

IN THE CIRCUIT COURT, ELEVENTH
JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

THE EVERGLADES FOUNDATION, INC.,

Plaintiff,

CASE NO.: 2022-CA-006441
SECTION: CA11
JUDGE: Carlos Lopez

v.

THOMAS VAN LENT, an individual,

Defendant.

THE CAPITOLIST, LLC,

Intervenor.

**INTERVENOR'S MOTION TO UNSEAL
ALL JUDICIAL RECORDS CURRENTLY FILED UNDER SEAL¹**

Intervenor The Capitolist, LLC, by counsel, moves the Court to unseal all judicial records filed in this action that remain under seal. In support, Intervenor states:

1. Litigants who would have our courts seal presumptively public documents bear a heavy burden that requires more than the conclusory predictions of harm that Plaintiff has provided in this case. That burden is even heavier when, as here, matters of exceedingly important public policy are at stake and when the parties, who are public figures, are calling into question each other's conduct that affects government operations, and the public's wellbeing.

2. The Capitolist, LLC is a digital journalism company that publishes as The Capitolist, <https://thecapitolist.com/>.

¹ Intervenor will file a memorandum of law separately from this Motion with applicable authorities.

3. The Capitolist provides original reporting, analysis, and aggregated news, all focused on the nexus of Florida business, policy, and politics, bringing together government and elected officials, business leaders and influencers. The Capitolist seeks to tell more complete stories about the businesses, industries and policy initiatives that drive Florida's economy, adding a new voice to legacy media that too often oversimplify or overlook these important stories. Since starting in 2016, The Capitolist has built a readership that exceeds 40,000 subscribers to its daily reports known as The Capitolist ReCap.

4. On April 6, 2022, Plaintiff filed its Complaint seeking in emergency fashion to enjoin Defendant, a former employee who allegedly misappropriated intellectual and other property of Plaintiff. At the same time, Plaintiff filed its Motion to Determine Confidentiality of Court Records ("motion to seal") and its separate Directions/Instructions to the Clerk, asking the Clerk, pursuant to Fla. R. Gen. Prac. & Jud. Admin. 2.420(e)(1), to "please temporarily seal the Complaint underlying the motion containing confidential information pending a ruling on the motion to seal." (Filing No. 147201660). Plaintiff's Motion to Determine Confidentiality made the incredible claim that the Complaint, "from the introduction to the prayer for relief," warrants sealing.

5. To date, more than 90 days later, it appears there has been no hearing or order on the motion to seal the Complaint as required by Rule 2.420.

6. On April 8, 2022, Plaintiff filed its Ex Parte Motion for Temporary Injunction, seeking an emergency injunction without the benefit of notice to Defendant (Filing No. 147369823). At the same time, Plaintiff filed its Motion to Determine Confidentiality of Court Records to seal Plaintiff's Ex Parte Motion for Temporary Injunction in its entirety. Similar to its motion to seal the Complaint, Plaintiff alleged in merely generalized fashion that the Ex Parte

Motion should be sealed in its entirety, including a proposed order that would grant the Ex Parte Motion, “because the entire subject matter” of the Ex Parte Motion and attachments “concerns information defined as confidential” in Plaintiff’s policy manual.

7. On April 11, 2022, the Court granted Plaintiff’s Motion to Determine Confidentiality of Court Records to seal the Ex Parte Motion in its entirety. The Court also granted Plaintiff’s Ex Parte Motion. That 13-page Order, which Plaintiff supplied with its Ex Parte Motion and had asked that it be sealed in its entirety, did not warrant sealing as the Court entered it into the public file maintained by the Clerk of Court.²

8. The docket shows a hearing was scheduled for May 3, 2022, on both motions to seal the Complaint and the Ex Parte Motion, which would have been within the 30-day deadline required by Florida Rule of General Practice and Judicial Administration 2.420. On May 3, however, the parties agreed to reschedule the hearing on the two motions to seal. The parties have yet to set a new hearing on the two motions as the Court directed, causing the Court to be in violation of Rule 2.420’s mandate for a timely hearing. Yet, the Complaint and the Ex Parte Motion remain sealed in their entirety.³

9. Plaintiff’s two motions to seal are based on nothing more than Plaintiff’s

² Plaintiff’s unsealed Ex Parte Motion, including its affidavits and proposed order, became available from a source other than the Court as early as April 18, 2022. Nothing in the Ex Parte Motion contains trade secrets or confidential information worthy of sealing. The motion contains only generic descriptions of categories of such secrets, not the would-be secrets themselves.

