

Recent Opinion Denying Unopposed Motion to Seal Holds Lessons for Federal Practitioners in the District of New Jersey

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Magistrate Judge Elizabeth A. Pascal recently denied an unopposed Motion to Redact and Seal (“Motion”) portions of a transcript of a telephone conference with the Court. In denying the Motion, the Court found multiple failures and deficiencies in defendant’s Motion papers under Local Civil Rules 5.3 and 7.2, which govern motions to seal in the District of New Jersey, and further require that affidavits, declarations and certifications filed in support of such motions be based upon the personal knowledge of the signatory. The Court’s ruling serves as a reminder to practitioners that care should be taken when crafting motion to seal papers to ensure compliance with both Local Civil Rules 5.3 and 7.2, or risk having your motion denied.

In *Puma Biotechnology, Inc., et al., v. Sandoz Inc.*, No. 21-19918, ECF No. 89 (Dec. 20, 2022), defendant Sandoz Inc. (“Sandoz”), sought to seal select portions of the transcript of a telephone status conference with the Court held pursuant to Federal Rule of Civil Procedure 16. Sandoz’s motion to seal was unopposed, *i.e.*, Sandoz reported in its motion papers that “no party opposes the redaction and sealing,” and no opposition to the Motion was filed. *Id.* at 2. The Court nonetheless denied the motion without prejudice – an unusual occurrence for an unopposed motion to seal in the District of New Jersey – but ordered that the confidential materials remain temporarily under seal for thirty (30) days to permit the parties to file a Motion that complies with Local Civil Rules 5.3 and 7.2.

Pursuant to Local Civil Rule 5.3, a party seeking to redact or seal materials filed with the Court must describe “with particularity”:

(a) the nature of the materials or proceedings at issue; (b) the legitimate private or public interests which warrant the relief sought; (c) the clearly defined and serious injury that would result if the relief sought is not granted; (d) why a less restrictive alternative to the relief sought is not available; (e) any prior order sealing the same materials in the pending action; and (f) the identity of any party or nonparty known to be objection to the sealing request.

In *Puma Biotechnology*, the Court found defendant Sandoz met its burden under parts (a), (e) and (f) of the Rule, but failed to satisfy parts (b), (c), and (d). *Id.* at 3.

Under part (b) – the legitimate private or public interests prong – merely citing to the fact that a document is designated “confidential” pursuant to a Discovery Confidentiality Order, is insufficient to support sealing it under Local Civil Rule 5.3. *Id.* at 4. Similarly lacking are

statements in a supporting declaration that simply recite, without more, that the subject information is “currently unavailable to the public.” *Id.*

Under part (c) – the clearly defined and serious injury prong – general and conclusory statements that fail to specify or elaborate on why the subject information is confidential, what competitive harm or injury would result if it was revealed, and/or from what source, do not adequately support sealing. *Id.* at 4-5. Local Civil Rule 5.3(c)(3) requires a showing of what clearly defined and serious injury “**would result** if protection is denied,” not merely a general and speculative statement of an injury that “**could** result.” *Id.* at 5 (emphasis in original, citations omitted).

Under part (d) – the less restrictive alternative prong – Magistrate Judge Pascal was once again critical of the use of general and conclusory statements to support the sealing request and the supposed lack of less restrictive alternatives. *Id.* at 5-6. “[B]ecause Defendant [Sandoz] has not articulated what legitimate interest it is protecting, or what injury it would suffer if its Motion were not granted, the Court does not have sufficient information to determine whether a less restrictive alternative is available.” *Id.* at 6.

Finally, the Court addressed two “procedural deficiencies” with the Motion. First, Local Civil Rule 5.3(c)(1) requires a single consolidated motion on behalf of all parties. Sandoz filed the Motion by itself, instead of on behalf of all parties. *Id.* at 6. Second, the Certification in support of the Motion filed by Sandoz’s outside (and local) counsel failed to comply with Local Civil Rules 5.3(c)(3) and 7.2(a) because it was “made by Defendant’s outside counsel, who does not attest to having personal knowledge of Defendant’s business operations or the competitive harm that Defendant could suffer.” *Id.* at 7.

Going forward, parties filing motions to redact or seal in the District of New Jersey should be wary of submitting affidavits, declarations, certifications or the like from outside (and/or local) counsel in support of their sealing requests that contain only general or conclusory statements regarding: (i) the interests that warrant redacting/sealing the subject information, (ii) the injury that would result if the subject information is not redacted or sealed, and (iii) why a less restrictive alternative to redaction or sealing the subject information is not available. In addition, because most outside (and/or local) counsel do not possess the personal knowledge required by Local Civil Rules 5.3(c)(3) and 7.2(a), consideration should be given to instead utilizing a client representative who actually possesses such personal knowledge.

A copy of Magistrate Judge Pascal’s December 20, 2022 Memorandum Opinion and Order in *Puma Biotechnology, Inc., et al., v. Sandoz Inc.*, is attached.