IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff*, v. FACEBOOK, INC., *Defendant*.	Civil Action No.: 2018 CA 008715 B Judge Fern F. Saddler Next Event: Motions Hearing Date: Mar. 22, 2019

DISTRICT OF COLUMBIA'S OPPOSITION TO
DEFENDANT FACEBOOK, INC.'S MOTION TO SEAL

This is a consumer protection enforcement case in which the Attorney General, on behalf of the District of Columbia ("District"), seeks to protect hundreds of thousands of D.C. consumers from Defendant Facebook, Inc.'s ("Facebook") ongoing unlawful trade practices. After Facebook moved to dismiss the District's Complaint for lack of personal jurisdiction, the District came forward – as is the usual course – with documents and affidavits that established additional grounds for jurisdiction to supplement those pleaded in the Complaint. This was proper. The law is clear that a plaintiff does not need to plead any facts relating to personal jurisdiction in the complaint (though the District did) – and its obligation to establish personal jurisdiction arises only after the defense is raised. Facebook seeks to seal one document (the "Document") submitted by the District that supports personal jurisdiction, asking the Court to set aside the strong presumption of public access to court proceedings. There is no basis to do so.

It is important to first make clear what the Document is. The Document is an email chain that shows Facebook employees based in Washington, D.C. ("D.C.") played a leading role in responding to how third-party applications improperly sold consumer data to Cambridge Analytica (and other

parties) in violation of Facebook's policies. As alleged in the Complaint, the data of nearly half of all D.C. residents was swept up in this illicit sale. This extensive harm to D.C. consumers, in addition to the failure by Facebook's D.C. employees to adequately respond, establish personal jurisdiction over Facebook. Facebook's concealment of this fact at the time, of course, is one of the District's causes of action in this case. Facebook now attempts another sleight by arguing the Document should be sealed because it contains sensitive commercial information.

There is nothing commercially sensitive about the Document. To show that information is commercially sensitive, a party must demonstrate that disclosure would result in substantial harm to its competitive position. Facebook has not done this. Facebook instead relies on conclusory assertions that disclosing this email chain would somehow provide competitors with "valuable insights" into Facebook's business. This lack of specificity confirms there is nothing in the Document that would advantage Facebook's competitors. Indeed, Facebook has already publicly admitted (years after the fact) in a March 2018 press release that consumer data was sold to Cambridge Analytica in violation of Facebook's policies. All the Document shows is that Facebook employees reached the same conclusion over two years prior. Having itself disclosed this information to the public, Facebook cannot now claim that it is commercially sensitive.

Facebook's concerns about the Document are ultimately reputational. For example, the Document contains candid employee assessments that multiple third-party applications accessed and sold consumer data in violation of Facebook's policies during the 2016 United States Presidential Election. It also indicates Facebook knew of Cambridge Analytica's improper data-gathering practices months before news outlets reported on the issue. But reputational harm is plainly insufficient to overcome the public's right of access. It bears repeating that the Document is only before the Court (and by extension the public) at this time because Facebook chose to challenge

personal jurisdiction. Having advanced this ground, it cannot now ask the Court to seal evidence directly material to deciding that question.

ARGUMENT

A. The District properly presented the Document to the Court in response to Facebook's jurisdictional challenge.

Facebook insists that the Court "cannot consider the Document" at all because the District "did not plead any allegations relating to [the Document] in its Complaint." Mot. at 9-10. This is wrong. Entirely to the contrary, a plaintiff need not plead any facts to establish personal jurisdiction and is only required to come forward with jurisdictional facts after the defense is raised. *E.g.*, *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 994 (D.C. Cir. 2014) ("[T]o bring an action a plaintiff has no obligation to establish personal jurisdiction until the defendant has raised that defense."); *Purdue Research Found. v. Sanofi-Synthelabo, SA*, 338 F.3d 773, 782 (7th Cir. 2003) (principle that a "complaint need not include facts alleging personal jurisdiction" is "well established"). This is basic hornbook law, as a leading civil procedure treatise confirms that "the complaint should not need to allege . . . the basis for jurisdiction over the defendant's person[.]" 5 Charles Alan Wright & Arthur R. Miller, *Fed. Practice and Procedure* § 1206 (3d ed. 2018). Directly relevant to Facebook's mistaken argument here, Wright & Miller also observe that "[s]ome district court judges have construed Rule 8(a)(1) [requiring a "short and plain statement" relating to subject-matter jurisdiction] as requiring the complaint to state the grounds for personal jurisdiction, an erroneous interpretation that contravenes decades of jurisprudence." *Id.* (emphasis added). Facebook relies on caselaw falling into this "erroneous interpretation" cautioned against in Wright & Miller, and the Court should reject Facebook's request to compound that error in this case.

