SUPREME COURT OF NEW YORK
NEW YORK COUNTY

PURSUIT CREDIT SPECIAL OPPORTUNITY FUND, L.P.,	:	
Plaintiff,	:	Index No. 651070/2022
- against -	:	
KRUNCHCASH, LLC, KC PCRD FUND, LLC, JEFFREY HACKMAN, and SEAN MCGHIE PLC	:	
Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DE-DESIGNATE DOCUMENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Name **Page**

Pursuit Credit Special Opportunity Fund, L.P. ("Pursuit") submits this Memorandum of Law in Support of Motion to De-Designate Documents.

PRELIMINARY STATEMENT

In September 2022, this Court ordered Defendants to produce the First Citizens Bank records of Defendants KrunchCash LLC ("KrunchCash") and KC PCRD Fund LLC ("KC PCRD"), entities into which Pursuit invested. (Doc. 111.) Pursuit sought, and the Court granted, the records because Pursuit requires those materials to conduct a tracing analysis to investigate the multi-prong investment fraud in which Defendants are engaged.

First Citizens Bank produced the statements. While Pursuit's counsel and their expert are currently analyzing the records, the analysis performed to date indicates that—more than an *investment*—defendant Jeffrey Hackman ("Hackman") has been [redacted]

Within hours of the bank's production, however, Defendants improperly deemed the entirety of the records "Attorneys' Eyes Only" ("AEO") under the parties' Protective Order, thus preventing Pursuit's principals from aiding counsel and the experts they retained in understanding the transactions at issue. (Doc. 113.) There is nothing sensitive or proprietary in the records that justifies AEO treatment, and KrunchCash and KC PCRD make *no showing* whatsoever to satisfy their burden under the Protective Order to assert AEO designation. Indeed, when it suited them, Defendants have selectively published huge swaths of the bank records on the docket in this action. (*See* Doc. 33 (publishing KC PCRD and redacted KrunchCash bank records spanning two and a half years).)

The bank records confirm [redacted]

[redacted] We require our client's assistance to help analyze the records.

Despite our numerous requests to Defendants to de-designate these records short of a motion, they have refused. Pursuit requests the Court de-designate the bank records.

FACTUAL BACKGROUND

A. Background on this Dispute

Hackman is engaged in a Ponzi scheme. (Doc. 14 ¶ 1-13.) Pursuit, an investor, invested over $10 million into Hackman-run entities KrunchCash and a special-purpose vehicle, KC PCRD. (*Id.* ¶ 23.) KrunchCash was *supposed* to use Pursuit's capital to fund "Advances," *i.e.*, law firm funding and medical receivables factoring. (*Id.* ¶ 24.) Hackman gave the appearance of early profits—on paper—to Pursuit, to justify collection of $3.5 million of profit-sharing, until mid-2019, when realizations came to a halt. (*See id.* ¶ 73.)

In mid-2019, Hackman divulged that KrunchCash and he had become embroiled in contentious litigation against the end-borrower of two Advances, "Resnick" (law firm) and "LB Pharma" (pharmacy) (the "Default Actions"). (*Id.*) Hackman insisted that Pursuit fund those Default Actions—which inexplicably spiraled into multi-million dollar protracted litigations. (*See id.*) [1]

In 2021, when Pursuit had enough of Hackman's evasiveness, Pursuit investigated, and learned Hackman collected $2.5 million of proceeds, but failed to disclose that fact to Pursuit or remit Pursuit's portion to Pursuit. (*See id.* ¶ 134.) Pursuit sued. (*See id.*)

[1] As Pursuit now knows, those Default Actions were more about the end-borrowers grievances with *Hackman*, and Hackman's attempt to silence those who had uncovered Hackman's Ponzi scheme, rather than any *bona fide* claim of underpayment.

Since then, Pursuit has made stunning discoveries of fraud. (*See id.*) Pertinently, Pursuit *now* understands that KrunchCash did not fund a ***fraction*** of what Defendants claimed to have. (*See id.*) A recent filing in the District Court of Florida, filed just two weeks ago, explains that Hackman lied in state and federal courts about the amounts funded to, and *actually* repaid by, end-borrower "Resnick." (*See* Ex.[2] 1.) Specifically, the Resnicks assert that, "KrunchCash only funded about five million three hundred thousand dollars ($5,300,000) and was repaid nearly twenty-three million dollars ($23,000,000)," by the Resnicks. (*Id.* ¶3.)

