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July 25, 2023

The Honorable Maryellen Noreika
United States District Judge
U.S. District Court
844 N. King Street
Wilmington, DE 19801

Re: United States v. Biden, No. 23-MJ-00274-MN

Your Honor:

We write this letter and provide the accompanying affidavit in response to the Court's Oral Order directing that counsel for Defendant show cause as to "why sanctions should not be considered for misrepresentations to the Court." See Dkt. No. 12. The matter under consideration appears to stem from an unfortunate and unintentional miscommunication between a staff member at our firm and employees of the Court. We have no idea how the misunderstanding occurred, but our understanding is there was no misrepresentation. Our staff member, who serves as our Director of Litigation Services ("Lit Services"), represented her affiliation with Latham & Watkins LLP to the ECF Clerk with whom she spoke earlier today. Both her phone number and her affiliation with Latham also typically appears on Caller ID (which typically shows "LATHAM"). We hope this letter and the attached declaration dispels any suggestion that undersigned counsel or our staff would ever intentionally misrepresent or mislead the Court with respect to any matter.

As this Court is aware, this morning, Chairman Smith, through his attorneys at Halloran Farkas + Kittila LLP ("Halloran") made a submission including several exhibits containing sensitive information regarding our client, including what we believe in good faith to include grand jury, tax payer, and other sensitive information. The United States District Courts for the District of Delaware have issued a Notice Regarding Criminal Case File Documents (the "Notice"),¹ in which certain personal information shall be protected, and "personal data identifiers must be partially redacted from [any] document whether it is filed traditionally or electronically." Upon learning that certain exhibits may contain information subject to the protections of both the Notice and Fed. R. Crim. Proc. 49.1, we quickly alerted Halloran of our concerns.

Contemporaneous with those communications, we asked our Lit Services Staff Member to determine whether a mechanism is available to protect such information from further disclosure. The Lit Services Staff Member is an administrative staff member with over eighteen years of

¹ <https://www.ded.uscourts.gov/sites/ded/files/cm-ecf/CMECF-PrivacyCrDE.pdf>.

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experience at the firm. She is not a practicing attorney, and is responsible for, among other things, preparing court submissions for filing, procedural rules in connection with same, and daily communications with the Court offices throughout the United States. As is routine and part of her normal firm responsibilities, the Lit Services Staff Member has in prior circumstances alerted ECF Clerks in other cases and in other jurisdictions to concerns stemming from the filing on a public docket of personal or other protected information of a firm client. In those prior instances she worked with ECF Clerks to temporarily quarantine such information pending a formal submission under seal.

Consistent with my instructions, earlier today our Lit Services Staff Member called and introduced herself to the ECF Clerk, and provided her full name and firm affiliation, and notified the ECF Clerk that she believed one or more exhibits in the recent filing may have personal information which we believed, in good faith, should not be on the public docket.

The ECF Clerk asked for more information about which specific materials should not have been filed on the public docket. Our Lit Services Staff Member did not immediately know the answer because she has had no involvement in this matter, other than occasional docket research. Because she did not know the answer to the ECF Clerk's question, our Lit Services Staff Member indicated she would call the ECF Clerk back with more information. Shortly thereafter, and before getting a chance to call the ECF Clerk back, our Lit Services Staff Member received a call from a different employee of the Court. This second employee of the Court informed our Lit Services Staff Member that the filing had been removed from the Court's docket.

We can only speculate how and when the misunderstanding occurred. We noted, however, that the Court employee who corresponded with Halloran (see Dkt. No. 8-1) is not the first ECF Clerk with whom our Lit Services Staff Member spoke. Our Lit Services Staff Member did not get the name of the second Court employee with whom she spoke.

Other than working on docket research, our Lit Services Staff Member was not engaged in the substantive defense of our client, Mr. Biden. And at no point was it our Lit Services Staff Member's intent, or the intent of the firm, to mislead the Court with respect to the intention to protect our client's information.

It is not our intention, through this submission or otherwise, to undermine any investigation conducted by the Court into this matter. However, to the extent there was a lack of clarity as to the purpose or intentions of our Lit Services Staff Member when she alerted the Court of our concerns, it was completely unintentional in nature and not in any way intended to persuade the Court or anyone else to take action that it would not otherwise take as a routine administrative matter. In such circumstances, award of sanctions is generally found not to be warranted. See Martinez v. Towne Ests. Condo. Owners Ass'n, Inc., No. 1:12-CV-779-RGA, 2014 WL 2293689, at *1 (D. Del. May 27, 2014) (declining to impose sanctions where conduct was the result of "confusion or miscommunication"; Novartis Pharms. Corp. v. Par Pharm., Inc., No. CV 11-1077-RGA, 2014 WL 1266320, at *2 (D. Del. Mar. 26, 2014) (declining sanctions where no bad faith was present).

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We stand prepared to address any inquiries of the Court to rectify this misunderstanding. Should the Court consider this letter and the accompanying materials to be an insufficient explanation for this misunderstanding, we request an opportunity to more fully brief and be heard on the issues of concern to the Court.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Matthew Salerno", written over a horizontal line.