What the law actually provides is that when a defendant challenges personal jurisdiction, the court has "considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction." *Companhia Brasileira Carbureto De Calcio v. Applied Indus. Materials*

Corp., 35 A.3d 1127, 1135 (D.C. 2012). As a plaintiff's "obligation to make some allegations relating to personal jurisdiction ar[ises] . . . only after [a defendant] file[s] its motion to dismiss," this factfinding latitude extends far beyond the facts alleged in the complaint. *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1090 (D.C. Cir. 1988). This is why the court is permitted to "inquire, by affidavits or otherwise, into the facts as they exist" and "may rely upon either written or oral evidence." *Applied Indus.*, 35 A.3d at 1135. Under this controlling case law, a court must allow a plaintiff to submit facts related to personal jurisdiction after a motion to dismiss is filed. *E.g.*, *Xie v. Sklover & Co, LLC*, 260 F. Supp. 3d 30, 40-41 (D.D.C. 2017) (finding personal jurisdiction over defendants after reviewing additional documents attached as exhibits to plaintiff's opposition to the motion to dismiss). Accordingly, there is no question that the Court can consider the Document, which was presented through an affidavit for a proper purpose: responding to Facebook's jurisdictional challenge by supplying facts that go directly to Facebook's contacts with D.C.

The jurisdictional facts in the Document show that as early as September 2015, a D.C.-based Facebook employee warned the company that Cambridge Analytica was a "[redacted]" asked other Facebook employees to "[redacted]" and received responses that Cambridge Analytica's data-scraping practices were "[redacted]" with Facebook's Platform Policy. FB-CA-DCAG-00050485, 489 (emphasis added). The Document also indicates that months later in December 2015, on the same day an article was published by *The Guardian* on Cambridge Analytica, a Facebook employee reported that she had "[redacted]" *Id.* at 487 (emphasis added). The Document thus illustrates that Facebook's D.C. contacts were extensive, with D.C.-based employees playing significant roles in both investigating Cambridge Analytica and communicating broader

principles of Facebook policy compliance to third-party applications. Moreover, far from being "divorced from the factual allegations in the complaint," Mot. to Seal at 9, the Document is consistent with the District's allegations that "Facebook had employees embedded within multiple presidential candidate campaigns who . . . knew, or should have known . . . [that] Cambridge Analytica [was] using the Facebook consumer data harvested by [Aleksandr] Kogan throughout the 2016 [United States Presidential] Election." Compl. ¶ 34. Ultimately, Facebook cannot have it both ways. Facebook is the party that has challenged jurisdiction, and the District has responded – as permitted by hornbook law backed by "decades of jurisprudence" – by coming forward with factual support establishing jurisdiction. The Court should reject Facebook's request to decide its jurisdictional challenge while turning a blind eye toward its very own Document that is both properly presented and material to that decision.

B. **Facebook cannot overcome the strong presumption of open records with respect to the Document.**

It is a "widely accepted principle that the public has a presumptive right of access to civil filings." *J.C. v. District of Columbia*, 199 A.3d 192, 207 (D.C. 2018). The party seeking to overcome this presumption bears the burden of showing the interest in secrecy outweighs the public's presumptive right of access. *Avirgan v. Hull*, 118 F.R.D. 252, 254 (D.D.C. 1987). Courts balance the presumption of access against privacy interests by applying a six-factor test that weighs: (1) the need for public access to the documents; (2) the extent to which the documents are already available to the public; (3) whether a party has objected to disclosure; (4) the strength of the privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purpose for which the documents were introduced. The third factor is not dispositive, as every sealing dispute involves an objecting party. Every other factor is either neutral or weighs in favor of disclosure here.