There is no real dispute that, combined, Pursuit and Signal entrusted Hackman and KrunchCash with nearly $10 million that was *supposed* to be advanced to the Resnicks. Pursuit's question from the onset has been: where did Pursuit's money go? In order to answer this fundamental question, and trace the fate of the amounts invested, Pursuit needs to be able to work with its counsel and experts on this exercise.

B. The Court Orders Production of Bank Records

In May 2022, Pursuit served subpoenas on Defendants and First Citizens Bank, seeking KrunchCash's and KC PCRD's bank records. (Doc. 21.) Defendants raged against the subpoenas, and moved to quash the third-party subpoena in Florida. (Doc. 80.) The crux of defendants' opposition was that there are unnamed "third parties" who might have privacy interest in the records. (Doc. 114 at 12:17-13:12, 14:01-03.)

Pursuit moved to compel, and opposed the motion to quash. (Doc. 63.) Pursuit supplied this Court a preliminary expert report of EisnerAmper, explaining, *inter alia*, that—based only on triangulating Hackman's hand-created "ledgers" that he provided Pursuit (and Signal) and what Hackman represented to courts in the Default Actions—there existed red flags

[2] "Ex." refers to exhibits to the Affirmation of Kimberly Grinberg ("Grinberg Aff.") filed simultaneously herewith.

of fraud: (i) there are millions of dollars of unaccounted-for capital with respect to the "Resnick" investments, because KrunchCash appears to have funded much less than what he told investors, (ii) with respect to "LB Pharma," Hackman engaged in a "false profits" scheme, wherein he misrepresented to Pursuit that early investments were repaid and successful, even though they were *really* failing, to convince Pursuit to invest millions more, and, (iii) that Hackman "churned" identical collateral across multiple investors. (Doc. 91.) Each gave the false *appearance* of performing assets, and enabled Hackman to collect millions in false profit fees. EisnerAmper required unredacted bank records to perform a tracing analysis. (*Id.*) The Court granted Pursuit's motion. (Doc. 111.)

C. The Contents of the Bank Records

First Citizens Bank provided the bank records on October 6, 20, and 28, 2022. It is readily apparent, based on the records, that KrunchCash funded much less than what Hackman told Pursuit, compounding our concerns as to *where* Pursuit's monies *really* went. (Grinberg Aff. ¶ 4.) And, contrary to Defendants' assertions, there is no mysterious "third party" who might have an interest in the proceeds. (*Id.* ¶ 6.) Rather, over the past several years, [redacted] (*Id.* ¶ 4.) [redacted] is owned and controlled by Hackman. (*Id.* ¶ 5, Ex. 2.) [redacted]). (*Id.* ¶ 8.)

[redacted]

(Grinberg Aff. ¶ 4.) [redacted]

[redacted] (*Id.* ¶ 6.)

With the exception of [redacted] Pursuit is already generally familiar with these various counterparties. (*Id.* ¶ 7.) Pursuit, however, has more specific and necessary knowledge regarding, for example, whether certain transactions represent other Advances Pursuit funded, represent counterparties associated with Advances in dispute, and whether transactions are as they were represented by Hackman.

D. Defendants' Refusal to de-designate the Bank Records

Within hours of First Citizens Bank's production of the bank records, Defendants' designated the *entire* statements as "Attorneys' Eyes Only" ("AEO") under the Protective Order in this action. (Ex. 3, Doc. 113.) On October 24, 2022, Pursuit requested in writing that Defendants de-designate the bank statements and/or specify which entries were *actually* AEO, and why. (Ex. 4.) Though we (counsel) and EisnerAmper can analyze *certain* aspects of the bank statements, we require the assistance of our client to fully analyze their contents. Specifically, only our client has sufficient information to contextualize the dates and amounts of each payment—including what Hackman told Pursuit at the time of certain transactions—and to identify certain identities of payors/payees. The principals of our clients have finance and accounting backgrounds and can be very helpful in analyzing these documents.

[redacted]

Defendants responded to our October 24th letter on November 4, 2022, with generalized assertions that unspecified third parties *might* have an interest in the bank statements. (Ex. 5.)

Having reached an impasse, Pursuit filed a pre-motion letter with the Court, explaining our position, with the aim of resolving the issue short of a motion. (Doc. 121.) Defendants responded with similar evasive objections. (Doc. 126.)

