

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3
4 FEDERAL TRADE COMMISSION,)
5 Plaintiff,)
6 vs.)
7 AMG SERVICES, INC., et al,)
8 Defendants, and)
9 PARK 269 LLC, et al.,)
10 Relief Defendants.)
11)

Case No.: 2:12-cv-536-GMN-VCF

ORDER

12 **INTRODUCTION**

13 Before the Court is Defendants Scott Tucker, Blaine Tucker, AMG Capital
14 Management LLC, Level 5 Motorsports, LeadFlash Consulting LLC, Blackcreek Capital
15 Corporation, and Broadmoor Capital Partners’ (hereinafter “the Tucker Defendants”) Motion
16 to Strike or in the alternative to seal certain documents (ECF No. 60).

17 Also before the Court is Defendants The Muir Law Firm LLC and Timothy J. Muir,
18 Esq.’s (hereinafter “the Muir Defendants”) Motion to Strike the Declaration of Victoria M.L.
19 Budich (ECF No. 68). Plaintiff Federal Trade Commission (hereinafter “FTC” or
20 “Commission”) filed a Response to both motions (ECF No. 95). The Tucker Defendants filed
21 a Reply (ECF No. 114) as did the Muir Defendants (ECF No. 118).

22 **BACKGROUND**

23 The FTC brings the instant action to halt a web of Internet-based payday lenders that
24 allegedly deceive consumers about the costs of their loans and engage in unlawful debt
25 collection practices. The FTC is currently seeking a preliminary injunction to enjoin

1 Defendants' alleged violation of the Federal Trade Commission Act, the Truth in Lending Act
2 and the Electronic Fund Transfer Act.

3 The instant motions seek to strike the Plaintiff's Motion for Preliminary Injunction,
4 including its Memorandum of Points and Authorities (ECF Nos. 4 & 5), the Declaration of
5 Victoria M. L. Budich (attached as Ex. 22 to Plaintiff's Memorandum of Points and
6 Authorities, ECF No. 5-23), and Defendants' financial documents which are attached to
7 Victoria M. L. Budich's Declaration (including, but not limited to Exs. CB-EP, filed at ECF
8 No. 5-37 through 5-46.) The financial documents that the parties wish to strike were obtained
9 by the FTC pursuant to civil investigative demands ("CID") directed to U.S. Bank compelling
10 production of bank records pertinent to the Defendants. The FTC relies on these financial
11 documents in its lawsuit to support its allegations against defendants.

12 DISCUSSION

13 **A. Legal Standard**

14 Documents and information obtained as part of a non-public investigation, utilizing the
15 compulsory process of a CID, federal law requires that confidentiality must be maintained. *See*
16 15 U.S.C. §§ 57b-1(c); 57b-2(b)(3)(C). Regulations promulgated by the FTC require that
17 before such information can be used or disclosed in a proceeding, the submitter must be
18 afforded the opportunity to obtain a protective or *in camera* order. *See* 16 C.F.R. §4.10(g).
19 Rule 4.10(g) reads, in its relevant part:

20 (g) Material obtained by the Commission:

21 (1) Through compulsory process and protected by section 21(b) of the Federal
22 Trade Commission Act, 15 U.S.C. 57b-2(b) or voluntarily in lieu thereof and
23 designated **by the submitter** as confidential and protected by section 21(f) of
the Federal Trade Commission Act, 15 U.S.C. 57b-2(f), and § 4.10(d) of this
part; or . . .

24 (2) That is designated **by the submitter** as confidential, and protected by
25 section 21(c) of the Federal Trade Commission Act, 15 U.S.C. 57b-2(c), and
§4.10(e) of this part; or

1 (3) That is confidential commercial or financial information protected by
2 section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and
3 §4.10(a)(2) of this part, may be disclosed in Commission administrative or
4 court proceedings subject to Commission or court protective or in camera
5 orders as appropriate. See §§ 1.18(b) and 3.45.

6 Prior to disclosure of such material in a proceeding, **the submitter will be**
7 **afforded an opportunity to seek an appropriate protective or in camera**
8 **order.** All other material obtained by the Commission may be disclosed in
9 Commission administrative or court proceedings at the discretion of the
10 Commission except where prohibited by law. (emphasis added)

11 16 C.F.R. §4.10(g).

12 **B. Analysis**

13 Defendants contend that the FTC violated §4.10(g) because they were never given the
14 opportunity to seek an appropriate protective or *in camera* order. Whether or not Defendants
15 had a right to an opportunity to seek an appropriate protective or *in camera* order turns on the
16 definition of “submitter.”

17 Defendants argue that a “submitter” is not limited to the person or entity that physically
18 delivered the banking documents to the FTC. Rather, they assert, the term “submitter”
19 includes those with a “commercial or proprietary interest in information which is within the
20 commercial, research, financial or trade secret categories” citing to a 1983 Senate Report. *See*
21 *Sen. Judiciary Comm., Freedom of Information Reform Act, S. Rep. No. 221, 98th Cong., 1st*
22 *Sess. 32 (1983); 1 Fed. Info. Discl. § 10.2, Submitters’ rights within the agency (2011).*

23 The FTC argues that Defendants merely rely on an old Senate report and a treatise
24 section citing that report discussing a proposed amendment to the statute that was never
25 actually enacted (i.e. the proposed provision – defining “submitter” is not found in the current
Freedom of Information Act (“FOIA”) or any amendments to the Act.) Instead, the FTC
argues that, although the FOIA does not use the term “submitter,” Executive Order 12600, 52
Fed. Reg. 23781 (June 25, 1987) relies on the term in setting forth requirements that executive

1 federal agencies notify “submitters” of confidential commercial information before disclosing
2 that information publicly in response to a FOIA request. This Executive Order specifically
3 defines “submitter” to mean “any person or entity who provides confidential commercial
4 information to the government.” *Id.* § 2(b).

5 In this case, the FTC asserts that the only submitter is U.S. Bank. The FTC claims that
6 it notified U.S. Bank regarding the public filing of the material on May 9, 2012, and has
7 received no objections or request for a protective order from it. However, the FTC admits that
8 this notification took place after they filed the Budich Declaration in this case.

9 The FTC argues that to expand the definition of “submitter” to include all entities and
10 individuals with a “commercial or proprietary interest” in the banking information at issue
11 would impose a crippling burden on the FTC’s law enforcement efforts. The FTC explains
12 that in connection with even a single bank account held by a business, an in exhaustible
13 number of entities and individuals could claim to have a commercial or proprietary interest,
14 including not only the account holder but every other party with whom the holder has engaged
15 in financial transactions. In this case, that would mean that the FTC would have to notify all
16 such parties in connection with the 57 accounts at issue, likely requiring hundreds or even
17 thousands of notices. The FTC claims that it routinely files banking information gathered
18 through CIDs in cases where it seeks preliminary injunctions. However, the FTC fails to cite
19 to a single example for the Court to examine.

20 Defendants reply that the FTC’s extreme scenario does not have to necessarily occur
21 under Defendants’ interpretation. Defendants argue that at a minimum the FTC would only
22 have to provide notice to the account holders and not to every entity or person that has
23 transactions with the account holder. Defendants indicate that the FTC produced account
24 information sheets that contain balance information, related customers, remarks, account
25 signatory information and checks issued to or by an account holder. Therefore, Defendants

1 conclude that it would not have been a burden on the FTC to notice all the account holders in
2 this case before they published the information.

3 A review of the relevant case law reveals no cases on point within the Ninth Circuit or
4 any other jurisdiction. “As a general interpretive principle, the Court looks to the plain
5 meaning of the regulation and ends its inquiry there if the language is clear.” *F.T.C. v.*
6 *Publishers Business Services, Inc.*, 821 F. Supp. 2d 1205, 1220 (D.Nev. 2010)(citing *Safe Air*
7 *for Everyone v. U.S. E. P.A.*, 488 F.3d 1088, 1097 (9th Cir. 2007). “A regulation should be
8 construed to give effect to the natural and plain meaning of its words.” *Bayview Hunters Point*
9 *Comm. Advocates v. Metro. Trans. Comm’n*, 366 F.3d 692, 698 (9th Cir.2004) (quotation
10 omitted). “The plain language of a regulation, however, will not control if clearly expressed
11 administrative intent is to the contrary or if such plain meaning would lead to absurd results.”
12 *Safe Air*, 488 F.3d at 1097 (quotation and alteration omitted). Administrative intent is
13 determined by looking to the published notices of the administrative agency. *Id.* at 1097–98.

14 The plain language of the regulation lends support to the FTC’s interpretation of the
15 word “submitter.” Subsection 4.10(g)(1) states: Material obtained by the Commission:
16 Through compulsory process . . . or voluntarily . . . *designated by the submitter as*
17 *confidential.*” (emphasis added.) Subsection 4.10(g)(2) reads: “Material obtained by the
18 Commission: That is *designated by the submitter as confidential.*” (emphasis added.) Both
19 these subsections make it clear that the submitter has the opportunity to mark the material
20 given to the commission as confidential.

21 If the Court were to accept Defendants’ interpretation of the term submitter, the FTC
22 would have to notify anyone with a commercial or proprietary interest in the information every
23 time it sought information from a bank regarding an account for investigative purposes to
24 make sure that the “submitter” would have the opportunity to mark the material confidential.
25 This would be an absurd result.

1 Thus in this case, it appears the law only requires that U.S. Bank must be afforded the
2 opportunity to seek an appropriate protective or *in camera* order. This means that *if* U.S. Bank
3 marked the specific information at issue in this motion as “confidential,” then it should have
4 been afforded the opportunity to seek a protective or *in camera* order. The Court cannot find
5 any evidence that U.S. Bank marked the bank account information at issue as being
6 confidential. Accordingly, it does not appear that the FTC did anything wrong with filing the
7 disputed exhibits in this case under these subsections.

