

JOHN J. GRAUBARD, Senior Attorney
GEORGE S. CANELLOS, Regional Director
Attorneys for Plaintiff
Securities and Exchange Commission
New York Regional Office
3 World Financial Center, Room 400
New York, NY 10281-1022
E-mail: graubardj@sec.gov
Telephone: 212-336-0084

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

SECURITIES AND EXCHANGE COMMISSION,	:	Case No.:
	:	CV06-2792-PHX-EHC
	:	
Plaintiff,	:	MOTION FOR
	:	PROTECTIVE ORDER
- against -	:	(FED. R. CIV. P. 5.2(e)(1))
	:	AND MEMORANDUM
HOWARD R. BAER and KEVIN C. BAER,	:	OF POINTS AND
	:	AUTHORITIES
Defendants.	:	

The Plaintiff Securities and Exchange Commission (the “Commission”) respectfully moves pursuant to Rule 5.2(e)(1) of the Federal Rules of Civil Procedure for a protective order requiring the redaction of the following personal identification information from electronic or paper filings with the Court:

- (1) Names of individual investors, indicated by initials only;
- (2) Street addresses of individual investors, indicated by city and state only;
- (3) Telephone numbers of individual investors; and
- (4) E-mail addresses of individual investors.

For the reasons set forth below, the Commission submits that the redaction of such information is necessary and appropriate to protect the privacy of persons who invested in Health Enhancement Products, Inc. (“HEPI”) common stock and who may be making claims for payment under the Commission’s proposed Distribution Plan if the Court adopts it.

Background

On November 20, 2006, the Commission filed a Complaint against the Defendants Howard R. Baer and Kevin C. Baer charging them with violations of the anti-fraud provisions of the federal securities laws with respect to HEPI common stock. The Commission’s complaint alleged that the Defendant Howard R. Baer violated Section 17(a) of the Securities Act of 1933 (“Securities Act”), 15 U.S.C. § 77q(a), and Sections 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. §§ 78j(b), and Rules 10b-5 and 13a-14 thereunder, 17 C.F.R. §§ 240.10b-5 and 240.13a-14. The Complaint further alleged that the Defendant Howard R. Baer engaged in acts that aided and abetted the violation of Section 13(a) of the Exchange Act, 15 U.S.C. § 78m(a), and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder, 17 C.F.R. §§ 240.12b-20, 240.13a-1, 240.13a-11, and 240.13a-13. The Complaint also alleged that the Defendant Kevin Baer engaged in acts that aided and abetted the violation of Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

On November 29, 2006, the Court entered Final Judgment as to the Defendant Howard R. Baer and as to the defendant Kevin C. Baer. The defendant Howard R. Baer paid substantial amounts of disgorgement and prejudgment interest to the Court Registry.

The Commission proposes to distribute funds in the Court Registry (the “HEPI Funds”) to persons who were the victims of the fraudulent conduct (“fraud on the market”) of the defendants with respect to HEPI common stock.

The Commission has identified approximately 400 persons and entities which engaged in transactions in HEPI common stock during the period covered by the allegations of the Commission’s action. The Commission intends to give each of these persons and entities notice of its motion seeking approval of its proposed Distribution Plan. In addition, a significant number of these persons and entities will fall within the proposed class to whom the fund will be distributed, and given the opportunity to file claims to participate in the distribution of the HEPI Fund.

The Commission’s Request for a Protective Order

Rule 5.2 of the Federal Rules of Civil Procedure provides for privacy protection in filings made with the Court. Rule 5.2(a)(1) specifically requires redaction of four categories of information. Documents filed with the Court may include only:

- (1) the last four digits of the social security-number and taxpayer-identification number;
- (2) the year of the individual’s birth;
- (3) the minor’s initials; and
- (4) the last four digits of the financial-account number.

Rule 5.2(e) allows the Court to enter a protective order to require redaction of additional information. For the reasons set forth below, the Commission requests that the Court order the redaction of the following additional information from Court filings:

- (1) Names of individual investors, to be indicated by initials only;

- (2) Street addresses of individual investors, to be indicated by city and state only;
- (3) Telephone numbers of individual investors; and
- (4) E-mail addresses of individual investors.

The Commission submits that these redactions are appropriate to implement the privacy policy set forth in Rule 5.2.

A Protective Order Is Appropriate

This action involves a species of securities fraud known as a “fraud on the market.” In such a matter, the fraud is against the market as a whole, not specifically against the individuals who purchased HEPI common stock. Therefore, the universe of potential claimants includes each person or entity who purchased HEPI common stock during the period the fraud was ongoing. None of these persons or entities were specifically targeted by the defendants.

No purpose is served by making the names, addresses, telephone numbers, and e-mail addresses of the individual investors available to the public. [FOOTNOTE 1 - In *FCC v. AT&T, Inc.*, ___ U.S. ___, 131 S. Ct. 1177, 1185 (2011), the Supreme Court held that corporations, and presumably similar entities such as partnerships and limited liability companies, do not have a right to “personal privacy” under the Freedom of Information Act. Accordingly, the Commission does not seek a protective order as to any of the entities which invested in HEPI common stock.] Making this information public might well have the effect of giving others involved currently in the violation of the federal securities laws a list of “potential victims” who might profitably be approached. Even if this were not the case, making this information public might have

the effect of stigmatizing these investors as those who were not smart enough to avoid being “taken in” by the activities of the defendants.