Factor 1: the need for public access to the Document. This factor weighs strongly against sealing the Document due to the "strong public interest in the openness of judicial proceedings."

Upshaw v. United States, 754 F. Supp. 2d 24, 28 (D.D.C. 2010). Indeed, in this very context where a defendant has moved to dismiss for lack of personal jurisdiction, multiple courts have held that the public access interest is "increase[d]" regarding evidence material to deciding such a challenge. *Blu Dot Design & Mfg., Inc. v. Stitch Indus., Inc.*, 2018 WL 1370533 , at *1 (D. Minn. 2018) (denying request to seal exhibit relating to Minnesota mailings because it is "likely to be of consequence in resolving the personal jurisdiction issue"); *see also City of Greenville, Ill. v. Syngenta Crop Protection, Inc.*, 2013 WL 1164788, at *3 (S.D. Ill. Mar. 19, 2013) (unsealing emails that were merely "consider[ed]" (and not expressly "mention[ed]") in order denying motion to dismiss for lack of personal jurisdiction). In addition, the interest of the public is at its "apex" where, as here, the "government is a party to the litigation." *Doe v. Public Citizen*, 749 F.3d 246, 271 (4th Cir. 2014). Facebook does not even attempt to rebut these heightened public interest factors and merely asserts that public access to these filings is "minimal at best." Mot. to Seal at 5. This kind of "conclusory" assertion "completely ignores" the relevant inquiry and accordingly, this factor weighs in favor of disclosure. *Upshaw*, 754 F. Supp. 2d at 28.

There are additional reasons why the public's interest in the Document is significant. First, Facebook has promised its consumers (including those in D.C.) that the company is getting to the bottom of the company's "breach of trust" as it relates to policing third-party applications. The Document shows how that breach of trust operated in one instance and lends color to misconduct that Facebook has admitted to the public. Second, Facebook has moved to dismiss this suit by arguing that a D.C. court cannot exercise personal jurisdiction over an action brought by the D.C. Attorney General under District law to remedy Facebook's misrepresentations to hundreds of thousands of D.C. consumers. As recognized by the courts in *Blu Dot* and *City of Greenville*, D.C. consumers (and other residents) have an interest in ascertaining the evidence pertaining to Facebook's D.C. contacts that form the basis of the Court's decision – which bear on the jurisdictional reach of the Superior

Court. *See also Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180-81 (6th Cir. 1983) (public has "an interest in ascertaining what evidence and records the District Court and this Court have relied upon in reaching our decisions").

Facebook's secondary argument that this presumption does not extend to briefing on its motion to dismiss can also be readily disregarded. Mot. to Seal at 5. The Court of Appeals (in a case Facebook itself cites) has expressly held that the presumptive right of public access "extends to the motions and oppositions filed with this court, including their supporting exhibits." *Mokhiber v. Davis*, 537 A.2d 1100, 1113 (D.C. 1988). Facebook's remaining arguments relating to sensitive commercial information are really privacy interest arguments, and are discussed in section B(3), below.

Factor 2: The extent to which the public had prior access to the Document. Where there "has been no previous access [to the document at issue]," this factor is "neutral." *Am. Prof. Agency, Inc. v. NASW Assurance Servs., Inc.*, 121 F. Supp. 3d 21, 24 (D.D.C. 2013); *In re McCormick & Co., Inc.*, 2017 WL 2560911, at *2 (D.D.C. June 13, 2017). Facebook's "converse[ ]" extrapolation of this factor therefore gets the law wrong again. Mot. to Seal at 6. To the District's knowledge, the Document has not been released to the public, so this factor does not cut in either direction.[1]

Factors 3, 4, and 5: Whether a party has objected to the disclosure, the strength of privacy interests asserted, and prejudice to those opposing disclosure. These factors are "interrelated, and require courts to look at the strength of the [ ] privacy interests involved, and to take into account whether anyone has objected to public disclosure and the possibility of prejudice to

