMB EXPORT INFRASTRUCTURE GROUP 48 LP	)	Magistrate Hawley
CMB EXPORT LLC,	)	
CMB REGIONAL CENTERS LLC	)	
	)	
Defendants.	)	

REPLY TO MOTION TO SEAL

Plaintiff Kewu Zhan, by the undersigned counsel, hereby replies to the Motion to Seal as follows:

The Defendants have not met the burden for sealing documents in the Central District or the Seventh Circuit. This is not a case involving informants, minor children, sexual assault victims, or any identifiable trade secret. The Defendants are simply embarrassed that the documents attached to the Complaint reveal three embarrassing facts: (i) the Defendants wrongly told investors that federal securities laws do not apply to the Defendants' sale of EB-5 securities; (ii) the Defendants did not register with the SEC as an investment company, investment advisor, or broker-dealer as required; and (iii) Defendants are taking extraordinary fees from Chinese investors. These are not "trade secrets." Courts in this Circuit are clear that mere "embarrassment" and a "preference for secrecy" are

insufficient grounds for sealing documents. *U.S. v. Foster*, 564 F.3d 852, 854 (7th Cir. 2009). In *Foster*, Judge Easterbrook laid down the limited instances when the sealing of documents can be justified:

> Statutes, yes; privileges, yes; trade secrets, yes; risk that disclosure would lead to retaliation against an informant, yes; a witness's or litigant's preference for secrecy, no. The law could not be clearer.

Id. Here, the defendants have not named a single *specific* trade secret that needs to be protected by sealing a three-year-old document that is already stale.

I. Local Rule 5.10(2) and Case Law Disfavors Filings Under Seal

CDIL-LR 5.10(2) provides, "The Court does not approve of the filing of documents under seal as a general matter." The burden is on the defendant to meet the severe standard for justifying a filing under seal. Judge Darrow has summarized the presumption against sealing of documents:

> The record of a judicial proceeding is public, as a general rule. *Jessup v. Luther,* 277 F.3d 926, 927 (7th Cir. 2002). The public often has an interest in the issues such records concern, in which case "concealing the records disserves the values protected by the free-speech and free-press clauses of the First Amendment." *Id.* at 928. Concealing records also reduces the public's ability to monitor judicial performance. *Id.* Moreover, judicial proceedings are public property, "and the third-party effects that justify the subsidy of the judicial system also justify making records and decisions as open as possible." *Union Oil Co. of Cal. v. Leavell,* 220 F.3d 562, 568 (7th Cir. 2000) (citations omitted). Therefore, parties "must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials" when they call upon the courts. *Id.* "[M]any litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made

> in litigation they must be revealed." *Baxter Int'l, Inc. v. Abbott Labs.,* 297 F.3d 544, 547 (7th Cir. 2002). Exceptions to this rule are limited: "[w]hen there is a compelling interest in secrecy, as in the case of trade secrets, the identity of informers, and the privacy of children, portions and in extreme cases the entirety of a trial record can be sealed." *Jessup,* 277 F.3d at 928; *see also Baxter Int'l,* 297 F.3d at 546 ("[V]ery few categories of documents are kept confidential once their bearing on the merits of a suit has been revealed.").

Netherland Insurance Co. v. Knight, 2014 WL 1876202 at *1 (C.D. Ill. May 9, 2014)(Darrow, J.)(refusing to seal a document solely because it contained a confidentiality clause). Here, Defendants merely repeat the bald assertion that somehow – someway – the disclosure of three year-old documents will cause them a competitive disadvantage.

This case is about securities fraud committed through contracts. The topic of the case – the EB-5 immigration visa program – is a matter of public concern as members of Congress are trying to shut it down or change it. This is not a case where the documents will contain an identifiable trade secret such as the formula for Coca-Cola, a list of specific customers, or some proprietary computer algorithm. Nor is this an antitrust case that deals directly with competition. This is a securities law case about a set of securities offering documents from 2015, in an industry where offering documents change from year-to-year. No third party competitor of the defendants would copy these documents, since they are already stale.