There is a strong presumption that judicial records should be public. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006):

Historically, courts have recognized a “general right to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Communs., Inc.*, 435 U.S. 589, 597, & n.7, 98 S. Ct. 1306, 55 L. Ed. 570 (1978). This right is justified by the interest of citizens in “keeping a watchful eye on the working of public agencies.” *Id.* at 598.

But the public’s right to access is not absolute. A party seeking to keep other materials from public disclosure can overcome the presumption of access by showing “sufficiently compelling reasons for doing so.” *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). This standard has been described as a “balancing test.” *San Jose Mercury News, Inc. v. United States Dist. Court – N. Dist.*, 187 F.3d 1096, 1102 (9th Cir. 1999). [FOOTNOTE 2 - Rule 5.2(e) states that the standard is “good cause.” This is a lesser standard than “compelling reasons.” *Pintos v. Pacific Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010). The Commission submits that its requested redactions meet both standards, so that the Court need not determine which one would apply here.]

“[T]he privacy interest of an individual in avoiding the unlimited disclosure of his or her name and address is significant. . . .” *National Ass’n of Retired Federal Employees v. Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989); *Minnis v. United States Dep’t of Agriculture*, 737 F.2d 784, 787 (9th Cir. 1984) (exemptions under the Freedom of Information Act).

Here, making public the name and address of each individual investor serves no purpose. These investors did not bring this action, are not parties to this action, and are not even witnesses who would have testified in this action. They are merely victims of a fraudulent scheme. Their names and addresses are not relevant to the substance of this action. In *Online Payment Solutions Inc. v. Svenska Handelsbanken AB*, 638 F. Supp. 2d 375, 384 n. 4 (S.D.N.Y. 2009), the Court placed under seal documents that revealed the names, e-mail addresses, phone numbers, and IP addresses of individuals who were not parties to the lawsuit but who might have been damaged by the conduct alleged in the suit. [FOOTNOTE 3 - The Commission will provide unredacted documents to the Court and the parties upon request.]

With respect to the names of individual investors, the Ninth Circuit recognizes that it is appropriate in certain cases for an individual to use a pseudonym in an action. *Does I Thru XXIII v. Advanced Textile*, 214 F.3d 1058, 1068 (9th Cir. 2000) (Fair Labor Standard Act case where plaintiffs feared immediate deportation to China and retaliation against family members); *United States v. Doe*, 655 F.2d 920, 922 n. 1 (9th Cir. 1980) (prisoner in fear of retaliation) (“Where it is necessary, however, to protect a person from harassment, injury, ridicule or personal embarrassment, courts have permitted the use of pseudonyms”); *Doe v. Penzato*, 2011 WL 1833007 at *3 (N.D. Cal. May 13, 2011) (victim of human trafficking).

Here, the Commission does not seek to redact the names of parties to this action. It seeks only to prevent the public disclosure of the names of individual investors.

Although these individual investors are not, as in the cases cited above, subject to consequences such as deportation, retaliation, or physical harm, revealing that they were

victims of a securities fraud scheme may cause them embarrassment or may even lead to other securities law violators targeting them.

As all violations of the federal securities laws are both civil and criminal in nature, the Commission believes that the Court should apply the standards of Rule 49.1 of the Federal Rules of Criminal Procedure. Specifically, this rule requires in a criminal matter the redaction of an individual's address except for his or her city and state.

Finally, there simply is no public interest in knowing the telephone numbers or e-mail addresses of the investors. This information is important to the Commission and the Distribution Agent, so that the individual investors can be contacted. This information is even more personal than the individual's street address.

Conclusion

The Commission submits that its proposed protective order under Rule 5.2(e)(1) strikes an appropriate balance between the public's right of access to judicial proceedings and the individual investors' right of privacy. The Court therefore should enter the protective order as requested.

Dated: New York, New York
August 1, 2011

/s/

JOHN J. GRAUBARD
Senior Attorney
GEORGE S. CANELLOS, Regional Director
Attorneys for Plaintiff
Securities and Exchange Commission
New York Regional Office
3 World Financial Center, Room
400 New York, NY 10281-1002
Email: graubardj@sec.gov
Telephone: 212-336-0084

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Securities and Exchange Commission,)	No. CV 06-2792-PHX-FJM
)	
Plaintiff,)	PROTECTIVE ORDER
)	
vs.)	(Fed.R.Civ.P. 52.(e)(1))
)	
Howard R. Baer and Kevin C. Baer,)	
)	
Defendant.)	
_____)	

The Plaintiff Securities and Exchange Commission (the “Commission”) having moved pursuant to Rule 5.2(e)(1) of the Federal Rules of Civil Procedure for a protective order requiring the redaction of personal identification information from electronic or paper filings with the Court, and it appearing to the Court that there is good cause for granting such protective order, having considered and balanced the public right of access and the privacy interest of individual investors, it is hereby

ORDERED, that the following information shall be redacted from all Court filings:

- (1) Names of individual investors, to be indicated by initials only;
- (2) Street addresses of individual investors, to be indicated by city and state only;
- (3) Telephone numbers of individual investors; and
- (4) E-mail addresses of individual investors.

No redactions shall be made with respect to investors who are not individuals. Upon request the Commission shall provide the Court and any party to this action a copy of the unredacted documents. Any party receiving the unredacted documents shall not make them public or otherwise distribute them without further order of the Court. (Doc. 52).

DATED this 12th day of September, 2011.

/s/ Frederick J. Martone
Frederick J. Martone
United States District Judge