[1] In discussing this factor, Facebook goes on to complain that the District's use of the Document in this litigation "directly contravened" its April 3, 2018 letter agreement (the "Letter Agreement") to Facebook. Mot. to Seal at 7 (citing Letter Agreement attached as Lipshutz Decl. Ex. 1). This is wrong because the Letter Agreement has nothing to do with this litigation. The Letter Agreement makes clear that it pertains to "public inspection of records" pursuant to the District's Freedom of Information Act. Letter Agreement at 1. In the Letter Agreement, the District purposefully made no commitments about how it would use materials produced by Facebook in any ensuing litigation. The Letter Agreement thus has no bearing on how the District may use the Document in this enforcement matter.

that person." *Upshaw*, 754 F. Supp. 2d at 29; *McCormick & Co.*, 2017 WL 2560911, at *2. Where, as here, the moving party asserts a privacy right over commercial information, it must set out specific facts that demonstrate disclosure would "result in substantial harm to [its] competitive position." *E.g.*, Prot. Order, *D.C. v. CashCall, Inc.*, No. 2015 CA 006904, at *1 (D.C. Super. Ct. Nov. 15, 2016) (attached as Ex. A); *Lytle v. JPMorgan Chase*, 810 F. Supp. 2d 616, 630 (S.D.N.Y. 2011) ("[B]road allegations of harm unsubstantiated by specific examples or articulated reasoning fail to satisfy the test."); *see also* D.C. Code § 2-534(a)(1) (exempting from disclosure under District's FOIA law "commercial [ ] information" whose "disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained").

Facebook has not even tried to meet its burden here. At bottom, the Document is just an email exchange between Facebook employees discussing how Cambridge Analytica (and others) violated Facebook's policies. Facebook has since disclosed this same information through a detailed press release posted in March 2018. *See* Facebook Newsroom, *Suspending Cambridge Analytica and SCL Group from Facebook*, (Mar. 16, 2018), https://newsroom.fb.com/news/2018/03/suspending-cambridge-analytica/. Facebook does not explain how information that it has already largely disclosed would give its competitors an unfair advantage. Nor does Facebook explain how a competitor (who presumably maintains policies separate from Facebook's) would benefit in any way from disclosure of how Facebook discussed third-party compliance with Facebook policies that have nothing to do with that competitor. It is therefore not surprising that Facebook resorts to conclusory assertions that disclosure would "provide competitors with valuable insights into how Facebook operates." Mot. to Seal at 6. Such assertions are insufficient to justify denying the public their presumptive right of access to these proceedings.

Moreover, the reach of Facebook's logic is limitless – if "insight" is dispositive, then virtually any internal communication could be characterized as confidentially sensitive or strategic. Courts

have consistently rejected such attempts to turn otherwise generic business practices into commercially sensitive information. *E.g.*, *Saks Inc. v. Attachmate Corp.*, 2015 WL 1841136, at *19 (S.D.N.Y. Apr. 17, 2015) ("demanding compliance with contracts . . . is hardly a novel or unique business practice"); *O'Connor v. Uber Techs., Inc.*, 2015 WL 355496, at *3 (N.D. Cal. Jan. 27, 2015) (rejecting company's representation that employees' email discussion relating to performance of third-party contractors (as classified by the company) rose to the level of "commercially sensitive" information); *Apple Inc. v. Samsung Elec. Co., Ltd.*, 2013 WL 412864, at *2 (N.D. Cal. Feb. 1, 2013) (employee email chains discussing "impressions of competitors' devices and how to develop [plaintiff's] devices" were not confidential or proprietary).

Once past the veneer of alleged competitive harm, Facebook's concerns boil down to the reputational, which cannot be the basis for hiding this document from the public. It might reflect poorly on the company, for instance, that a D.C.-based Facebook employee identified Cambridge Analytica (in addition to other third-party political applications) as a "[redacted]" months before news outlets first reported on Cambridge Analytica's improper access of Facebook consumer data. FB-CA-DCAG-00050485. The company may also seek to avoid publicizing its employees' candid assessments of how multiple third-parties violated Facebook's policies. *Id.* at 490 ("[redacted]") (emphasis in original), 489 ("[redacted]"), 489 ("[redacted]"). But concerns that information would "harm the company's reputation [are] not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records." *B&W Tobacco*, 710 F.2d at 1179-80; *see also Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) (potential harm of disclosing "candid assessment of the [company's]

internal operations" that reflected "poor management in the past" insufficient to justify sealing document).