Matthew S. Salerno

Enclosure

cc: Benjamin L. Wallace, Esq. (U.S. Department of Justice)
Leo J. Wise, Esq. (U.S. Department of Justice)
Derek E. Hines, Esq. (U.S. Department of Justice)
Christopher J. Clark, Esq. (Clark Smith Villazor LLP)
Richard I.G. Jones, Jr., Esq. (Berger Harris, LLP)
Brian C. McManus, Esq. (Latham & Watkins LLP)
Timothy H. McCarten, Esq. (Latham & Watkins LLP)

**UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE**

UNITED STATES OF AMERICA,

Plaintiff,

- against -

ROBERT HUNTER BIDEN,

Defendant.

23-mj-274-MN

**DECLARATION OF
JESSICA BENGELS**

I, Jessica L. Bengels, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. I am a staff member at the law firm of Latham & Watkins LLP, 1271 Avenue of the Americas, New York, New York, and am a member in good standing of the bar of the State of New York. I submit this declaration in response to the Court Order of July 25, 2023.

2. I have worked at Latham & Watkins LLP for more than 18 years (since March 9, 2005). My current title at Latham is Director of Litigation Services, Litigation Services Counsel, and part of my role is to help attorneys comply with court and judges' rules and e-filing protocol, with a focus on New York procedure. My name, contact information, and biographical information are publicly available on Latham's web site and attached as Exhibit 1.¹

3. To date, I have not had any personal involvement in this case other than assisting the attorneys in this case with e-filing protocols and basic docket research.

4. On July 25, 2023 at around 11:42 a.m., at the request of one of the Latham attorneys handling this matter, I called the number listed on the Court's CM/ECF Manual

¹ <https://www.lw.com/en/people/jessica-bengels>

(302.573.6170) from my Latham & Watkins phone number (which often comes up on caller ID as "LATHAM") to ask for guidance regarding the appropriate procedures for restricting confidential e-filed material from the public view.

5. The clerk I spoke with, who identified herself as Julia, said that a motion to seal would need to be filed. I asked whether there is any policy for restricting personal information -- such as tax records, social security numbers, or other personal identifiers -- from the docket on an interim basis while the parties filed a more formal sealing application. In my experience, New York federal courts have such procedures to afford interim protection of confidential information. Julia asked me for the case number (which I provided) and placed me on a brief hold.

6. Julia asked me what law firm I was calling from and I told her Latham & Watkins LLP. I also mentioned that I believed the attorney for the matter from my firm (Latham) was Matt Salerno. She asked which docket numbers contained confidential materials and what the confidential content was specifically. I did not know the answer to those questions because I am not otherwise personally involved in this case and the purpose of my phone call was to figure out the procedure for seeking interim protection of materials. I told Julia I could call her back with that information once I had it if that would be helpful and that I really appreciated her help and guidance. She asked me if the documents in question were filed by Mr. Kittila's firm, and I said I believed so.

7. I did not call Julia back because at around 11:54 a.m., another Court employee called my Latham & Watkins phone number (which I believe she knew through caller ID) to let me know she would be removing the material from the docket as non-compliant with Federal Rule of Criminal Procedure 49.1. She did not ask which law firm I was affiliated with, and at no

time during this call did I mention anything about my law firm affiliation. After reading Exhibit B to Mr. Kittila's filing (Dkt. 8) and the Court's Oral Order (Dkt. 12), I believe there may have been some confusion when Julia passed the information on to the other Court employee, resulting in a mistaken understanding that I had called from Mr. Kittila's firm.

8. I am completely confident that I never indicated that I was calling from Mr. Kittila's firm or that I worked with him in any way. The only mention of his name was when Julia had asked me if the filings had been entered by Mr. Kittila's firm and I answered that I believed that to be the case.

9. At no time during any call with the Court today or ever did I misrepresent my firm affiliation or otherwise attempt to deceive the Court. Nor would this ever be my intention.

10. Attached as Exhibit 2 is a true and correct copy of my notes during the call with Julia in which I noted that she asked for the exact page and docket numbers and what the nature of the confidential material was more specifically, as I was unclear of the details.

11. Attached as Exhibit 3 is a screenshot of my phone log reflecting the call to Julia at 11:42 a.m. and the Clerk's call back to me at 11:54 a.m. I also received two missed calls from the court at around 1:46 p.m. and 1:54 p.m. I tried to return the missed calls at around 4:40 p.m. today to help clear up any confusion, but was directed to address any further issues with the Court.

Dated: July 25, 2023



Jessica L. Bengels

EXHIBIT 1



Jessica L. Bengels

Director of Litigation Services, Litigation Services Counsel

New York

jessica.bengels@lw.com

+1.212.906.1684



Profile

Jessica Bengels oversees Latham's Litigation and eDiscovery Services operations and helps case teams strategize on the full spectrum of procedural issues that arise across the litigation life cycle, from commencement to resolution. Ms. Bengels interprets procedural rules, case law, and complex legal data to guide on strategy and compliance with all court requirements. She leverages cutting-edge litigation analytics and extensive litigation services experience to optimize client outcomes. A recognized thought leader in the industry, she regularly presents on innovation in legal analytics and litigation services, including for the American Bar Association and the National Docketing Association.

Qualifications



Jessica L. Bengels

QUALIFICATIONS \

New York

EDUCATION

JD, Fordham University School of Law, 2005
cum laude

BA, Brown University, 2000

EXHIBIT 2

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Julia

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EXHIBIT 3

