

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Edward W. Miller, Circuit Court Judge

RECEIVED

SEP 16 2015

S.C. Supreme Court

Case No. 2011-CP-23-8578
Appellate Case No. 2014-002638

Francis P. Maybank and Jane H.P. Maybank, as trustee for
the Francis P. Maybank Family Insurance Trust,Plaintiffs

Of whom Francis P. Maybank is.....Respondent/Appellant,

v.

BB&T Corporation, Branch Banking & Trust Company,
successor in merger to Branch Banking & Trust Company of
SC, and Sterling Capital Management, LLC, successor in
merger to BB&T Asset Management, LLCAppellants/Respondents,

Motion to File Portions of the Record on Appeal Under Seal

Pursuant to Rule 240 of the South Carolina Appellate Court Rules and the Supreme Court's Administrative Order 2014-04-15-02, Appellants/Respondents BB&T Corporation, Branch Banking & Trust Company, and Sterling Capital Management, LLC ("hereinafter "Defendants") hereby file this motion to file certain limited portions of the record on appeal in this matter under seal. Certain trial exhibits designated for inclusion in the record on appeal include private financial information as to third parties as well as confidential/proprietary information of the Defendants.¹ The Trial Court in this matter

¹ Defendants are requesting that the following designated trial exhibits be sealed in a separate volume of the record on appeal: Agreed Exhibits 30, 31, 52, 53, 55, 56; Plaintiff's Exhibits 89, 90, 91, 92, 100, 101, 102, 103, 104, 106, 107, 114; and Defense Exhibits 10, 167, 170, 177, 178, 182, 188, 214. These exhibits are attached to this Motion in a sealed envelope identified as Exhibit A.

previously granted Defendants' motion to seal these exhibits finding that the requirements of SCRCP 41.1 had been met.² Pursuant to this Court's Administrative Order 2014-04-15-02, Defendants are renewing their motion to seal with this Court. Undersigned counsel has consulted with counsel for Respondent/Appellant regarding this motion. Opposing counsel refuses to consent and has indicated they will oppose this motion.³

In determining whether filing under seal is proper, this Court considers the factors set forth in *Ex Parte Capital U-Drive It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006), and *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991). Those factors are: (1) ensuring the parties' rights to a fair trial or hearing; (2) the need for witness cooperation; (3) the reliance of the parties upon expectations of confidentiality of the proceeding; (4) the public or professional significance of the proceeding; (5) the perceived harm to the parties from disclosure; (6) why alternatives other than sealing the documents are not available to protect legitimate private interests; and (7) why the public interest is best served by sealing the documents. *Capital U-Drive It*, at 12, 630 S.E.2d at 470; *see also* Rule 41.1(b), SCRCP. As previously found by the Trial Court in this matter, a review of these factors shows that they weigh in favor of protecting the confidentiality of the subject documents through an order sealing those documents from public access.

The need to ensure a fair trial or hearing. The ability to have a fair trial or hearing is not impeded by this request to seal. The trial has already been completed. The parties agreed to the free use of confidential documents entered into the record during the course of trial, with the understanding that post-trial limitations on public access to the

² Order Sealing Confidential Trial Exhibits, dated September 10, 2014, attached as Exhibit B.

³ Opposing counsel did not oppose the Trial Court's sealing of certain trial exhibits. *See* E-mail from Kristinik to Judge Miller (cc'ing opposing counsel) dated 8/27/14, attached as Exhibit C.

documents would be addressed after the trial was completed. This was initially accomplished by the Trial Court's Order sealing certain trial exhibits. Now that these appeals have been brought, this issue is being raised with this Court.

The need for witness cooperation. Because the trial has already been completed, the sealing of certain trial exhibits will have no impact on witness cooperation. There was free use of all confidential documents at trial, and they could be used with any witness presented by either party during the trial.

The reliance of the parties upon expectations of confidentiality. The Defendants had a high expectation of maintaining the confidentiality of the exhibits at issue after the conclusion of trial. In the interest of expediting the trial and making the process more efficient, the Defendants agreed to allow the use of their confidential documents during trial without the need to close the proceedings contemporaneously with their use. The Defendants did so under the belief that confidentiality would be protected by sealing the specific exhibits following the trial. This was done, and Defendants seek a continuation of that protection with regard to the record on appeal.

The public or professional significance of the lawsuit. The lawsuit has no public or professional significance. This is not an action addressing the use of public property or funds or which involves any state agencies or government officials. The matters at issue concern the private investing decisions and the personal banking and investment accounts for a single individual. But for the lawsuit, the public would have been completely unaware of any of the events which were addressed at trial.

The perceived harm to the parties from disclosure. The trial exhibits that the Defendants seek to protect under seal reflect an array of sensitive business information,

including information related to individual customers who are not parties to this litigation. These documents also include confidential and proprietary business strategies and analysis, proprietary human resources materials, internal presentations, as well as the personal performance reviews of several current and former employees of the Defendants. All of these documents were designated as confidential pursuant to the Confidentiality Order at the time they were produced, and the Defendants have continued to protect the confidentiality of the documents throughout the litigation. Allowing these materials to be included in an unprotected court record would subject the personal information of customers and former employees to abuse through public dissemination. Moreover, competitors to the Defendants would have access to information and materials developed by the Defendants and which the Defendants believe give them competitive advantage.

Why alternatives other than sealing the documents are not available to protect legitimate private interests as identified by this Rule. Less drastic alternatives to sealing are not available in this situation. First, the Defendants have been selective with the exhibits they have chosen to include in their request to seal. Second, redacting information from the exhibits at issue would not be a practical means of resolving this issue. For the most part, the exhibits in their entirety require confidential protection.

Why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents. As demonstrated by the numerous state and federal privacy laws, maintaining the confidentiality of personal information is of high importance in today's society. Some of the documents at issue in this motion contain financial information relating to third-party customers of BB&T, while other

documents contain the private performance evaluations of current and former employees. This is the type of information that existing privacy laws require to be maintained in a confidential manner and with safeguards to avoid the breach of that confidentiality and potential wide dissemination through the internet or other electronic means.

Conclusion

Based on the above, this Court should grant this motion and order that the limited number of trial exhibits that were previously sealed by the trial court shall remain sealed within the record on appeal in this matter.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

C. Mitchell Brown
D. Larry Kristinik
Michael J. Anzelmo
Brian P. Crotty
1320 Main Street
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

William S. Brown
104 S. Main Street, 9th Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for Appellants/Respondents BB&T Corp.,
Branch Banking & Trust Co., and Sterling Capital
Management, LLC

September 16, 2015

Exhibit A

See Separate Volume Attached in Sealed Envelope

Exhibit B

Order Sealing Confidential Trial Exhibits, dated September 10,
2014

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) FOR THE THIRTEENTH JUDICIAL CIRCUIT

FRANCIS P. MAYBANK and JANE) Civil Action No. 2011-CP-23-8578
H.P. MAYBANK, as TRUSTEE for the)
FRANCIS P. MAYBANK FAMILY)
INSURANCE TRUST,)

Plaintiffs,)

vs.)

**ORDER SEALING CONFIDENTIAL
TRIAL EXHIBITS**

BB&T CORPORATION, BRANCH)
BANKING AND TRUST COMPANY,)
Successor in merger to BRANCH)
BANKING AND TRUST COMPANY)
OF SC, and STERLING CAPITAL)
MANAGEMENT, LLC, Successor in)
merger to BB&T ASSET)
MANAGEMENT LLC,)
Defendants.)

BEFORE THE COURT is the motion of the Defendants, Branch Banking and Trust Company and Sterling Capital Management, LLC, pursuant to Rule 41.1 of the South Carolina Rules of Civil Procedure, for an order sealing certain trial exhibits that had been designated as "Confidential" under the Court's Confidentiality Order. In their motion, the Defendants request that the Court order that the following trial exhibits be maintained under seal:

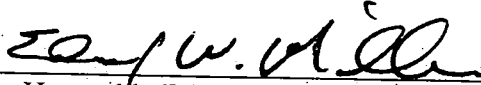
- Agreed Exhibits: 17, 29, 30, 31, 36, 41, 45, 52, 53, 54, 55, and 56
- Plaintiffs' Exhibits: 89, 90, 91, 92, 100, 101, 102, 103, 104, 106, 107, 108, 110, 111, 112, 114, and 115
- Defendants' Exhibits: 10, 167, 170, 177, 178, 182, 188, and 214

#1

THE COURT FINDS that the Defendants' motion is in compliance with Rule 41.1 and that sealing the designated trial exhibits is warranted based on the reasons set forth in the Defendants' motion.

NOW, THEREFORE, it is ordered that the Defendants' motion to seal certain trial exhibits be **GRANTED** and that the above-referenced trial exhibits hereinafter be maintained under seal.

AND IT IS SO ORDERED.


The Honorable Edward W. Miller
Circuit Court Judge, Thirteenth Judicial Circuit

Greenville, South Carolina

9/10, 2014

Exhibit C

E-mail from Kristinik to Judge Miller (cc'ing opposing counsel),
dated August 27, 2014

From: Larry Kristinik
Sent: Wednesday, August 27, 2014 6:44 PM
To: emillerlc@sccourts.org
Cc: Miller, Edward W. Law Clerk (Courtney S. Camferdam); Mitchell Willoughby; Bruce W. Bannister (bbannister@bannisterwyatt.com); William Brown; Chad Johnston (cjohnston@willoughbyhoefer.com); Kristen Horne; Meg Thrasher; Tonya Macaulay; Elizabeth Zeck (ezeck@willoughbyhoefer.com)
Subject: Maybank v. BB&T et al, Civ. Action No. 2011-CP-23-8578 (Proposed Order Sealing Confidential Trial Exhibits)
Attachments: Proposed Order Granting Motion to Seal Particular Trial Exhibits - 4830-3035-8301 v 1.docx

Judge Miller,

Attached is a proposed order granting the Defendants' motion to seal certain confidential trial exhibits. We have presented this proposed order to Mr. Willoughby for his review. He informed me today that the Plaintiffs do not oppose this proposed order. He noted in his communication that he reserves, and does not waive, any objections made earlier in the case to certain confidentiality designations made by the Defendants under the confidentiality order.

We appreciate your consideration of this proposed order. Please let us know if there is any additional information you need regarding this request.

D. Larry Kristinik | Partner | NELSON MULLINS RILEY & SCARBOROUGH LLP
Columbia, South Carolina | 803.255.9531

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-8578
Appellate Case No. 2014-002638

Francis P. Maybank and Jane H.P.
Maybank, as trustee for the Francis P.
Maybank Family Insurance Trust, Plaintiffs,

Of whom Francis P. Maybank is the, Respondent/Appellant,

v.

BB&T Corporation, Branch Banking and
Trust Company, Successor in merger to
Branch Banking and Trust Company of SC,
and Sterling Capital Management, LLC,
Successor in merger to BB&T Asset
Management, LLC, Appellants/Respondents.

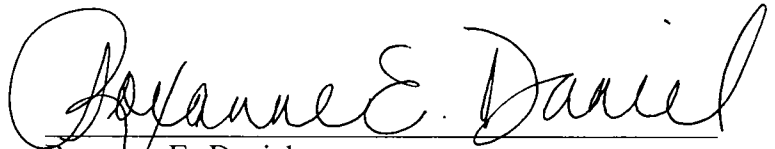
PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants/Respondents, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy to the following address(es):

Pleadings: Motion to File Portions of the Record on Appeal Under Seal

Counsel Served:

Mitchell M. Willoughby, Esquire
Elizabeth Zeck, Esquire
Chad Johnston, Esquire
John M.S. Hoefler, Esquire
Tracey Colton Green, Esquire
Willoughby & Hoefler, P.A.
Post Office Box 8416
Columbia, SC 29202



Roxanne E. Daniel
Administrative Assistant

Sept. 16, 2015