Facebook's failure to assert prejudice is only magnified by the cases upon which it relies, all of which involve significantly more specified harm. For example, in *100Reporters LLC v. United States Department of Justice*, the court sealed a compliance monitor's comprehensive "annual reports and associated documents" of a company's compliance program because it could provide competitors with a "roadmap" to that program without "incurring the substantial investment cost [the company] has incurred." 248 F. Supp. 3d 115, 143 (D.D.C. 2017); *see also United States v. Anthem, Inc.*, 2017 WL 8893757, at *2 (D.D.C. 2017) (sealing information relating to insurer "provider rates, pricing, marketing analysis, new products, and strategic plans"). A comprehensive annual report and strategic plans are far more proprietary than a single email chain between Facebook employees. And surely, even in the most charitable light, this email chain cannot possibly provide competitors with a "roadmap" of how to effectively enforce and oversee third-party application compliance with a company's policies. In addition, the decisions in *100Reporters* and *Anthem* cited sworn declarations submitted by company representatives that testified how the information-to-be-sealed would unfairly advantage competitors. *100Reporters*, 248 F. Supp. 3d at 140; *Anthem*, 2017 WL 8893757, at *2. Facebook has not provided any such declarations that explain the unfair advantage to competitors here.

Finally, Facebook's conclusory assertions also show that its request to redact the Document should also be denied. Notably, Facebook did not quote a single passage from the Document in its Motion to Seal that would justify redaction. Facebook's lone quote refers to an employee's note to keep an entity's name "[redacted]" Mot. to Seal at 6. But the only reason the employee sought the entity's identity was because it had been flagged as violating Facebook's policies through accessing and selling consumer data in a manner similar to that in the Cambridge Analytica incident. *See* FB-

CA-DCAG-00050489 ("[redacted]") (emphasis added). This is nothing but an employee's informal assurance not to disclose the identity of a party in violation of Facebook's policies – there is nothing proprietary about the party's identity and Facebook does not explain how disclosure would advantage a competitor. Indeed, this is the exact same kind of concealment that Facebook engaged in with Cambridge Analytica that forms one basis of the District's Complaint. *E.g.*, Compl. ¶ 43 ("Facebook also failed to take reasonable measures to enforce its Platform Policy in connection with other third-party applications and failed to disclose to users when their data was sold or otherwise used in a manner inconsistent with Facebook's policies.").

Factor 6: The purpose for which the Document was introduced. As discussed above in section A, the Document is properly before the Court. Facebook has raised the defense of personal jurisdiction, and the District is permitted by law to come forward with evidence establishing personal jurisdiction for this action. This factor, together with the overwhelming majority of the others, should move this Court to allow the Document to be publicly filed as in the normal course.

CONCLUSION

This Court, the District, and D.C. residents have a strong interest in enforcement matters proceeding on the public record. Against that strong interest and Facebook's failure to even try and justify departing from it, the Court should deny Facebook's Motion to Seal in full.

Dated: March 18, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Randolph T. Chen, certify that on March 18, 2019 a copy of the foregoing District of Columbia's Opposition to Defendant Facebook, Inc.'s Motion to Seal was served on all counsel of record via CaseFileXpress.

/s/
RANDOLPH T. CHEN
Assistant Attorney General

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff*, v. FACEBOOK, INC., *Defendant*.	Civil Action No.: 2018 CA 008715 B

ORDER

Upon consideration of the Motion to Seal filed by Defendant Facebook, Inc., Plaintiff District of Columbia's Opposition, and the entire record in this case, it is hereby:

ORDERED that Defendant Facebook, Inc.'s Motion to Seal is **DENIED.**

Date: _____

_____
JUDGE FERN F. SADDLER
Superior Court of the District of Columbia

Copies to: all counsel of record

EXHIBIT A

IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA, CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff,* v. CASHCALL, INC., WS FUNDING, LLC, J. PAUL REDDAM, *Defendants.*	)	Civil Action No: 2015 CA 006904 B Judge: Hon. Jennifer A. Di Toro – Calendar 1 Next Court Date: None Scheduled