³ Unrelated to the two motions to seal, on June 13, 2022, Plaintiff filed a Motion for Entry of Confidentiality Order (Filing No. 151396295) and set that for hearing on July 5, 2022. On July 6, 2022, the Court granted the June 13, 2022, motion and a day later entered the Confidentiality Order requested by Plaintiff (Filing Nos. 152842501 & 152842485). That order pertains only to the handling of discovery matters by the parties and does not address the sealed status of the Complaint or the Ex Parte Motion for Temporary Injunction.

sweeping, generalized assertions of the need to keep both documents sealed from public view. Those assertions are in turn based on the insufficient allegations that the entire subject matter of the Complaint and Ex Parte Motion “concerns information defined as confidential in the Foundation’s written Policy Manual and related employee agreement.” Nothing in the Ex Parte Motion, affidavits in support, or the proposed order granting the motion constitutes trade secret information worthy of sealing. It is reasonable to assume that the Complaint suffers from the same generalized assertions of trade secrets and otherwise proprietary property.

10. The ultimate question for the Court’s adjudication—if there was misappropriation of proprietary information by a former employee of Plaintiff and how should that be punished—is a far different question from whether the Plaintiff should be able to litigate its claims in secret without meeting the stringent requirements in the U.S. and Florida Constitutions, Florida common law, and Florida Rule of General Practice and Judicial Administration 2.420 for conducting court business in the sunshine.

11. There is no expectation of privacy or secrecy in Florida courts except where expressly determined as essential under exceedingly narrow conditions needed to rise above the adamant presumption of openness. For example, even in disputes involving businesses where commercial success is at stake or in nasty disputes between formerly married persons where public embarrassment and shame are commonplace, Florida courts are nonetheless dedicated to the proposition that operating in the sunshine with public access to all facts that litigants would rather keep private serves to ensure equal justice under the law and to engender public trust in the fairness and efficacy of our judicial branch.

12. This dispute, however, carries additional motivation to keep its adjudication in the sunshine. This is not a routine matter of a former employer calling upon the judicial branch to

protect allegedly proprietary property whose misappropriation could harm the employer's business. This is a dispute between public figures involving matters of great public import beyond the foundational reasons for maintaining public access to our courts. For instance:

a. The parties are two major figures deeply involved in an initiative of vital import to the health, vitality, and future of Florida's economy, environment, and citizens and visitors—restoration of the size and function the Florida Everglades.

b. Plaintiff is a 501(c)(3) non-profit organization whose mission is to support the restoration of the Everglades through science-based strategies. Plaintiff is widely viewed as the most influential source of information relied upon by lawmakers who allocate billions of tax dollars and develop policies for restoring the Everglades.

Plaintiff's website asserts "The Everglades Foundation is the leading science-based nonprofit organization that works to inform government decision-makers with the goal of advancing Everglades restoration projects that maximize environmental and economic benefits." <https://www.evergladesfoundation.org/science>

c. Plaintiff is not a commercial enterprise so much as it is an organization that the government has conferred with preferential tax status so that it can effectively advise local, state, and federal lawmakers on how to spend tax dollars and implement policy initiatives. Plaintiff's tax-preferred status requires heightened accountability and transparency.

d. Plaintiff's involvement in key policymaking decisions include efforts to use public funds to purchase vast agriculture land holdings for the purpose of Everglades restoration. Various methods have been proposed over the years for restoring the Everglades, including the purchase and construction of a restoration reservoir north of

Lake Okeechobee and one south of the lake. Those and other restoration proposals are usually the subject of controversies centered on questions of whether they will achieve restoration goals and whether they are a good use of taxpayer dollars. Among such efforts are:

- i. In 2010, Plaintiff sought public dollars when it released a study concluding "that the economy gets a \$4 return for every \$1 the state and federal governments invest in protecting [the Everglades]" and "Investing nearly \$12 billion to get Everglades restoration back on track would bring a more than \$46 billion return". (*Study projects 400,000 jobs, \$46 billion in economic boost could come from restoring the Everglades*, The Palm Beach Post Oct. 19, 2010) <https://www.palmbeachpost.com/story/news/2010/10/19/study-projects-400-000-jobs/7432025007/>
 - ii. In 2015, Plaintiff publicly advocated, based on a university study, for lawmakers to spend public dollars to buy land from U.S. Sugar. (*U.S. Sugar Land Buy A Tough Sell Among Lawmakers*, CBSNews Miami, Mar. 3, 2015) <https://www.cbsnews.com/miami/news/u-s-sugar-land-buy-a-tough-sell-among-lawmakers/?intcid=CNM-00-10abd1h>
 - iii. In 2017, Plaintiff issued a report that the South Florida Water Management District described as an erroneous pretext designed "to dictate [Plaintiff's] preferred outcome." SFWMD also said that Plaintiff's release of the "report in this form is a misrepresentation of the facts." <https://www.tcpalm.com/story/news/local/indian-river-lagoon/politics/2017/01/12/sfwmd-and-everglades-foundation-go/96506574/>
 - iv. In 2018, when the State of Florida was trying to solve toxic red tides blooms, Plaintiff issued a press release adding its reputation to the debate by stating that Foundation scientists have concluded that discharges from Lake Okeechobee "almost certainly" cause algae blooms on both east and west coasts of Florida. (<https://www.evergladesfoundation.org/post/everglades-foundation-scientists-confirm-link-between-red-tide-and-polluted-discharges-from-lake-oke>)
- e. For his part, Defendant is a well-known and respected scientist who was employed by Plaintiff for 17 years, but who has now publicly separated himself from