On January 31, 2023, the parties met with Ms. Klinger for a compliance conference, and discussed the issue. (Grinberg Aff. ¶ 15.) Ms. Klinger heard arguments from both sides—with Defendants again making generalized, nonsensical objections as to why unspecified entries *might* be AEO, and—to keep the Court at bay—promising that Defendants would cooperate in reviewing and de-designating documents (even though that is what Defendants had been stating for months). (*Id.* ¶ 18.) Pursuit expressed that, despite the bank records being at issue since *June*, Defendants have still yet to identify the basis for a single entry that warrants AEO treatment, and that Defendants were simply obstructing disclosure. The Court directed Defendants to cooperate and to provide itemized entries which Defendants believed warranted AEO treatment, (*id* ¶ 18), and told Pursuit that, if Defendants did not cooperate, Pursuit could file a motion. (*Id.* ¶ 19.)

In an effort to muddy the waters, and in response to Pursuit's efforts to follow up on this issue, Defendants nonsensically assert that this dispute would be resolved by Pursuit's experts agreeing to abide by the terms of the Protective Order. (Grinberg Aff. ¶ 22.) This is a red herring. Pursuit's experts are already bound by the Protective Order, and are able to review the bank records with the AEO designation. (*Id.* ¶ 10.) It is Pursuit, however, who is blocked from

aiding counsel or Pursuit's experts in that analysis or engaging in substantive discussions with counsel regarding findings. (*Id.* ¶ 9.)

On February 9, 2023, the Court entered an Order requiring Defendants to adhere to certain discovery obligations, but omitting the issue of de-designation of the bank records, as Pursuit had requested. (Doc. 190.)

On February 9, 2023, Pursuit *again* wrote to Defendants, and requested that they identify which specific transactions they believed warranted AEO treatment and to immediately de-designate the remaining records. (Ex. 6.) Once again, Defendants refused to review their designations.

ARGUMENT

The parties entered into the Commercial Division standard Stipulation and Order for the Production and Exchange of Confidential Information ("Protective Order") (Doc. 113), which defines "Highly Confidential – Attorneys Eyes-Only Information" ("AEO") as:

> any "Confidential Information" that is of such a private, sensitive, competitive or proprietary nature that present disclosure to persons other than those identified in paragraph 5.1 below ***would reasonably be expected to cause irreparable harm or materially impair the legitimate competitive position or interests of the Producing Party***.[3]

(*Id.* § 3(b).) The burden is on the party asserting the AEO designation to demonstrate that it is warranted. (*Id.* § 4.) The Protective Order permits a party to move to de-designate a document as AEO. (*Id.*) Once a party has moved to de-designate material, that material loses its AEO status and receives only "Confidential Information" treatment "unless and until the Court rules otherwise." (*Id.*)

[3] We note that Defendants are not the producing party of the subject bank records. The bank records which are the subject of this motion were produced by First Citizens Bank.

This Court is "reluctant to allow the sealing of court records." *Gryphon Domestic VI, LLC v. APP Intern. Finance Co., B.V.*, 28 A.D.3d 322, 324 (1st Dep't 2006) (citations omitted). Confidentiality is "clearly the exception, not the rule." *Id.* (citations and quotations omitted). A court is required to make an independent determination of good cause, or AEO, and courts in the First Department authorize sealing only in strictly limited circumstances. *Id.* at 325. To warrant "AEO" designation, the party seeking the protection must demonstrate that the information sought constitutes "trade secrets." *See also Susan D. Fine Enterprises, LLC v. Steele*, 66 A.D.3d 613, 614 (1st Dep't 2009) (finding no good cause existed, and "AEO" designation inappropriate). *See also Cortlandt Street Recovery Corp. v.* Bonderman, 71 Misc.3d 908, 910 (Sup. Ct. N.Y. Cty. Mar. 25, 2021) (to warrant "good cause," must demonstrate "trade secrets, confidential business information, or proprietary information"). To qualify for trade secret protection, the information sought cannot be known by others. *Susan D. Fine Enterprises, LLC*, 66 A.D.3d at 614.