PROTECTIVE ORDER

Whereas the District of Columbia (the "District") and Defendants CashCall, Inc., WS Funding, LLC, and J. Paul Reddam (collectively, the "parties") agree that certain discovery materials in this case may qualify as confidential information, and to prevent undue disclosure of any such information, have requested that the Court enter a protective order; and whereas the Court has determined that the terms set forth herein are appropriate to protect the respective interests of the parties and third parties; accordingly, it is **HEREBY ORDERED**:

1. **Confidential Information**. "Confidential Information" shall refer to any document, information, or deposition testimony that contains: (a) information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy; or (b) trade secret or commercial or financial information, to the extent disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained. During the course of this proceeding, the parties may produce documents or other information that constitutes Confidential Information, and such documents or other information may be designated as "Confidential Information" by the processes set forth in

Paragraph 5 of this Order. In addition, the protections conferred by this Order shall also extend to any information copied or extracted from information protected by this Order, as well as all copies, excerpts, summaries, or compilations of this protected information, including testimony. Confidential Information shall be limited to information and documents that have not previously been disclosed or produced by the designating party or have been previously disclosed or produced with a Confidential designation. All Confidential Information produced or exchanged in the course of this proceeding shall be used only for the purposes of the litigation and trial of this case, or any appeal, except as otherwise set out in this Order.

2. Duty of Good Faith. A designating party shall use good faith in designating information as Confidential Information, making such designation only when there is a legitimate reason for the restrictions on disclosure called for by the designation. The parties recognize this is a public enforcement lawsuit brought by the District, and that the District desires for it to be conducted on the public record to the greatest extent possible. A party may challenge the designation of information as "Confidential Information" when it has a good faith basis to believe the designated information is not Confidential Information (as further discussed in this Order).

3. Limitations on Disclosure. Information designated as Confidential Information shall not be disclosed, copied or disseminated to anyone, by any person or entity, except to the following:

(1) The Court and all persons assisting the Court in this Action, including law clerks, court reporters, and stenographic or clerical personnel;

(2) attorneys, and employees or agents of the attorneys, appearing in this proceeding as counsel of record for the Parties;

(3) officers, directors and employees of the Parties, including in-house counsel, who have agreed to be bound by and to comply with this Order;

(4) court reporters and videographers involved in depositions in this case and their employees;

(5) consultants or experts retained by counsel of record for this proceeding who have signed the "Acknowledgement and Agreement to be Bound" that is attached hereto as Exhibit A. These persons shall not use such information for any purpose other than this proceeding and shall not disclose such information to any person not specifically authorized by this Order;

(6) litigation consultants, copy services, and other third parties who have been retained to assist the attorneys of record in translating, copying or computer coding of documents, transcribing or videotaping depositions, or assisting with hearing preparation who have signed the "Acknowledgement and Agreement to be Bound" that is attached hereto as Exhibit A;

(7) mediators or settlement officers, and their supporting personnel, mutually agreed upon by any of the parties engaged in settlement discussions;

(8) any witness, provided that no copy of any document marked as "Confidential" shall be shown to or left with the witness unless the witness signs the "Acknowledgement and Agreement to be Bound" that is attached hereto as Exhibit A;

(9) other law enforcement agencies provided they agree in writing to be bound and comply with this Order; and

(10) during their depositions, witnesses, and attorneys for witnesses, in the action to whom disclosure is reasonably necessary. Pages of transcribed deposition

testimony or exhibits to depositions that reveal Confidential Information must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Order.

Nothing contained in this Order shall prevent a party from sharing a witness' own account-level data with that witness. Further, nothing contained in this Order shall prevent a party from sharing documents or information marked as "Confidential" with any witness (i) who authored, or (ii) previously received the document or information, but not in violation of this Order.

4. Agreement to Abide by Protective Order. Counsel for the Parties (collectively, the "Lawyers"), need not be identified or provide a written acknowledgment of this Order, it being understood and acknowledged by the Lawyers that they are bound by the terms of this Order. Moreover, no court reporters or videographers will be required to provide a written acknowledgment of this Order. However, the Lawyers will work in good faith to provide notice of this Order to any court reporters or videographers who may receive Confidential Information.