Plaintiff because he no longer trusts Plaintiff to put science ahead of politics in pursuing its mission.

f. Defendant's papers filed in Court tell a far different story from the Plaintiff's narrative. He claims that he could qualify for whistleblower status because Plaintiff began to "systematically isolate [him] from participating in external processes, such as the Lake Okeechobee System Operating Manual, only because he would voice opinions contrary" to Plaintiff's political interests (Def's Answer ¶2) and that Defendant "happens to be in a singular and unique position to demonstrate that science had been suborned to a political agenda" (Def's Affirmative Defense No. 1).

g. Defendant further alleges that Plaintiff is misusing this litigation and the Court system to "bully, harass, scare, smear and silence" Defendant from discussing what he describes as inconvenient science. (Def's Answer ¶ 3).

h. Defendant denies "that anything he did was or should be considered confidential, as the very nature of his scientific work requires findings to be shared outside the Foundation for review, comments, and to confirm or dispel findings." Further, he denies Plaintiff "instructed him to keep materials secret, as this would seemingly be in direct contravention of its mission statement and far outside of scientific principles." Def's Answer ¶ 20.

i. Defendant demands proof of "how or why the Foundation is seeking to classify documents as trade secrets, when its stated mission is to educate the public, and knowing that scientists like [Defendant] routinely send out models and papers to the scientific community for peer-review and comment." Def's Answer ¶ 66.

j. Defendant also states that "The Foundation is treating [Defendant]

differently from every other scientist that has resigned from the Foundation, based upon [Defendant's] tweet [that Plaintiff values politics over science], and the Foundation's worry that [Defendant] would reveal to others that the Foundation has lost its way in how far it has strayed from its stated mission, all in order to show fealty to Florida's governor and administration, with actions that run counter to facts and science." Def's Affirmative Def. No. 3.

k. Defendant denies that Plaintiff is entitled to the preferred tax status of a 501(c)(3) without specifying the grounds for this belief. Def.'s Answer ¶ 8. Coupled with this statement, Defendant's overarching accusation that Plaintiff has placed politics ahead of science begs the question whether Plaintiff has violated the IRS Code and Regulations that require heightened transparency and public accountability in exchange for the preferred tax status of 501(c)(3) organizations and the ability to solicit and receive tax exempt contributions from the public. The code and regulations also restrict the amount of lobbying a 501(c)(3) organization may conduct. A separate entity must be created under section 501(c)(4) to conduct lobbying. The code and regulations also restrict the amount of benefit to private individuals that 501(c)(3) operations can generate. Keeping the Court's file unsealed will increase the chance that the public will learn and be able to evaluate Defendant's reasons for questioning Plaintiff's preferred tax status and any rebuttal that Plaintiff offers to show that it meets the heightened standards for transparency and accountability.

13. Plaintiff seeks to maintain a highly disfavored veil of secrecy over what are nothing more than most generalized references to the types and categories of trade secrets, confidential and proprietary information it alleges Defendant has misappropriated, and the

generalized steps Plaintiff took to investigate its suspicions of misappropriation. The Ex Parte Motion never sets forth the allegedly secret information itself. It is reasonable to assume that the Complaint suffers from the same inadequate generalities of confidential information.

14. None of these generalities even remotely rises to the level of sensitive information that if known to the public would irreparably harm Plaintiff in the manner and to the degree that warrants secret adjudication. On the other hand, keeping these documents sealed could keep the public from ever learning information that will allow the public to determine for itself whether the Legislature and Congress were deceived into mispending tens of billions tax dollars.

15. All of the foregoing shows that it is the citizens and taxpayers of Florida who stand to lose from Plaintiff's improper sealing of documents in this case. If Plaintiff can truly meet the exacting standards for sealing Court documents, that relief will be available. If Defendant's assertions are true, they may give evidence of irreparable financial harm to Florida taxpayers whose reliance on the science advocated by Plaintiff has resulted in the investment of billions of tax dollars for multiple restoration projects, including some of questionable value.

16. Given Florida's commitment to operating in the sunshine, Plaintiff's reliance on mere generalities, the identity and history of the parties involved in this litigation, and the grave risk that unwarranted secrecy presents to citizens and taxpayers, the Complaint and Ex Parte Motion are due to be unsealed.

WHEREFORE, Intervenor respectfully requests the Court enter an order unsealing the Complaint and Ex Parte Motion for Temporary Injunction.

Respectfully submitted this **19th day of July 2022**.

/s Edward L. Birk

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **July 19, 2022**, I electronically filed the foregoing with the Florida Courts E-Filing Portal, which will serve a copy on the following parties of records:

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