8 Defendants also argue that subsection 4.10(g)(3) which states: “[m]aterial obtained by
9 the Commission [t]hat is confidential commercial or financial information protected by section
10 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and §4.10(a)(2) of this part . . .”
11 includes Defendants’ confidential banking information. Section 6(f) of the Federal Trade
12 Commission Act, 15 U.S.C. 46(f) disallows the disclosure of “any trade secret or any
13 commercial or financial information which is obtained from any person and which is
14 privileged or confidential.” Section 4.10(a)(2) protects “trade secrets and commercial or
15 financial information obtained from a person and privileged or confidential. 16 C.F.R. §
16 4.10(a)(2). The section goes on to explain that “this exemption applies to competitively
17 sensitive information, such as costs or various types of sales statistics and inventories. It
18 includes trade secrets in the nature of formulas, patterns, devices and processes of
19 manufacture, as well as names of customers in which there is a proprietary or highly
20 competitive interest.” *Id.*

21 Defendants fail to demonstrate that their bank account information is confidential such
22 that it is protected from disclosure in a civil case. Furthermore, even if Defendants can
23 demonstrate that the information is confidential, 15 U.S.C. § 57b-2(d)(1)(C) allows disclosure
24 of relevant and material information in judicial proceedings to which the Commission is a
25 party. In this case, the bank account information is relevant and material information

1 regarding whether or not a preliminary injunction should issue.

2 Defendants also argue that this Court's Special Order 108 requires certain personal data
3 identifiers contained in documents and exhibits filed with the court to either be omitted or
4 redacted and claim that the FTC violated this Special Order. *See* District of Nevada, Special
5 Order 108. These personal identifiers include: social security numbers, names of minor
6 children, dates of birth, financial account numbers and home addresses. *Id.* A document
7 containing unredacted personal data identifiers must be filed under seal. *Id.* Special Order 108
8 states that it is the responsibility of counsel and the parties to redact the personal identifiers
9 and that the Clerk will not review each pleading for compliance. *Id.* Documents which do not
10 comply with Special Orders are subject to being stricken. *Id.* However, Defendants do not
11 identify which exhibits contain the protected information because they claim it would provide
12 a roadmap to anyone who wants to review the unprotected information. This Court refuses to
13 make a blanket ruling on the redaction claims without being provided the specific violations.
14 Therefore, Defendants are given leave to file a new motion under seal to strike or redact the
15 specific exhibits that they claim have been filed in violation of Special Order 108 so long as
16 they note with specificity the information to be redacted.

17 The Defendants also make a number of evidentiary objections to the Budich
18 Declaration: that the statements are not relevant, are unauthenticated, are hearsay, are unduly
19 prejudicial and are conclusory. The court finds some of these to be baseless while others are
20 proper evidentiary objections. However, a "trial court may give inadmissible evidence some
21 weight when to do so serves the purpose of preventing irreparable harm before trial." *Flynt*
22 *Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). Therefore, the Court will
23 not strike the declaration of Ms. Budich from the record. The Court will consider the
24 Defendants' arguments when deciding how much weight to give the Budich Declaration and

25 ///

1 accompanying exhibits.¹

2 Accordingly, the Court does not find that Defendants have demonstrated that the
3 motion for preliminary injunction, Budich Declaration and specified exhibits should be
4 stricken.


5 Defendants ask that, in the alternative, the Court seal the pleadings and filings
6 immediately. The court will grant this request and seal the Budich Declaration which is Ex. 22
7 located at ECF No. 5–23 and the associated financial documents which are Exs. CB–EP,
8 located at ECF No. 5–37 through 5–43.

9 **CONCLUSION**

10 **IT IS HEREBY ORDERED** that Defendants Scott Tucker, Blaine Tucker, AMG
11 Capital Management LLC, Level 5 Motorsports, LeadFlash Consulting LLC, Blackcreek
12 Capital Corporation, and Broadmoor Capital Partners’ Motion to Strike or in the alternative to
13 seal certain documents (ECF No. 60) is **DENIED in part and GRANTED in part. The**
14 **Budich Declaration (ECF No. ECF No. 5–23) and the associated financial documents**
15 **(ECF No. 5–37 through 5–46) shall be SEALED.**

16 **IT IS FURTHER ORDERED** that Defendants The Muir Law Firm LLC and Timothy
17 J. Muir, Esq.’s Motion to Strike the Declaration of Victoria M. L. Budich (ECF No. 68) is
18 **DENIED.**

19 DATED this 15th day of August, 2012.

20
21 
22 _____
23 Gloria M. Navarro
24 United States District Judge

25 ¹ In their Reply, the Muir Defendants make a new argument that the FTC also violated Kansas law by filing confidential documents. The Court does not consider this new legal argument that did not appear in the moving papers. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007)(“district court need not consider arguments raised for the first time in a reply brief.”)