Prior to disclosing information designated as Confidential Information to any other persons specified in Paragraph 3 of this Order, the party receiving the information shall first give a copy of this Order to such persons.

5. Methods of Designation. Any document produced in this proceeding containing Confidential Information or any written discovery response containing Confidential Information shall be marked by the designating party with the legend: "Confidential." Deposition testimony may be designated as Confidential during the course of the deposition by counsel for the party whose information is disclosed in the testimony or in writing served upon all parties by specifically noting the page and line numbers designated within thirty (30) days after the

transcript of the deposition becomes available. If testimony is designated as Confidential, the court reporter shall make the appropriate legend on each page of the deposition transcript where such designated testimony appears. The cover page of a deposition transcript containing any designated portions shall indicate that it contains portions of testimony subject to a confidentiality order. During the time period between the deposition testimony and the deadline to designate such testimony, the deposition testimony in its entirety shall be designated and treated as Confidential Information by all parties.

6. **Filing Confidential Information with the Court**. This Order explicitly permits parties to file under seal with the Clerk pleadings that contain Confidential Information. Any pleading filed or lodged with the Court containing Confidential Information shall be placed in a sealed envelope or other appropriately sealed container with the cover page of the pleading on the outside of the envelope on which shall be a typed statement in the following form (as applicable):

> **SUBJECT TO PROTECTIVE ORDER – CONFIDENTIAL INFORMATION**
> The contents of this envelope are confidential, filed under seal, and are subject to a Protective Order of the Court. The contents are not to be made public except upon order of the Court.

7. **Presentation of Confidential Information to the Court**. With respect to testimony elicited during hearings, at trial or other proceedings before the Court, whenever counsel for any party deems that any question or line of questioning calls for the disclosure of Confidential Information, counsel shall alert the Court to this concern and the Court shall take such action as it deems necessary to protect the information. For purposes of any trial in this case, a party's failure to have previously challenged the designation of Confidential Information shall not prevent that party from arguing that the trial, including any discussion of the Confidential Information, should proceed publicly.

8. **Public Knowledge or Independent Acquisition**. Notwithstanding any other provision of this Order, no person shall be precluded from using or disclosing, in any lawful manner, any Confidential Information that, prior to disclosure, (a) is public knowledge; (b) was independently known by that person; (c) after disclosure, either is independently and lawfully developed or is acquired by the receiving party from any source, other than the designating source, unless the receiving party knows or should know that the person came into possession of such Confidential Information unlawfully; or (d) becomes public knowledge other than by an act or omission of the receiving party. The burden of proving prior possession, prior knowledge or prior public knowledge of such Confidential Information shall be on the receiving party.

9. **Disputes Over Designation**. This Order shall not preclude any party from bringing before the Court, at any time, the question of whether any particular information is properly designated as Confidential. If a party disputes the designation of particular information as Confidential, that party has the burden to seek relief from the Court, and the party asserting the propriety of any designation has the burden to defend the designation. In its request for relief from the Court, the party disputing the designation of any information shall provide specific citations to the particular information that it believes in good faith is not Confidential Information. Prior to bringing any motion, the parties shall meet and confer in good faith to attempt to resolve the dispute. If the dispute cannot be resolved, there shall be no disclosure inconsistent with the limitations on disclosure provided for under this Order for the designation in dispute absent an express ruling by the Court granting permission for the disclosure.

10. **Inadvertent Failure to Designate**. Inadvertent failure to designate qualified information as Confidential Information produced during the course of this proceeding does not, standing alone, waive the designating party's right to secure protection under this Order for such

material produced during the course of this proceeding. Parties shall use reasonable care in designating qualified information as Confidential Information. If material is appropriately designated as Confidential Information after the material was initially produced, the party receiving the information, on timely notification of the designation, must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order. Where a party or third party (pursuant to this Order) to this proceeding changes the confidentiality designation under this Order, that party or third party shall promptly furnish the information re-designated.

11. No Waiver. Nothing in this Order shall be deemed a waiver of the right of any party to oppose production of any information or material on any available grounds or to object to the authenticity or admissibility of any document, testimony or other evidence.