The *Gryphon Domestic* decision is instructive. There, the Appellate Division reversed the trial court order permitting a party to designate documents as "AEO" because such a designation requires "good cause" and, notwithstanding the designating party's claim that such designation was warranted, "the motion court made no such finding" of good cause. *Gryphon Domestic VI, LLC.*, 28 A.D.3d at 326. The Appellate Division concluded no basis for a finding of good cause existed because, "plaintiffs do not deny that Defendants are not their competitors in business, but, instead, [] are [] adversaries in the context of resolving an acceptable restructuring." *Id.* "Records and/or documents should not be sealed simply to enable one of the parties to retain an advantage over the other party when such sealing prevents counsel from fully discussing with their clients all of the relevant information in the case … ". *Id.*

I. The Court Should Order De-Designation of the KrunchCash and KC PCRD Bank Records

Defendants have not identified any specific entries that they believe are AEO. Instead, Defendants deemed the entire bank records as AEO, and refused to de-designate them. Wholesale designation as AEO, or even "Confidential" is inappropriate. *See Cortlandt Street Recovery Corp.*, 71 Misc.3d at 911 (finding "vague and conclusory assertions, which do not address any particular document or deposition transcript or explain how or why public disclosure might cause harm, are insufficient to meet its burden").

To the extent Defendants are attempting to shield Pursuit from viewing documents based on purported "third party" interests, that argument cannot stand. When asked—repeatedly—to identify these third parties, Defendants have been unable to name even one. Rather, there do not even appear to be any third parties *at all* requiring protection. Signal who, with Pursuit, is one of the largest investors in the Advances, *supports* Pursuit's accessing the bank records. (Doc. 92.) No actual third party interests have been established (much less appeared to express their objections), rather Defendants are attempting to prevent Pursuit's counsel from speaking with Pursuit, obstruct the expert analysis, and bar Pursuit's counsel from meaningfully discussing with Pursuit how [redacted] entity. *Gryphon Domestic VI, LLC.*, 28 A.D.3d at 326.

Nor is there anything confidential enough to warrant AEO status about the transactions more broadly: Pursuit *already knew* the identities (but not the amounts) of the vast majority of transactions to and from Defendants. *See id.* And, as in *Gryphon*, there is no dispute that Pursuit and Defendants are not competitors—Pursuit provided capital to Defendants. *See id.* Defendants' AEO designation is clearly not designed to protect sensitive information. Lifting the AEO designation would not impair legitimate competitive interests. *See id.* Instead, it will allow

Plaintiff to discuss the context of the transactions with the EisnerAmper experts and with counsel, in order to understand the full breadth of Defendants' Ponzi scheme and mishandling of funds, an outcome Defendants have sought to avoid since Pursuit first issued these subpoenas. *See JSB Partners LLC v. Colabella*, 2012 N.Y. Slip Op. 31202 (Sup. Ct. N.Y. Cty. 2012) (denying motion to vacate order de-designating documents where plaintiff required access to the information to investigate its claims, where the information did not constitute a trade secret, and where a confidentiality order was in place to prevent any misuse of the information).

Defendants also justify their position by claiming, disingenuously, that Pursuit consented to a blanket AEO designation of the bank records. (Doc. 126 ¶ 7.) This is false. Pursuit never agreed to a blanket AEO designation of the bank records. Rather, Pursuit indicated it would consent to Defendants' having an opportunity to review the records and mark individual transactions as Confidential or AEO *where appropriate and legally supported.* (Doc. ¶ 114 7:23-8:3.) (Ms. Bea: "We [Pursuit] have no objection to that information being designated ***as confidential***, and ***where it's appropriate*** and third-party information ***is actually sensitive information***, is *actually being included*, then an 'attorneys' eyes only' designation will take care of that." (emphasis supplied).)

Defendants have refused to review the bank records, identify and offer their basis for which transactions merit AEO treatment, and de-designate the remaining transactions, even after telling the Court during the January 31st conference that they would do so. Defendants are skirting their obligations and attempting to delay their disclosure obligations and will continue to do so unless the Court compels otherwise. In light of Defendants' refusal—despite many opportunities—to provide specific designations, the Court should (i) enforce the Protective Order, and (ii) de-designate the entries in the bank records from the AEO designation.

CONCLUSION

For the foregoing reasons, the motion to de-designate should be granted.

New York, New York
Dated: February 16, 2023

SLARSKEY LLC

By: */s/Kimberly Grinberg*
Kimberly Grinberg
Evan Fried
Renee Bea
Kimberly Grinberg
767 Third Avenue, 14th Floor
New York, NY 10017
(212) 658-0661
Counsel for Pursuit Credit Special Opportunity Fund, L.P.

CERTIFICATION

I hereby certify pursuant to Rule 17 of the Commercial Division that the word count for the foregoing memorandum of law is 2,968 words, exclusive of caption, table of contents, table of authorities, and signature block, as prepared by Google Documents.

/s/*Kimberly Grinberg*
Kimberly Grinberg