II. Defendants Fail to Meet the 7th Circuit Standard in *Baxter*

The leading case on sealing of documents in this Circuit is *Baxter Int'l, Inc. v. Abbott Labs,* 297 F.3d 544, 547 (7th Cir. 2002). In *Baxter*, Judge Easterbrook said that seals are appropriate for cases involving children, informers, and assault victims, but not for commercial disputes unless there is a genuine and clear trade secret involved. The mere desire of a party to keep something secret is insufficient: "many litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed." *Id.* at 547. In *Baxter*, as in the instant case, the parties failed to make clear exactly the specific trade secret at issue. The Seventh Circuit requires clear evidence of harm, not a conclusory allegation:

> Beyond asserting that the document must be kept confidential because we say so (the "agreement is, by its terms, confidential"), this contends only that disclosure "could ... harm Abbott's competitive position." How? Not explained. Why is this sort of harm (whatever it may be) a legal justification for secrecy in litigation? Not explained.

Id. at 547. Judge Easterbrook had already made clear in an earlier case that a seal is appropriate only where there is a stature, privilege, or trade secret. *U.S. v. Foster*, 564 F.3d 852, 854 (7th Cir. 2009).

In the instant case, CMB merely repeats dull generalities of 'competitive disadvantage' that this Circuit already rejected in *Baxter* and *Foster*.

III. Plaintiff Can Provide This Court with an *In Camera* Review of 10 other PPMs that are virtually Identical to the One in this Case

Plaintiffs are happy to provide the Magistrate with 10 other EB-5 transaction PPMs for *in camera* review, so that the Magistrate can judge for himself if there is truly something unique about the CMB document in this case. The chance of the Magistrate finding anything unique or special is infinitesimally small.

All EB-5 projects have PPMs that set forth virtually identical investor notices, they all charge approximately $550,000 for a $500,000 membership interest, they provide for a management fee, payments to finders, instructions for payment to a bank escrow, and they attach a limited partnership agreement and loan agreement. All of these terms and verbiage are industry standard and can be obtained by doing a simple Google search for "EB-5 memorandum PPM," which immediately turns up nearly identical PPMs of the Doral EB-5 project in Florida, and the Greentech Automotive EB-5 project in Virginia. The only difference between this PPM and others is that CMB's version is *lacking* in certain necessary respects. For instance, it lacks an explanation to investors about the protection of the federal securities laws, it lacks a FINRA required disclosure about payments to foreign finders, and it shows that CMB routes their payments between onshore and offshore companies. These are not protectable trade secrets in any sense.

CMB has already voluntarily disclosed to the SEC in its Form D filings the identity of its key executives, promoters, agents, the amount of capital raised, payments in sales commissions, and all related addresses and contact information.

See list of documents filed with the SEC at Exhibit 1. CMB also maintains a web site that lists over sixty (60) projects: https://www.cmbeb5visa.com/projects/. They even have a page devoted to the Fund at issue in this case, and a place to click to get a full flyer: https://www.cmbeb5visa.com/project/group-48-century-plaza/. To top it off, CMB staff went to China to publicly promote this project back in 2015, as reported in the Chinese news. And the PPM is held by 900 Chinese investors and untold others who inspected it and decided not to invest. It is therefore bizarre for CMB to suddenly claim that this three year old document which has already passed through so many hands is a repository of trade secrets, yet these secrets are impossible to describe to the Court with any degree of specificity.

IV. A Confidentiality Clause in Irrelevant to the Issue of a Seal

As the Complaint made clear, the Plaintiff did not receive the entire set of investment documents before signing up. CMB took Plaintiff's money on a referral from attorney Hui Feng, who has since been disbarred by the SEC for fraud in connection with EB-5 cases. If this Court looks closely at the PPM, the Magistrate will see that the cover page and the signature page are fuzzier than the other pages. That is because the Plaintiff only received a few pages before actually getting the body of the PPM, and these pages were faxed and scanned back and forth (hence the fuzziness) and then wrapped around the body of a PPM.

So it is not clear that Plaintiff has ever seen the confidentiality provision inside the PPM. Regardless, he doesn't read English, a fact that didn't stop CMB

from taking his money. He relied on his lawyer who is now disbarred by the SEC from any involvement in securities. Therefore, the Defendants have not established that this confidentiality provision is binding on Plaintiff since his investment may have been induced by fraud in the first place. Interestingly, CMB knows that the Plaintiff invested through Hui Feng, the attorney barred by the SEC, and they know he cannot read English, they know he was told he could come to the USA in a few years after the investment in 2015, and they know he is in his 60s and under current conditions will not get a visa until his mid to late 70s. They don't care. He is a mere 1/900th of the investment in this deal alone (out of 60 other deals that CMB is working on), and they still won't give his money back.

But putting all that aside, even if the document had a confidentiality provision, that would still not be grounds for sealing. The Seventh Circuit made this clear:

> Calling a settlement confidential does not make it a trade secret, any more than calling an executive's salary confidential would require a judge to close proceedings if a dispute erupted about payment (or termination). Many a litigant would prefer that the subject of the case—how much it agreed to pay for the construction of a pipeline, how many tons of coal its plant uses per day, and so on—be kept from the curious (including its business rivals and customers), but the tradition that litigation is open to the public is of very long standing).

Union Oil Co. v. Leavell, 220 F.3rd 562, 567 (7th Cir. 2000). The logic of *Union Oil* is clear and reasonable. Most business contracts have a confidentiality clause, and if the mere presence of that clause was sufficient to trigger a seal, then virtually every

contract dispute in every court would have to be sealed.

F.R.C.P. 10(c) is permissive in allowing a plaintiff to attach the relevant contracts in a dispute, but the better practice is to do so, because it puts the Court and the public on the same page as the litigants. Since this case is grounded in securities fraud based on misrepresentations and omissions in contracts, it makes sense that the Court (and the public) possess the entirety of the relevant contracts. Merely calling a contract or document "confidential" does not create an obligation for the court to seal it. If that were the case, then most business disputes would require the sealing of all contractual documents, which is absurd.

V. The Real Reason for the Motion To Seal is Embarrassment

Defendants want to keep a lid on all information about CMB because the truth is somewhat shocking.

In reality, the "Midwest Executive Office" and "Headquarters" of CMB doesn't exist in the normal sense. Rather, it is actually part of Rock Island Auction, a gun auction on 42nd Street between cornfields and a few old warehouses.

It is from the back room of the gun auction shop that CMB and Hogan run what is by their own account (per their web site) a multi-billion dollar business that serves over 5000 investors. Their web site lists 60-plus projects in which they are the sponsor or general manager, presumably from which they draw fees. On the Fund at issue in this case alone, Hogan draws fees including a 10% ($50,000) administrative fee and a 1% annual 'management' fee on $450,000,000 ($4,500,000

a year)(see PPM at page 67). Multiply this for each project (or even use a lesser amount) and you can get some idea of the money being generated by Chinese investors that is going into Hogan's pocket and not going back to the Chinese investors. Sixty funds, billions of dollars, managed from a "Headquarters" that has no receptionist, no front desk, no visible staff, and a sign out front announcing a gun auction. See attached photos for proof at Exhibit 2.

CMB doesn't want people (especially Chinese investors) knowing that it is literally running a back room operation while getting rich on Chinese investors. The CMB web page says flatly that Hogan gets paid even if the investor earns nothing: "General Partner compensation is based upon the foreign national investment amount and independent of any interest earned by the partnership." https://www.cmbeb5visa.com/about-us/eb-5-investment-with-cmb/. The timelines for the projects are typically 6 years from the *last investment* (which could be years from when a person invests their own money), and each investor is subject to a visa retrogression currently estimated by the US government at 13-15 years for Chinese nationals – a fact not disclosed fully to the investors. Most of these investors don't even read English in the first place and have never been to America: they judge whether to invest solely based on the pictures on the CMB web page and what they are told by 'finders' that act as CMB's agents in China.

In short, this has all the makings of a bait-and-switch. Hogan lures the Chinese investors from unregulated overseas 'finders,' then shifts the money between his US and Swiss entities, puts each capital raise into one project with a

six year timeline that is really a decade or more, then sits back in his corporate jets and his special hanger at Quad City Airport and collects streams of money generated by nameless and faceless Chinese investors whom he never has to see, who cannot get their money out of the funds, and are stuck without a visa and without money for well over a decade.

It is preposterous that one person who lacks a finance background, even with help from a staff of twenty or more, could 'manage' 60 funds, while also being the CEO and manager of another phalanx of workers at the Rock Island Auction.

When counsel for plaintiff and his female process server went to serve Mr. Hogan and the defendant entities at CMB's Headquarters, we were met at the reception window only by employees of Rock Island Auction. We were informed that CMB is "out in the back." When counsel asked if this meant that CMB was in a different building, he was informed that it meant that CMB had its offices in the back of the gun auction business. In other words, no person associated with CMB was visible. All of the decorations and business cards were about the auction business and about guns, not about immigration.

After a protracted wait, the COO of this multi-billion dollar investment firm (Mr. Kraig Schwigen) came to the window. He is an ex-lieutenant in the Rock Island Sheriff's Department and former Administrator of the County Jail, hardly the credentials for running a multi-billion dollar financial business. He addressed the female process server in a rather intimidating tone, demanding her name in writing, and refused to tell her where Mr. Hogan lived so that he could be served. This is

consistent with the general concealment of Mr. Hogan's location. His lawyers – the Lewis Brisbois firm -- refuse to take service for either the CMB entities or for Mr. Hogan, and although they have the Complaint in their hands, they refuse to waive service.

Mr. Hogan is comfortable taking billions of dollars in investments from the Chinese, and taking fees on these investments, and funneling the fees through offshore entities, and selling weapons of violence and aggression, but he refuses to take service of a piece of paper. Meanwhile, his lavish lifestyle is funded by Chinese EB-5 investors who will not likely get their visa for 15 years, and will not likely be allowed to come to the USA for 13 years, all while their investment is trapped as a cash cow for Hogan.

None of this adds up. No single person can operate so many multi-million dollar funds from the back of a gun shop while simultaneously running the gun shop. There is a lot more to this story, and it is obvious that the Motion to Seal (and the previous Motion to Quash) are just an attempt to cut off all public information about CMB and Mr. Hogan. When the truth comes out – when the Chinese people finally see the pictures of CMB – it will likely embarrass the Defendants.

But embarrassment is not a justification to seal documents. *Foster*, 564 F.3rd 852, 855. Recently, the Southern District reviewed the Seventh Circuit precedents on sealing of documents and proclaimed that the requirements for sealing are "strict." *Hale v. State Farm Mutual Auto. Ins. Co.*, 2018 WL 2862859 at *2, 3 (S.D. Ill. June 11, 2018)("The Seventh Circuit has taken a strict position regarding

requests to seal documents . . . An assertion that information is sensitive or confidential is not a sufficient showing.") Defendants have not come anywhere close to approaching the 'strict' standard in this Circuit.

Conclusion

The Motion to Seal is conclusory, non-specific, and it violates the letter and spirit of Local Rules and case law in this Circuit and this District. The Defendants have not even remotely cited a protected trade secret, nor any statute, privilege, or rule that would justify a seal.

Wherefore, Plaintiff asks that the Motion to Seal be denied and that costs and fees be assessed against the Defendants.

Respectfully submitted,

/s/ Doug Litowitz

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Exhibit 1: SEC list of CMB Entities
Exhibit 2: Photos of CMB

Certificate of Service

I certify that on the 28th day of July, I electronically filed this Reply to Motion to Seal with the Clerk of the Court using the CM/ECF system.

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