12. Unauthorized Disclosure of Confidential Material. If a party receiving protected material learns that, by inadvertence or otherwise, it has disclosed Confidential Information to any person or in any circumstance not authorized under this Order, the receiving party must immediately (a) notify in writing the designating party of the unauthorized disclosures; (b) use its best efforts to retrieve all copies of the protected material; and (c) inform the person or persons to whom unauthorized disclosure was made of all the terms of this Order.

13. Confidential Information Subpoenaed or Ordered Produced in Other Litigation. If a party is served with a subpoena or court order issued in other litigation that compels disclosure of any information or items designated in this action as Confidential Information, that party must:

(1) promptly notify in writing the designating party. Such notification shall include a copy of the subpoena or court order;

(2) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Protective Order. Such notification shall include a copy of this Protective Order. The purpose of imposing these duties is to alert the interested parties to the existence of this Protective Order and to afford the designating party in this action an opportunity to try to protect its confidentiality interests in the court from which the subpoena or order is issued. The designating party shall bear the burden and expense of seeking protection in that court of its Confidential Information – and nothing in these provisions should be construed as authorizing or encouraging the party that received the Confidential Information in this action to disobey a lawful directive from any other court.

The designating party shall promptly file an appropriate objection or motion regarding the requested materials and subpoena or order.

14. A Non-Party's Confidential Information Sought to be Produced in this Litigation.

(1) The terms of this Order are applicable to information produced by a non-party in this action and designated as Confidential Information. Such information produced by a non-party in connection with this litigation is protected by the remedies and relief provided by this Order. Nothing in these provisions should be construed as prohibiting a non-party from seeking additional protections.

(2) In the event that a party is required, by a valid discovery request, to produce a non-party's Confidential Information in its possession, and the party is subject to an agreement with the non-party not to produce the non-party's confidential information, then the party shall:

(a) promptly notify in writing the requesting party and the non-party that some or all of the information requested is subject to a confidentiality agreement with the non-party;

(b) promptly provide the non-party with a copy of the Stipulated Protective Order in this action, the relevant discovery request(s), and a reasonably specific description of the information requested; and

(c) make the information requested available for inspection by the non-party, if requested.

(3) If the non-party fails to seek a protective order from this court within 14 days of receiving the notice and accompanying information, the receiving party may produce the non-party's confidential information responsive to the discovery request. If the non-party timely seeks a protective order, the receiving party shall not produce any information in its possession, custody or control that is subject to the confidentiality agreement with the non-party before a determination by the court. Absent a court order to the contrary, the non-party shall bear the burden and expense of seeking protection in this court of its confidential information.

15. Duration. Even after final disposition of this litigation, the confidentiality obligations imposed by this Order shall remain in effect until a designating party agrees otherwise in writing or a court order directs otherwise.

16. Violation. Any violation of this Order may be punished by appropriate measures including, without limitation, contempt proceedings and/or monetary sanctions.

17. Relevant Laws. Nothing contained herein shall alter either party's obligations to maintain and protect information that is privileged or otherwise protected under state, federal, or

common law or to alter the District's obligations under the District of Columbia Freedom of Information Act.

IT IS SO ORDERED, this 15th day of November, 2016, hereby

Superior Court Judge
Associate Judge
Signed in Chambers

For service via CaseFileExpress:
Richard Rodriguez – richard.rodriguez@dc.gov;
Jimmy Rock – jimmy.rock@dc.gov;
Joseph Barloon – jbarloon@skadden.com;
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EXHIBIT A

ACKNOWLEDGEMENT AND AGREEMENT TO BE BOUND

I, [print or type full name], of

[print or type full address], hereby state the following:

(1) I have read in its entirety and agree to be bound by the attached Stipulated Protective Order that was issued by the Superior Court of the District of Columbia on [date] in the case of District of Columbia v. CashCall, Inc., *et al.*, Case No. 2015 CA 006904 B.

(2) I will not use nor disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

(3) I further agree to submit to the jurisdiction of the Superior Court for the District of Columbia for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

Date:

Signed:

Printed Name:

Signature: